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Protecting Human Rights in the European Union's External Relations

Sara Poli (ed.)

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**PROTECTING HUMAN RIGHTS
IN THE EUROPEAN UNION'S EXTERNAL RELATIONS**

SARA POLI (ED.)

The research leading to the publication of this volume has been funded with support from the European Commission. The research was carried out during the Jean Monnet Chair (Lifelong Learning Programme), awarded to Professor Sara Poli between 2013 and 2016. The pieces included in this collection reflect the views of the authors only, and the Commission cannot be held responsible for any use which may be made of the information contained therein.



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ISSN 1878-9587 (print)
ISSN 1878-9595 (online)

© Author
Printed in The Netherlands
T.M.C. Asser Institute
P.O. Box 30461
2500 GL The Hague
The Netherlands
www.cleer.eu

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PROTECTING HUMAN RIGHTS IN THE EUROPEAN UNION'S EXTERNAL RELATIONS: SETTING THE SCENE

Sara Poli

On 1-2 October 2015, the Jean Monnet Chair of the Political Science Department of the University of Pisa, Italy, organised a conference entitled: 'Human Rights in EU Foreign Affairs.' The discussion we had in that context inspired the speakers to write the group of papers that follows. These pieces enquire into selected legal problems that the EU's contribution to human rights protection in the world entails, taking into consideration not only the Common Foreign and Security Policy (CFSP), but also other aspects of EU external action, such as development cooperation and the Common Commercial Policy. Hence, the title: 'Protecting Human Rights in the European Union's External Relations.'

In a nutshell, the themes investigated are the following: the limits to the Commission's discretion in exercising administrative powers in the implementation of the EU's human rights policy; and the strengths and weaknesses of selected legal instruments – such as human rights clauses in EU agreements, the Council guidelines on human rights, and unilateral measures such as trade incentives – used to promote respect for human rights. Two papers specifically focus on the promotion of social rights, labour standards and good governance practices in the world. The final research theme, explored by the last two pieces, concerns the international responsibility of the EU and/or its Member States when breaches of human rights are committed in the course of CSDP military missions, in particular Operations EU NAVFOR Med Sophia and EU NAVFOR Atalanta.

There is hardly a need to state that the seven pieces of this collection do not intend to comprehensively address the many legal issues arising from the chosen broad topic. The programme of the Conference considered a number of other problems related to human rights protection in EU foreign affairs. For example, the EU's practice of pursuing human rights protection (originally a CFSP objective) through non-CFSP measures was critically examined. Furthermore, insights were given into the legal bases of international agreements and the extent to which these legal foundations affect the protection of human rights. This problem is particularly acute considering that there are a number of cases confirming that the legal bases of international treaties lie in the Treaty bases related to the CFSP rather than in those falling within the Area of Freedom, Security and Justice.¹ This may have indirect but tangible consequences as far as the protection of human rights is concerned. Indeed, whereas the Court

¹ The research leading to the publication of this article has been funded with support from the European Commission. This piece reflects the views of the authors only, and the Commission cannot be held responsible for any use which may be made of the information contained therein. See CJEU, Case C-130/10, *Parliament v. Council*, ECLI:EU:C:2012:472; Case

of Justice of the European Union (CJEU) has a general competence to review the legality of non-CFSP acts in light of fundamental rights, this competence is exceptional with respect to CFSP acts.² In addition, the European Parliament is excluded from the decision-making process when an EU act is founded on the CFSP provisions of the Treaty; this exclusion is likely to affect the quality of an EU act/agreement from a human rights perspective. Indeed, as practice shows, this institution has played an active role in ensuring that EU agreements outside the realm of CFSP comply with human right standards.³ For example, the Parliament has made frequent use of its power to consent to EU agreements, but it has also threatened to refuse its consent when a draft agreement did not meet human rights standards.⁴

The speakers of the conference dealt with one further issue related to the specificity of the CFSP, defined by the second paragraph of Article 24 (1) of the TEU. This is whether the EU has the duty to respect human rights when its institutions act under the provisions of Title V Chapter 2 of the TEU. A positive answer can be given to this question;⁵ however, there is a gap in the Treaty considering that respect for human rights in this area cannot be enforced by the CJEU due to its limited competence. We shall come back to this issue in the comments on the final paper in this collection.

Let us turn to the first piece. Its object is a study of the role that administrative law may play in guaranteeing respect for human rights in the EU's external relations. Indeed, the administrative activities carried out by the Commission to ensure that human rights are respected by third countries are numerous. This institution is entrusted with monitoring human rights situations in third countries, including European states wishing to accede to the EU,⁶ both before concluding international agreements and after. The Commission's monitoring task is therefore crucial as it enables the Council to take diplomatic action or legally binding decisions.⁷ In this regard, the role of NGOs and individuals in

C-658/11, *Parliament v. Council*, ECLI:EU:C:2014:2025; Case C-263/14, *Parliament v. Council*, ECLI:EU:C:2016:435.

² The exceptions are defined by Art. 24 (1), para. 2 of the Treaty of the European (TEU) and Art. 275, para. 1 of the Treaty on the Functioning of the European Union (TFEU).

³ For example, in 2011, the Parliament refused to approve the Morocco Fishery Partnership Agreement and the Anti-Counterfeiting Trade Agreement. See respectively European Parliament Legislative Resolution of 14 December 2011 on the Draft Council Decision on the Conclusion of a Protocol between the European Union and the Kingdom of Morocco Setting Out the Fishing Opportunities and Financial Compensation Provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, Doc P7_TA(2011)0569, 14.12.2011, and European Parliament Legislative Resolution of 4 July 2012 on the Draft Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement, Doc P7_TA-PROV(2012)0287, 4.7.2012.

⁴ See the case of the envisaged Protocol to a trade agreement with Uzbekistan, whose adoption was contested by the Parliament because of the concerned country's practices of forced child labour. See EC-Uzbekistan Partnership and Cooperation Agreement and Bilateral Trade in Textiles, European Parliament Resolution of 15 December 2011, Doc P7_TA(2011)0586, 15.12.2011.

⁵ C. Hillion, 'Decentralised Integration Fundamental Rights Protection in the EU Common Foreign and Security Policy', *European Papers* No. 1 (2016) 2016), at 58.

⁶ Respect for human rights is also one of the EU values that European countries, wishing to accede to the EU, must respect under Art. 49 of the TEU.

⁷ Such as the request for consultations with partner countries, breaching human rights or the suspension of the negotiation for an international agreement or the suspension of the financing of a project.

highlighting possible human rights breaches enables the Commission to perform the aforementioned activities.

More precisely, Vianello's paper examines the extent to which the Commission is constrained in the way it exercises its administrative powers by looking at the practice of the Ombudsman and the CJEU. The former has had the chance to verify whether the Commission committed acts of 'maladministration', a concept that goes beyond that of 'illegality'. The latter has reviewed the legality of the Commission's action in relation to complaints concerning the breach of human rights in third countries, in light of the principle of legitimate expectations. The results showed that the Ombudsman recognised an instance of maladministration in the Commission's activity in only one case, whereas in none of the annulment actions examined by the Court the applicants were successful. Indeed, the threshold to prove the breach of the principle of legitimate expectations is very high. However, although the Union's institutions enjoy discretion in exercising their external powers, it is argued that the Commission is not unbounded when implementing the EU's external action. For example, it has a duty to state the reason why a certain course of action is taken. The way this duty was discharged by the Commission is criticised by the author.

The EU institutions also have a duty of care with respect to human rights of third-country nationals. This is well illustrated by the General Court (GC)'s ruling in *Front Polisario*.⁸ Here, the decision to conclude an agreement between the EU and Morocco, aimed at the liberalisation of trade in agricultural products (fish), was annulled. The applicant, representing the people of Saharawi, challenged the legality of the EU-Morocco Treaty, replacing selected provisions of an earlier association agreement (the so-called Euro-Mediterranean Treaty). The contested Treaty applies to the territory of Western Sahara, inhabited by the people of Saharawi and under the *de facto* control of Morocco that illegally occupies it. The GC annulled the decision concluding the agreement given that the Council had failed to examine whether, by entering into the contested Treaty, it was indirectly favouring the breach of human rights of the Saharawi people.⁹ In other words, the Council did not observe the duty of care. We shall see whether the CJEU will confirm the position of the GC in the appeal,¹⁰ given that there is more than one aspect of this ruling that is objectionable.¹¹

⁸ GC, Case T-512/12, *Front Polisario v. Council*, ECLI:EU:T:2015:953.

⁹ *Ibid.*, para. 241.

¹⁰ CJEU, Case C-104/16 P, *Council v. Front Polisario*, pending.

¹¹ For example, the reasoning of the GC in admitting that *Front Polisario* has legal standing is not entirely convincing. This national liberation movement is qualified as a 'legal person' under Art. 263 (4) of the TFEU and is considered as 'individually concerned' by the contested agreement. It may be doubted that the reasons provided by the GC in para. 57-59 make it a legal person within the meaning of Art. 263 (4) TFEU. It is also contestable that the GC considers *Front Polisario* individually concerned as a result of its position of party to an international dispute with Morocco over the territory of Western Sahara (para. 113). The 'individual concern' should have been appreciated with respect to the special effects of the contested agreement on *Front Polisario* and not as a result of its position in the settlement of the dispute with Morocco. In the context of this action, the applicant does not act to protect a private interest (as private applicants are entitled to do in the context of Art. 263(4) TFEU). Rather, the entity relies on EU legal remedies to achieve

As announced, the papers examine selected legal instruments that were enacted in order to promote respect for human rights in the EU's external relations. The next two pieces focus, on the one hand, on the so-called 'human right clauses,' included in EU bilateral or multilateral agreements, and, on the other, on the Council guidelines concerning a specific human right or specific victims of human rights violations.

Martines' paper deals with clauses considering respect for human rights, as an 'essential element' of the agreement and often associated with non-execution clauses that enable the EU to adopt appropriate measures in case of breach. In its first part, the piece explores the notion of 'essential element', placing emphasis on its evolution; the second part comments on the non-execution clause. It is well known that the EU only rarely has been willing to react to breaches of the essential elements of the agreement. Thus, the question is posed: what is the added value of human rights clauses? The author criticises the EU practice of concluding agreements with countries that commit human rights violations. However, she considers that the inclusion of human rights clauses is necessary, because these clauses offer the opportunity to improve the level of human rights protection in the concerned third country by opening up a political dialogue with the ruling political leaders. Despite this positive assessment, when looking at the scope and content of the essential element clauses in practice, the author highlights a number of problematic aspects.

A further question developed in Martines' paper is whether the EU is unbounded when it envisages to conclude an agreement with a partner country, when there are serious reasons to believe that the application of the envisaged treaty may indirectly lead to serious human rights violations. This issue was raised for the first time in the GC's ruling in the *Front Polisario* case mentioned above. The main ground for the annulment of this treaty was that the Council's decision to conclude the agreement was made without an appropriate *ex ante* evaluation of the impact that the envisaged agreement could possibly have had on fundamental rights. In particular, the Council had the obligation to carefully examine the evidence that the exploitation of natural resources (which was the object of the agreement) was likely to be made at the detriment of Saharawi people's fundamental rights. It is noted that the EU could have avoided this by excluding the Western Sahara's territory from the scope *ratione loci* of the contested agreement. The author appreciates the Court's position insofar as it annuls the Council decision. However, she criticises selected positions taken by the GC, including the interpretation of the human rights clause of the prior Euro-Mediterranean agreement. The applicant submitted that the later agreement on the liberalisation of agricultural products breached this clause. However, the Court contestably considered that the impugned (later) treaty superseded the earlier one, including its human rights clause. The GC thus disregards the organic link existing between the two agreements and treats them as two separate agreements. Let us now turn to the non-execution clauses of the EU agreements. One of the issues picked up by the author in this part

its political objectives. In light of this, can and should the Court consider actions of this kind admissible or should it not leave these claims to different fora and to the EU's political institutions?

concerns the technique of linking a trade agreement (or other sector-related treaties), deprived of human rights and non-execution clauses, to a framework agreement concluded earlier, containing the said clauses. The purpose is to make sure that the EU can suspend the operation of a trade agreement in case human rights are breached by the concerned partner country. Martines has a number of reservations on the usefulness of this technique. Finally, the question is raised whether a clear breach of human rights, such as the adoption of anti-gay legislation by several African countries, could be an obstacle to the development of contractual relations with the concerned partners. The answer is positive as a matter of law, but it is negative if one looks at practice.

Wouters and Hermez' piece tackles the second instrument upon which this collection enquires. These are the EU Guidelines on Human Rights, developed by COHOM, the working party on human rights of the Foreign Affairs Council, and adopted by the Foreign Affairs Council. These policy documents are different from the human rights clauses, because they have a strong intergovernmental flavour and are not legally binding. The authors explain the reasons why these guidelines are enacted and who the measures address; they further consider the decision-making process leading to their adoption and the techniques enshrined in the guidelines to give visibility to the content of human rights principles. It is emphasised that these CFSP instruments are not meant to be means to export EU values or to advance the level of human rights protection in third countries. The authors seem to hint at the fact that their function is much more modest: they give visibility to existing human rights standards, incorporated in human rights instruments of universal or regional application, and, more rarely, to EU internal standards. The envisaged added value of these guidelines is that they are to be used as pragmatic instruments by EU officials to influence the policy of third countries on the ground. In one case, the authors argue that the guidelines could be useful to identify the elements of practice and *opinio juris* of the EU and its Member States when ascertaining whether a certain norm falls within customary international law. Taking into account the non-binding and intergovernmental nature of these guidelines, it is not clear whether the CJEU would use them as interpretative tools when examining the legal issues pertaining to acts, pursuing CFSP objectives. Finally, the authors point out that, overall, the implementation of the guidelines remains problematic.

In addition to human rights clauses and Council guidelines, the legal toolkit used to strengthen human rights also includes sanctions, a prominent CFSP instrument. Sanctions, which may include a variety of restrictive measures,¹² are

¹² Such as the prohibition to enter the territory of EU Member States and the freezing of economic resources and funds. On the EU's sanctions policy, see, *inter alia*, C. Beaucillion, *Les Mesures Restrictives de l'Union Européenne* (Brussels: Bruylant 2014); T. Gazzini and E. Herlin-Karnell, 'Restrictive Measures Adopted by the EU from the Standpoint of International and EU Law', 36 *European Law Review* 2011, at 798; C. Eckes, 'EU Restrictive Measures against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions', 51 *Common Market Law Review* 2013, at 888; L. Paladini, 'Le Misure Restrittive Adottate nell'Ambito della PESC: Prassi e Giurisprudenza', 14(2) *Diritto Unione Europea* 2009, at 341; P. Palchetti, 'Reactions by the European Union to Breaches of Erga Omnes Obligations', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (The Hague: Kluwer Law International 2002), at 22;

relevant in this context given that, on the one hand, they are used in situations of human rights abuses, and, on the other, if they are addressed to individuals, they may themselves give rise to fundamental rights problems. The reader of this collection may be remarkably surprised not to see any piece on this topic. The conference programme did cover sanctions and the absence of a paper on this topic is merely due to a number of contingencies. In this context, I will limit myself to making a few comments on these instruments. First, there are few doubts that the sanctioning of human rights abuses is a legitimate objective of the EU's foreign policy and that the EU has competence to adopt these measures.¹³ Second, these unilateral instruments are aimed at exercising pressure on the ruling class of third countries, groups of individuals associated with the political leadership, or the members of militias committing serious violations of human rights, so as to bring these breaches to an end. Third, sanctions have been used extensively both as autonomous measures (or partially independent measures)¹⁴ and to implement the United Nations Security Council Resolutions, mostly in the context of Africa with a number of exceptions (Belarus,¹⁵ Iran,¹⁶ Myanmar¹⁷ and Ukraine¹⁸). Human rights abuses were sanctioned when committed in the aftermath of the elections (Belarus) or in connection with the repression of the political opposition by a military junta (Myanmar). By contrast, human rights abuses are self-standing justifications in the case of Iranian sanctions. Fourth, sometimes the EU's decisions instituting restrictive measures do not sufficiently motivate sanctions for human rights abuses. This was the case when restrictive measures were imposed on members of the Ukrainian government during the Maidan Square disorders; the decision instituting these sanctions does not say anything about what particular violations of human rights the persons listed have committed. Fifth, the addressees of this category of sanctions are not only third countries and/or their political/military leadership, but also non-state parties. Targeting individuals (different from those belonging to the political leadership) is useful to fill the gap resulting from the difficulties of attributing state responsibility to the behaviour of individuals (i.e., militias), who operate in a third country. In addition, a number of other non-state actors, 'persons associated with the government', are targeted by restrictive mea-

P.A. Pillitu, 'Le Sanzioni dell'Unione e della Comunità Europea nei Confronti dello Zimbabwe e di Esponenti del Suo Governo per Gravi Violazioni dei Diritti Umani e dei Principi Democratici', 86(1) *Rivista di Diritto Internazionale* 2003, at 55.

¹³ See GC, Case T-273/13, *Sarafraz v. Council*, ECLI:EU:T:2015:939, para. 108.

¹⁴ These are sanctions that are adopted to implement a UN Security Council Resolution but are integrated in EU measures by expanding their scope *ratione materiae* or *personae*.

¹⁵ Council Common Position 2006/276/CFSP, OJ [2006] L 101/5, 11.4.2006 and Regulation 765/2006, OJ [2006] L 134/1, 20.5.2006. The targeted sanctions were abolished in February 2016 (except for four persons) as a result of the release of political prisoners in August 2015 and some progress in the presidential election of October 2015. See at <<http://www.consilium.europa.eu/it/press/press-releases/2016/02/25-belarus-sanctions/>>.

¹⁶ Council Decision 2011/235/CFSP, OJ [2011] L 100/51, 14.4.2011.

¹⁷ See Council Common Position 2006/318/CFSP, OJ [2006] L 116/77, 29.4.2006. Currently, most of the sanctions have been lifted. See Council Decision 2013/184/CFSP, OJ [2013] L 111/75, 23.4.2013.

¹⁸ Council Decision 2014/119/CFSP, OJ [2014] L 66/26, 6.3.2014.

tures. The Court has broadly interpreted this notion. This is witnessed by the rulings in *Tomana*,¹⁹ *Mikhailchanka*²⁰ and *Sarafraz*,²¹ respectively challenging the Zimbabwean, Belarusian and Iranian regimes.

The final observation concerns judicial review of CFSP decisions instituting sanctions. As it is known, the CFSP decisions, setting up restrictive measures *vis-à-vis* individuals, may be challenged before the CJEU, under Article 275 (2) of the TFEU. The GC has been very active in dealing with annulment actions and even action in damages introduced by the addressees of freezing orders. The grounds of these challenges are not only the violation of due process rights, but also of substantive rights, and the number of successful actions is not at all negligible. While the case-law is dominated by applicants challenging the Iranian sanction regime (dealing with the non-proliferation of weapons of mass destruction), it is also possible to observe that there are challenges to sanctions that are justified by human rights abuses, as the cases mentioned above show.

It is now time to turn to substantive aspects of the EU's external human rights policy to which the following two papers are devoted. The first discusses specific categories of rights and standards promoted by the EU in its trade policy. The second enquires into the meaning and scope of the principle of good governance, which is pursued as an autonomous objective of the EU's external relations.

Velluti's paper looks at the 'incentive' (positive conditionality) offered by the EU to third countries in order to improve respect for social rights and international labour standards. Thus, this study complements Martines' examination of human rights clauses that sanction the failure of third countries in complying with human rights (negative conditionality). The paper considers both unilateral instruments, such as the Generalised System of Preferences (GSP) – in particular, the GSP+ (special incentive arrangement for sustainable development and good governance) – and the so-called 'social clauses' of recent trade agreements, providing market access to third countries in exchange for respect of labour, environmental, and social standards. The purpose of the research

¹⁹ See, for example, GC, Case T-190/12, *Tomana and Others v. Council and Commission*, ECLI:EU:T:2015:222. In this case, a group of over 100 applicants, including members of the government, but also natural and legal persons (qualified as 'associated' to those members), has unsuccessfully challenged the extension of restrictive measures. The latter sanctions were justified by the engagement in criminal conduct, leading to human rights abuses against the Zimbabwean people in 2002. The GC rejected the action and its ruling was upheld on appeal (see CJEU, Case C-330/15 P, *Tomana and Others v. Council and Commission*, ECLI:EU:C:2016:601).

²⁰ See GC, Case T-693/13, *Aliaksei Mikhailchanka v. Council*, ECLI:EU:T:2016:283. In this successful action, the applicant is a Belarusian journalist, working for a state TV channel; his listing is linked to his position of a highly influential journalist presenting a TV programme that had not impartially presented the presidential elections of 2010 and the following repression of the demonstrations of civil society and political opposition in his TV programme. The GC considered that the Council had failed to prove that his influence on the Belarusian media was such as to be considered responsible for violation of democratic standards and human right abuses committed in the aftermath of the political elections.

²¹ This action was brought by Mr. Sarafraz, the Director of a TV channel who had broadcasted the interview of a journalist that included a forced confession. The EU had listed the applicant on the ground that he had worked with the Iranian security services to broadcast forced confessions of detainees in breach of the right to due process and fair trial. The action was rejected. See Case T-273/13, *supra* note 13.

is to examine whether the EU's social conditionality discourse and practice prove that the EU is genuinely committed to promoting social rights and labour standards. The paper shows that there is a wide consensus on the promotion of social trade in the EU context, both in the internal and external dimensions of EU policies. However, the author is critical of the way the GSP+ works in practice and considers that its overall credibility is weak. Indeed, the EU has been traditionally reticent to withdraw trade preferences that eligible third countries receive in exchange for the ratification and effective implementation of core human rights, labour, and environmental standards. The reform of the GSP scheme of 2012 has addressed some of the weaknesses of this instrument. However, certain deficiencies remain. For example, the threshold enabling an eligible country to be admitted to the GSP+ scheme is very low: indeed, only in cases where the competent bodies of the International Labour Organization (ILO) identify serious violations of labour standards will the country concerned not be admitted. Next, the author turns to the social clauses of international agreements, starting from that of the ACP-EU Partnership Agreement (Cotonou Agreement). This clause is quite weak in that it does not enshrine precise legal obligations. In addition, compliance with labour standards is not part of the essential element clause of that agreement. In the new generation of Free Trade Agreements (FTAs), concluded to implement the Global Europe Strategy of 2006,²² it is possible to identify social/environmental clauses, drafted in stronger legal terms than that of the Cotonou Agreement. The minimum common elements of these clauses, which are included under the chapter on sustainable development and trade of the FTAs, also with a protectionist purpose, are laid out by the author. The model clause is that of the 2011 EU-Korea FTA. The robustness of the social clause of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) stands out with respect to that of other agreements of a similar nature. It is emphasised that the stronger social dimension of trade agreements is linked to the Parliament's power to consent to these agreements. If the systematic inclusion of social clauses, following the conditionality principle, may be considered as a positive development, the author points out that it is very hard to enforce these clauses. Thus, their inspiring principle is 'soft conditionality,' which contrasts with the 'hard conditionality,' underlying human rights clauses, described in Martines' paper. Velluti's conclusions on the effectiveness of human rights and social clauses are overall more negative than those of Martines.

As a result of the legal framework just described, there are third countries, such as Guatemala and Pakistan, that are notorious for their lack of compliance with labour standards, but which nonetheless receive trade preferences under the GSP+ or other trade agreements. The author advocates for changes in the Commission's administration of the trade scheme: for example, this institution should 'giv[e] more weight to ILO reports and its supervisory bodies findings and exercise more pressure on beneficiary countries in cases where there is

²² Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 4 October 2006 'Global Europe: Competing in the world', COM(2006) 567 final.

strong evidence of labour rights abuses.²³ There are also ways to improve the effectiveness of the social conditionality clause in trade agreements. Amongst these, the author suggests a wider use of *ex ante* trade sustainability impact assessments, which could potentially lead to the decision not to conclude a trade agreement, in case it disrespects labour/environmental standards.

The next paper, written by Poli, concerns the EU's aspiration to promote the ambiguous standard of 'good governance' in third countries. The EU links good governance with values such as respect for democracy, human rights, and the rule of law. The main questions addressed by the author are the following: what does 'good governance' mean and what is its added value? Looking at the practice, how does the EU concretely encourage good governance? To what extent does the EU subject the development or the continuation of cooperation with a third country to respect of good governance? And finally, is the EU consistent in encouraging good governance practices?

In trying to clarify the meaning of 'good governance,' the findings of the paper are the following: first, there is only minimum overlap in the meaning of 'good governance' in EU internal and external action. Second, in the context of the development cooperation policy, good governance implies that the political leadership of third countries should manage the resources of its country to the benefit of its population. The EU seeks to support the setting up of a well-functioning administration, which is free from corruption and is committed to use all the resources of a country for the public good, reinforcing the independence of the judiciary, ensuring the primacy of law, and promoting the sustainable use of natural resources. This is key to the establishment of EU values, such as democracy and the rule of law, and, ultimately, to reducing poverty.

Let us now turn to the means used to influence the way third countries manage their resources. The key findings of the paper are the following: first, originally, improving good governance was an aim of EU development cooperation. In the Cotonou Agreement, good governance was recognised as a 'fundamental element', but not as an 'essential' one.²⁴ In case of serious instances of corruption, the EU may adopt 'appropriate measures'. As for human rights clauses, their enforcement is quite disappointing: the EU requested consultation with a third country in only one case (Liberia). Second, the importance attached to respect for good governance, in order to develop international cooperation with states other than ACP countries, is lower than in the case of the Cotonou Agreement. For example, the texts of recent regional and bilateral agreements, concluded with countries other than developing countries, include good governance at best amongst the principles at the basis of the cooperation. It is stressed that the EU is not always consistent in the ways reference to good governance is made in the texts of the agreements with countries that have governance gaps. For example, no mention is made of this principle in the Stabilisation and Cooperation Agreements with the Western Balkans. Third, the paper further argues that the contribution made by the EU towards improving good governance in developing countries, as a result of unilateral trade mea-

²³ See S. Velluti in this collection, at 112.

²⁴ On 'essential elements' clauses, see F. Martines in this collection.

asures, such as the special incentive arrangement for sustainable development and good governance (GSP+), is very modest. In addition, despite the potential wide scope of the concept of 'good governance,' surveying the practice shows that the EU has deployed efforts mostly to ensure good environmental governance. Fourth, the paper emphasises that the EU has included clauses on good governance in tax matters in recent association agreements. Therefore, in these cases, good governance is invoked to defend the EU's interests; that is to say, the reduction of the phenomenon of unfair tax competition from third countries. In this respect, the rationale of these clauses is similar to that of social clauses included in trade agreements and described in Velluti's paper.

Finally, the paper draws the conclusion that the EU should not continue to refer to 'good governance' as an autonomous objective of its external action. It would be more appropriate, and ultimately more effective, if the EU referred to the objective of providing comprehensive support for public institutions and for the country's management of natural resources in a sustainable manner.

The last set of papers concern two different CSDP missions, namely, the EU NAVFOR MED Operation Sophia and EU NAVFOR Atalanta. The research questions addressed by the authors are different but they share a common denominator. They both investigate international responsibility for possible breaches of human rights. The first paper argues that both the EU and its Member States are obliged to respect human rights in the area of CFSP; it then highlights the problematic aspect of attribution of international responsibility and possible breaches of human rights that may be committed during the operation of EU NAVFOR MED Operation Sophia. The second paper examines the rules on attribution of responsibility that are applicable in the context of EU NAVFOR Atalanta, as laid down by a ruling of the German High Administrative Court. The concerned rules are, indeed, crucial to understanding who is responsible between the troop-contributing state (Germany) and the international organisation (the EU) for possible breaches of human rights committed during the transfer of pirates to a third country with a questionable human rights record.

Amongst the many legal issues raised by EU NAVFOR MED Operation Sophia, Papastavridis' paper focuses on two. The first concerns the conditions under which Member States and the EU are bound by the obligations pertaining to the protection of human rights when carrying out interception operations on the high seas. The conclusion is that both subjects of international law are bound by human rights law. For international responsibility to arise, it is necessary to attribute the conduct causing the breach of human rights to the EU or to its Member States. According to Article 7 of the ILC Articles on the Responsibility of International Organizations (ARIO), this depends on who exerts 'effective control', or as the author submits, who has 'operational control' over the conduct in question. Indirect responsibility of both actors could arise too. The second research question addressed by the author revolves around individual human rights that the personnel of Operation Sophia might violate in breach of the obligations of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). First of all, there is the right to life of the persons on board of the boats, which could be threatened when,

for example, the EU mission uses the force to confront migrant smugglers. The author submits that the use of force should be excluded in the context of Operation Sophia. Yet, if one looks at the Operation's rules of engagement, this is not the case. Although the use of force is a tool of last resort, and is subject to the proportionality principle, it is still legal; this is in itself a source of concern since it is risky to exercise it in the interception of vessels full of migrants. Next, the author examines whether the prohibition of *refoulement* could be committed during the operations of the EU mission. This is excluded to the extent that migrants are transferred to countries that do not present systemic asylum deficiencies. In addition, the right to liberty and security (Article 5 of the ECHR) and the right not to be subject to degrading and inhuman treatment (Article 3 of the ECHR) may be breached when the suspect human smugglers/traffickers are detained on board before they are disembarked, as provided for the Operation's rules of engagement.

Sommario's paper examines a judgement of the Higher Administrative German Court dealing with the attribution of international responsibility for the transfer of Somali pirates to Kenya, in the context of the EU NAVFOR Atalanta mission, carried out by the EU in Somalia. The German judges had to rule on whether Germany, the EU, or the UN should be considered responsible for the handing over of the suspected pirates to Kenya. In 2009, a German frigate, seconded to the EU Operation by Germany, had arrested suspected pirates. A few days later, an agreement providing for the transfer of the arrested pirates to Kenya was concluded between the EU and Kenya, as envisaged by Article 12 (1)²⁵ of the measure setting up the Atalanta mission. Subsequently, the alleged pirates were delivered to Kenyan authorities in conformity with the agreement. One of the suspected pirates brought an action before an Administrative Court on the ground that this transfer was contrary to Article 3 of the ECHR, as the conditions of detention in Kenya were expected to amount to inhuman and degrading treatment. Indeed, Article 12(2) of the Joint Action, setting up the Atalanta mission, *de facto* imposes on third countries concluding the transfer agreement to respect international human rights. But this was not enough to ensure that the human rights of the suspected pirates are respected. The ruling at first instance, finding in favour of the applicant, was then appealed by Germany before the Higher Administrative Court. Did Germany fail to respect human rights, derogating from the ECHR, by delivering the pirates to a third country that is widely recognised as not respecting its human rights obligations? The attribution of the conduct to Germany was preliminary to the assessment of possible breaches of human right obligations stemming from the ECHR. The domestic courts involved in the case concluded that the transfer of the pirates to Kenya had to be attributed to Germany, and that this country was in breach of international human rights norms.

²⁵ This provision enables the EU to conclude agreements with third countries on the transfer of persons arrested and detained with a view to their prosecution. See Joint Action 2008/851 of 10 November 2008 on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Somali Coast, OJ [2008] L 301/33, 12.11.2008.

Before turning to the substance of the ruling, a couple of preliminary remarks are necessary. First of all, it is not at all frequent that a national court rules on international responsibility in the context of an EU CFSP mission. Therefore, the judgement of the domestic court presents special interest. Second, and more importantly, it is not sure that it would have been possible for the CJEU to deal with the matters raised by the applicant to protect his rights. Indeed, as EU law currently stands, the Court is not competent to rule on an agreement that exclusively deals with the CFSP in the context of a preliminary ruling procedure.²⁶ Therefore, the National Court could not ask the CJEU any questions in the framework of a preliminary ruling procedure to clarify its doubts on how to allocate international responsibility. It is true that recently the CJEU has narrowly interpreted the provisions of the Treaty limiting its jurisdiction in the CFSP in *Elitaliana*²⁷ and *H.*²⁸ However, in these cases, the Court was confronted respectively with acts of an administrative nature,²⁹ and with decisions merely taken 'in the context of CFSP',³⁰ but not with a 'CFSP decision of a purely political nature' such as that at stake in German case. Thus, the lifting of the immunity from jurisdiction for the acts at stake in the previously mentioned cases does not entail that the Court would have asserted its jurisdiction in the German case, had the national court decided to refer a preliminary ruling to the Court asking for the interpretation of applicable EU rules.³¹ On the contrary, probably in light of those cases, it would have excluded its jurisdiction. Thus, as the law stands, it is up to the domestic courts³² to provide legal protection to individuals affected by an action carried out to give effect to the EU agreement with Kenya. This state of affairs presents inconveniences. Indeed, it is possible that national courts come up with different interpretations of the provisions of CFSP; in addition, this interpretation may be different from that of the

²⁶ See Art. 24(1) TEU, para. 2, stating that the CJEU 'shall not have jurisdiction with respect to [Title V chapter 2] provisions' and Art. 275 TFEU, para. 1, which excludes the CJEU's jurisdiction with respect to the provisions relating to the CFSP and 'acts adopted on the basis of those provisions.'

²⁷ CJEU, Case C-439/13 P, *Elitaliana v. Eulex Kosovo*, ECLI:EU:C:2015:753.

²⁸ CJEU, Case C-455/14 P, *H v. Council*, ECLI:EU:C:2016:569.

²⁹ In particular, the decision to award a contract under the rules of the Financial Regulation applicable to the general budget of the European Communities. See CJEU, Case C-439/13 P, *supra* note 27, para. 63.

³⁰ CJEU, Case C-455/14 P, *supra* note 28, paras. 42-44.

³¹ In this context, it should be emphasised that under Art. 24 (1) TEU, para. 2, the CJEU is not competent to hear a preliminary ruling procedure concerning the provisions of Title V, ch. 2 TEU. It is also uncertain whether such a competence may be envisaged with respect to CFSP decisions instituting restrictive measures *vis-à-vis* private parties, whose legality may be examined by the Court under Art. 275 TFEU, para. 2. This issue will be clarified soon. It is the object of a preliminary ruling procedure in the pending case C-72/15 *Rosneft Oil Company OJSC*. In his Opinion, released on 31 May 2016, A.G. Whatelet argued in favour of extending the Court's competence to rule on these acts in the framework of a preliminary ruling procedure.

³² The principle of 'decentralised judicial control' in the area of PESC is recognised by A.G. Kokott in her Opinion of 13 June 2014, on the Accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms, para. 103. The expression within brackets is borrowed by C. Hillion, *supra* note 5, at 65. The author emphasises the complementary role that national courts play in enforcing fundamental rights in the context of the CFSP. *Ibid.*, at 61-64.

CJEU.³³ Yet, the importance of having access to justice for the possible victims of human rights abuses resulting from the EU/Member State action should not be underestimated. Had it not been for the German Courts, the pirates would have been deprived of access to justice, given that CFSP decisions are immune from judicial review in the EU context. The lack of jurisdiction of the CJEU has serious human rights implications in this case. Indeed, the transfer of the pirates to Kenya, taken to implement a CFSP agreement, does have an impact on the right to liberty and on the right to physical integrity. Therefore, this is one of those, perhaps rare, cases in which a CFSP agreement affects the position of individuals.³⁴

Having this framework in mind, let us return to Sommario's piece. The purpose of the research is not to look at the EU and international rules in order to see to whom international responsibility for the possible breaches of human rights can be attributed between the EU and its Member States. Rather, the paper examines the criteria that the German Court followed in attributing the unlawful conduct to Germany to see if they reflect those chosen in the practice of the ECHR, and, to some extent, of domestic courts. The author starts his analysis from the Draft Articles on the Responsibility of International Organisations (DARIO), providing the most authoritative guidance on the attribution criteria. He argues that the applicable criterium to determine who is responsible between the troop-contributing state and the EU is who has 'effective control over the alleged unlawful conduct'. Indeed, under Article 7 of the Draft Articles mentioned above, the national contingents may be considered as organs that Member States place at the disposal of the EU. In this case, the EU is responsible if the test of effective control is satisfied. It should be noted that this interpretation is different from that offered by other leading scholars who qualify CSDP missions as *de facto* organs of the EU, thus triggering Article 6 of the DARIO, which attributes responsibility on the basis of the status of the mission. Subsequently, Sommario elaborates on the notion of 'effective control,' taking into consideration the most relevant case law of the ECHR and the *Nuhanovic* case. The author is convinced that the rules applicable to UN peacekeeping operations could be considered to be valid also in respect of any other international organisations; this is also the position that is reflected in the DARIO. Thus, for the author the *sui generis* nature of the EU as an international organisation, which is undeniable with respect to all other international organisations, is not relevant in the context of the CFSP, given that this sector is inspired by 'intergovernmentalism.'

Then, the attention is shifted to the reasoning leading the Higher Administrative Court to attribute the unlawful conduct to Germany. In substance,

³³ The decentralised control of the legality of CFSP also entails further problems. First of all, national courts are not bound by the *Foto-Frost* case-law (Case 314/85 [1987] ECR 1987 04199, paras. 15 to 20) in the context of the CFSP; this may affect the uniform application of CFSP decisions. In addition, although it is possible that national courts act as if they were 'agents' of the Court, preserving the validity of CFSP measures rather than annulling them, this should not be taken for granted.

³⁴ R. Wessel, 'Lex Imperfecta: Law and Integration in European Foreign and Security Policy', *European Papers* No. 2 (2016), at 464.

the decisive factor was that the command and control structure of Operation Atalanta heavily relied on national decision-making, while the involvement of the Operation Headquarters was limited. The author argues that the Court applies a fact-oriented 'effective control' test, in line with the findings of the ILC, although the reasoning of the German Court is not entirely limpid. A striking feature of the ruling is that it is not clear what is the legal framework from which the German Court derived this principle.

GUARANTEEING RESPECT FOR HUMAN RIGHTS IN THE EU'S EXTERNAL RELATIONS: WHAT ROLE FOR ADMINISTRATIVE LAW?

Ilaria Vianello

Article 21 of the Treaty of the European Union stipulates that the Union's action on the international scene shall be guided by the principles that inspired its own creation, including human rights.¹ However, even before the entry into force of the Treaty of Lisbon, the Union has tried, over the years, to actively promote and defend human rights when engaging in relations with non-EU states. The Union's objective of promoting human rights when acting externally is supported by the action of the Commission and of the European External Action Service (EEAS). To promote this objective, the Commission and the EEAS use administrative activities: progress reports, action plans, impact assessments, strategy papers, programming documents, etc.²

Despite the EU's tendency to impose human rights obligations on its external partners, and to adopt tools aimed at further guaranteeing their protection, very little enforcement has taken place to date to punish those countries that violate them. For example, human rights clauses are virtually present in all agreements between the Union and third countries, together with a 'suspension clause', which allows for the suspension of the agreement if one of the parties violates human rights.³ The original version of the 'suspension clause' foresaw suspension in case of 'serious violations' of human rights.⁴ On the other hand, the most recent version foresees the suspension of the agreement in cases of 'non-compliance' with human rights,⁵ meaning that serious violations are no

¹ Art. 21 TEU: '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.' Treaty of the European Union, OJ [2010] C 83/13, 30.3.2010.

² The Union's activities aimed at implementing the Union's external human rights policy are administrative in nature since they are essentially geared towards meeting the policy objectives of the Union. H.C.H. Hofman, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press 2012), at 11.

³ For a detailed analysis see L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press 2005).

⁴ E.g., Art. 21 of the TCA with Estonia stated that: 'The parties reserve the right to suspend this Agreement in whole or in part with immediate effect if a serious violation occurs of the essential provisions of the present Agreement.' Agreement between the European Economic Community and the Republic of Estonia on Trade and Commercial and Economic Cooperation, OJ [1992] L 403/16, 23.9.2003.

⁵ E.g., Art. 133 of the SAA with Montenegro states that: 'Either Party may (1) suspend this Agreement, (2) with immediate effect, (3) in the event of non-compliance by the other Party of one of the essential elements of this Agreement.' Stabilisation and Association Agreement between

longer necessary to trigger suspension, and that ‘non-compliance’ is sufficient to freeze the agreement. Despite this change in wording, no suspension has as yet occurred.⁶ While it is a political decision if the Council decides to suspend an agreement with a third state due to human rights violations, can the same be said for the Commission’s duty to suggest that the Council should freeze the agreement? In other words, how can we reconcile the Commission’s lack of action with its numerous reports stating that human rights have been violated in third countries? Shouldn’t the Commission at least be required to explain why it decides to act or not to act?

The purpose of this paper is to determine whether administrative law offers ways to solve the tension between the Union’s decision to guarantee the respect of human rights in external relations and its reluctance to enforce the measures in place aimed at actively ensuring their promotion. By acknowledging the role of the Commission, and recently also that of the EEAS, in developing and implementing the Union’s external action, it becomes clear why it is important to critically analyse and question whether they live up to administrative principles and standards. European administrative law is not simply the right to enforcement; rather, it is the branch of a legal system that should put into practice the ambitions of the constitutional order.

The paper is structured as follows. First, examples of significant cases decided by the European Ombudsman (the Ombudsman) and the Court of Justice of the European Union (CJEU) will be discussed in order to highlight how administrative activities in external relations are relevant, in particular in consolidating and supporting the EU’s external human policy. Second, the paper shows how administrative law principles – the duty of care and the duty to state reasons – can be operationalised in order to fulfil their function also when the EU acts externally. The paper concludes by analysing whether respecting administrative law principles could be instrumental in strengthening the role of the Union as a human rights promoter in the world.

I. THE RELEVANCE OF ADMINISTRATIVE POWER IN EXTERNAL RELATIONS

This section outlines how the impact and function of the administrative activities aimed at developing and implementing the EU’s external action cannot be neglected; particularly in terms of promoting human rights in the wider world. In order to do so, a few compelling cases decided by the Ombudsman and the

the European Communities and their Member States, of the One Part, and the Republic of Montenegro, of the Other Part, *OJ* [2010] L 108/3, 29.4.2010.

⁶ More in general, there are very few instances in which the Union suspended agreements concluded with third countries for failure to respect human rights. See European Parliament Resolution of 4 September 2008 on the Evaluation of EU Sanctions as Part of the EU’s Actions and Policies in the Area of Human Rights, 2008/2031(INI), 4.9.2008, para. 21, in which the European Parliament ‘[c]onsiders that failure to take appropriate or restrictive measures in the event of a situation marked by persistent human rights violations seriously undermines the Union’s human rights strategy, sanctions policy and credibility.’.

CJEU are presented, focusing only on the reasoning of the Ombudsman and of the CJEU in addressing the Commission's external administrative power.

A. The cases in front of the European Ombudsman

The three cases presented all deal with complainants asking the Ombudsman to establish whether the action or inaction of the Commission in the exercise of its external power amounts to maladministration. Specifically, the claimants wanted to ascertain whether the Commission did not respect its obligations to follow certain rules when acting externally in accordance with Article 4 entitled 'lawfulness' of the European Code of Good Administrative Behaviour (ECGAB).⁷ In the first case, the claimant stated that the Commission had not respected its legal obligations in the way it developed the 'National Parks Rehabilitation Project' in Southern Ethiopia. The legal obligations derived from the EU Development Policy, the IV Lomé Convention, the OECD guidelines on resettlement, and international human rights agreements. The claimant listed a series of flaws in the way the Commission had implemented the project (e.g., no sufficient attention to cultural and social issues, lack of consultation with affected people, etc.).⁸ In the second case, the complainant alleged that, in the face of serious human rights violations by the Republic of Vietnam, the Commission failed to use its power to suspend the Cooperation Agreement with Vietnam.⁹ Finally, the third case concerns the alleged failure of the Commission to carry out a human rights impact assessment (HR impact assessment) during the negotiations for a free trade agreement (FTA) between the EU and Vietnam.¹⁰

In the first case, regarding the 'National Parks Rehabilitation Project', the Ombudsman checked whether in the implementation of the Ethiopian project, the Commission had taken due account of the values that became essential in the EU development policy (i.e., cultural and social values through grass roots community participation) and whether it had complied with international law (in this case Human Rights Conventions).¹¹

In the second case, dealing with the application of the human rights clause, the Ombudsman started his analysis with the text of the Cooperation Agreement between Vietnam and the Union in order to check whether there were any guidelines for the implementation of the clause. Given that there were no such guidelines, the Ombudsman then turned to the Treaty which again did

⁷ 'The official shall act according to law and apply the rules and procedures laid down in EU legislation. The official shall in particular take care to ensure that decisions which affect the rights or interests of individuals have a basis in law and that their content complies with the law.' Art. 4 ECGAB.

⁸ Decision on 26 October 2000 of the European Ombudsman on Complaint 530/98/JMA against the European Commission, External Relations, Breach of Art. 4 ECGAB.

⁹ Decision on 28 June 2005 of the European Ombudsman on Complaint 933/2004/JMA against the European Commission, External Relations, Breach of Art. 4 ECGAB.

¹⁰ Decision on 26 February 2016 of the European Ombudsman on Complaint 1409/2014/JN against the European Commission, External Relations, Breach of Art. 4 ECGAB, Duty of Care.

¹¹ *Supra* note 8, points 2.3-2.5.

not specify how the human rights clauses should be implemented.¹² However, the lack of binding rules did not stop the Ombudsman in his analysis. On the contrary, she stated that even if the Community legislator seemingly intended to confer a large degree of discretion to the Commission for the interpretation and application of the clause, this did not imply a complete absence of legal limits.¹³ In this context, the Commission set out various principles for the operationalisation of the human rights clause in its 1995 Commission communication.¹⁴ Thus, the Ombudsman assessed the legality of the inaction by the Commission against the principles outlined in the 1995 Commission communication.¹⁵ In both cases, the Ombudsman found the action and the inaction of the Commission to be lawful.

In the third case, the Ombudsman decided that although there was no express and specific legally binding requirement to carry out an HR impact assessment during the negotiations for an FTA with Vietnam, it would be in the *spirit* [emphasis added] of Article 21(1)(2) TEU to carry out an HR impact assessment.¹⁶ Moreover, the Ombudsman stated that it would also be consistent both with the Commission's current practice of carrying out HR impact assessments and with the 2012 Action Plan.¹⁷ The Ombudsman made it clear that the respect for human rights cannot be subjected to considerations of mere convenience.¹⁸ Thus, she found that the Commission's refusal to carry out an HR impact assessment constituted an instance of maladministration. The lack of clear procedures as well as the external relations context – in which the Commission is normally granted a wide margin of discretion – did not prevent the Ombudsman from deriving procedural obligations and from limiting the discretion of the Commission.

At first sight, the Ombudsman's approach does not seem helpful. Only in one out of three cases did the Ombudsman state that the action of the Commission amounted to maladministration. Nonetheless, the approach opens a window to the constraints of administrative power. According to the Ombudsman, the power of the administration in external relations is not unbounded. The cases provide guidance as to the boundaries that need to be respected by the administrative power when acting externally, also in the absence of legally binding rules. When assessing whether the administration is in breach of Article 4 ECGAB, the Ombudsman considered the following points: whether

¹² *Supra* note 9, point 1.5.

¹³ *Ibid.*, point 1.6.

¹⁴ Commission Communication of 23 May 1995 on the Inclusion of Respect for Democratic Principles and Human Rights in Agreement between the Community and Third Countries, COM (95) 216 final, 23.5.1995.

¹⁵ *Supra* note 9.

¹⁶ *Supra* note 10, Duty of Care, point 24.

¹⁷ The 2012 Action Plan requires the Commission to incorporate human rights in all impact assessment when conducting negotiations on trade agreements that have significant economic, social and environmental impacts. Strategic Framework and Action Plan on Human Rights and Democracy, Council Doc 11855/12, 25.6.2012. Decision on 26 February 2016 of the European Ombudsman on Complaint 1409/2014/JN against the European Commission, External Relations, Breach of Art. 4 ECGAB, Duty of Care, point 25.

¹⁸ *Supra* note 10, point 26.

the administration has the responsibility to exercise a specific power; whether it complies with a list of sources – not limited to primary and secondary law; and whether the administration has to follow procedures – explicitly provided or implied – aimed at protecting values of overarching importance such as human rights. The Ombudsman stretched the meaning of legality (Article 4 ECGAB) beyond primary and secondary law to include the respect for international human rights conventions, the values that underline a policy, administrative self-guidelines, and action plans.

B. The cases in front of the Court of Justice

The three cases that are presented here deal with natural and legal persons that try to challenge the failure to act by the Commission, and claim that the Union breached their legitimate expectations by departing from the numerous administrative activities aimed at implementing the Union's external action.

The first case involves Mr. Muhamad Mugarby as claimant, who is a Lebanese citizen claiming to have suffered human rights violations in his home country.¹⁹ The applicant filed an action for failure to act by seeking a declaration that the Council and the Commission unlawfully omitted to take a decision on the applicant's request concerning the adoption of measures against the Republic of Lebanon on account of the alleged violations by the latter of the applicant's fundamental rights. Mr. Mugarby claims that the Community, the Commission and the Council incurred non-contractual liability as a result of their failure to effectively use the available resources and instruments for the effective enforcement of the human rights clause in the Association Agreement concluded by the European Community and its Members with the Republic of Lebanon (the Association Agreement).²⁰ In this respect, the General Court affirmed that the implementation of suspension mechanisms is a matter of discretion for the Commission, which excludes the right of an individual to require that the Commission take a position in that connection.²¹ The Court does not provide any indication as to whether there are any limits to the Commission's discretion. Moreover, Mr. Mugarby claimed to have developed:

'strong and legitimate expectations that his fundamental rights would be protected by all the institutions of the European Union, including the courts of law, and that

¹⁹ GC (order), Case T-292/09, *Mugarby v. Council and Commission* [2011] ECR II-00255; CJEU, Case C-581/11 P, *Mugarby v. Council and Commission*, ECLI:EU:C:2012:466.

²⁰ The available resources being: the suspension of aid granted by the Community to Lebanon in accordance to Art. 28 of the Regulation (EC) No. 1638/2006 of the European Parliament and of the Council of 24 October 2006 Laying Down General Provisions Establishing a European Neighbourhood and Partnership Instrument (ENPI), OJ [2006] L 310/1, 9.11.2006; and the suspension of Community aid programs granted under the Association Agreement.

²¹ 'Therefore, it must be concluded that, taking account of the Commission's discretion as regards the submission to the Council of a proposal under Article 28 of the ENPI Regulation, its failure to address such a proposal to the Council cannot be relied on in an action based on the third paragraph of Article 232 EC.' GC, Case T-292/09, *supra* note 19, paras. 38-39.

those institutions would hold the parties to the Association Agreement to their obligations'²² [emphasis added].

So how could Mr. Mugraby expect the Union to suspend its relations with Lebanon due to its violations of human rights? He claims to have derived his legitimate expectations from the various public statements that the Commission and the Council have made in the context of the management of the European Union's external policy and the respect of the Association Agreement, and in relation to the protection of human rights.²³ The General Court, however, observed that such assertions are:

'not precise enough to identify, firstly, the conduct complained of with any certainty and, secondly, its possible unlawfulness. In any event, the applicant *does not establish how he could acquire a right* from those expectations'²⁴ [emphasis added].

The second case involves 'a coalition of non-governmental organisations and Turkish citizens'.²⁵ The coalition filed an application for the annulment of the Commission's Regular Report of 5 November 2003 (the progress report) concerning Turkey's progress towards accession, insofar as – according to the applicants – it contains a Commission decision refusing to make a recommendation to the Council concerning pre-accession aid granted to Turkey and, in alternative, for a failure to act in that regard. The General Court reformulated their claim by stating that the applicants did not seek the annulment of the Regular Report as such, but a Commission decision refusing to propose that the Council should take appropriate measures concerning the assistance granted to Turkey in light of its failure to comply with its pre-accession obligations.²⁶

Before starting the lawsuit, the applicants contacted the Commission by letter asking them to act in connection with Turkey's breaches of pre-accession criteria.²⁷ However, the progress report on Turkey was adopted without mentioning the violations reported by the coalition of non-governmental organisations and Turkish citizens. The applicants did not succeed either in their claim for annulment or in their claim for failure to act. Again the General Court was clear in stating that:

'the question as to whether an essential element for continuing to grant pre-accession assistance is lacking or otherwise and, consequently, whether it is appropriate to propose that the Council apply Article 4 of Regulation No. 390/2001 is a matter of discretion *excluding the right* [emphasis added], for an individual, to require the Commission to take a position in that connection or, where such a position exists, to bring an action for annulment against it.'²⁸

²² CJEU, Case C-581/11, *supra* note 19, para. 78.

²³ GC, Case T-292/09, *supra* note 19, para. 52.

²⁴ *Ibid.*, para. 71; also confirmed on appeal, see *supra* note 19, para. 27.

²⁵ GC, Case T-2/04, *Cemender Korkmaz, Corner House Research, and The Kurdish Human Rights Project v. Commission* [2006] ECR II-00032, para. 11.

²⁶ *Ibid.*, para. 34.

²⁷ *Ibid.*, para. 13.

²⁸ *Ibid.*, para. 50.

The General Court did not give any guidelines as to how the discretion should be exercised. The core of the dispute lies in the coalition's frustration of not having their views taken seriously. The coalition expected the Commission – by virtue of its duty to monitor the pre-accession process²⁹ – to conduct more adequate research in respect of their allegations.

In the third case, the applicants did not claim to derive their legitimate expectations from an administrative act, but from a European Parliament resolution. However, the case is still interesting since it shows how the numerous acts characterising the EU's external action can create expectations; and because it tells us something about the approach and criteria used by the Court in arguing the case. The applicants – Grégoire Krikorian, Suzanne Krikorian, and Euro-Arménie ASBL – brought an action for damages in which they sought compensation for the harm caused to them by the recognition of Turkey's status as a candidate for accession to the EU, despite the state's refusal to acknowledge the genocide perpetrated in 1915 against the Armenians living in Turkey. In this respect, the applicants claimed that the defendant institutions – the European Parliament, the Council of the European Union, the European Commission – blatantly failed to consider the resolution of the European Parliament of 18 June 1987 regarding a political solution to the Armenian question (the 1987 resolution). In this resolution, the Parliament declared that the Turkish government's refusal to acknowledge this genocide constituted an insurmountable obstacle to the examination of the Republic of Turkey's possible accession. According to the applicants, the 1987 resolution is a legal act which, similarly to recommendations and opinions, can produce legal effects; and that it intends to publicly lay down a special condition for the Republic of Turkey's accession – namely the prior acknowledgement by that state of the genocide in question.³⁰ It is in this context that the applicants argued that the 1987 resolution gave rise to a legitimate expectation on their part that the Parliament would exercise its right of veto on the Republic of Turkey's accession.³¹ The Court disposed that the 1987 resolution could not have given rise to a legitimate expectation, on the part of the applicants, since:

*'the 1987 resolution is a document containing declarations of a purely political nature, which may be amended by the Parliament at any time. It cannot therefore have binding legal consequences for its author nor, a fortiori, for the other defendant institutions'*³² [emphasis added].

However, if instead of a European Parliament resolution, the applicants in the last case had relied on a Commission progress report – thus not a political

²⁹ Ibid., para. 14.

³⁰ GC, Case T-346/03, *Krikorian v. European Parliament, Council and Commission* [2003] ECR II-06037, para. 6.

³¹ The applicants stress that since the entrance into force of the Single European Act the Parliament had the power to object to the Republic of Turkey's accession; they state that the requirement of the assent of the Parliament is now laid down in article 49 of the Treaty on European Union. Ibid., para. 7.

³² Ibid., para. 19.

document – would the conclusion of the Court have been the same? Or would it have at least imposed on the Commission an obligation to state the reasons as to why it decided to depart from its position as stated in the progress report?

The three cases just discussed were clearly not presented sharply by the applicants; therefore it is difficult to argue that the Court should have decided the cases differently. Third country citizens clearly cannot acquire a right as to how the Union should behave towards their own states. Mr. Mugraby was not precise enough in identifying how the Union's conduct conflicted with his expectations. The coalition of Turkish citizens was confused as to the Union's decision-making process, and in the last case, the applicants relied on a political instead of an administrative document for which the Court would have possibly used a different argument. Nevertheless, in these cases the Court ignored – or maybe thwarted? – the opportunity of going beyond a purely formalistic approach in favour of one that takes into account the social reality and the implication of the Union's activities outside its borders.

If it is true that Mr. Mugraby could have been much clearer as from which documents he developed strong and legitimate expectations, both the General Court and the Court of Appeal could have recognised how the numerous administrative activities aimed at implementing the Union's external action make third country citizens believe that the protection of human rights is at the forefront of the Union's action towards the rest of the world. The coalition of Turkish citizens challenged how the Commission progress report was drafted; they believed it deliberately decided not to denounce violations of human rights in Turkey. However, the Court did not even address this issue. The Court in these two cases underlines the Commission's discretion in deciding when to trigger a suspension of the Union's benefits in the case of human rights violations by a third country. However, it does not suggest possible constraints that should be imposed on the Commission in terms of how it should exercise its discretion.³³ The role of the Commission is essential in triggering the implementation of human right clauses. The same Court recognised this role of the Commission in the *Mugraby* case by stating that

'it follows from Article 17(1) TEU that the Commission, as guardian of the EU and FEU Treaties and of the agreements concluded under them, must ensure the correct implementation by a third State of the obligations which it has assumed under an agreement concluded with the European Union, using the means provided for by that agreement or by the decisions taken pursuant thereto.'³⁴

The Commission is the institution that monitors third states and that should suggest to the Council whether to take action; and the Council may decide to act upon the suggestion.

It can thus be concluded that the Court in these cases did not take a proactive approach in limiting the Union's external administrative power. However, some questions are worth posing. Was it so strange for Mr. Mugraby to believe

³³ E.g., Commission Communication, *supra* note 14.

³⁴ CJEU, Case C-581/11 P, *supra* note 19, para. 68.

that the Union would act consistently with its administrative activities and declarations aimed at implementing the Union's external action? Was it that odd for the coalition of Turkish citizens to believe that the Commission's progress report could contain a *de facto* position regarding whether the Council should take action in the case of human rights violations in Turkey? If every year the Commission denounces human rights violations in a specific third country, is it not reasonable to foresee that its citizens would expect the Union to take action under its human rights clauses? Finally, in light of the Union's emphasis on the importance of NGOs as watchdogs regarding the respect of human rights in third countries,³⁵ should the Commission not be expected to take their claims more seriously? These expectations might not be defined as 'legitimate' under EU law and, thus, lacking legal protection; however, other obligations imposed on the administration could act as safety net to protect individuals from wrongfully relying on them. Moreover, these same administrative obligations have the potential to guarantee that the Union's external human rights policy is implemented in a more serious and consistent manner.

II. OPERATIONALISING ADMINISTRATIVE LAW PRINCIPLES IN EU EXTERNAL RELATIONS

The cases analysed show that the Commission's activities aimed at implementing the Union's policies towards its external partners cannot be neglected. They raise expectations that the Union would take its commitment to respect human rights seriously by abiding to human rights conventions when implementing its projects, by conducting human rights impact assessments before concluding an international agreement, or by monitoring the human rights situation on the ground with care and due diligence. However, protecting legitimate expectations that arise from these administrative activities in external relations is extremely difficult. Although the Commission and EEAS documents report human rights violations, the Union enjoys a wide margin of discretion as to whether to take action.³⁶

If on the one hand it is true that the Union's institutions should preserve their flexibility and discretion in managing their relations with external partners; on the other, imposing administrative standards on the administration's behaviour does not necessarily imply that it will be deprived of its discretionary powers. It

³⁵ E.g., Address by High Representative/Vice-President Federica Mogherini at the EU-NGO Human Rights Forum, Brussels (4 December 2015), available at <http://eeas.europa.eu/state-ments-eeas/2015/151204_01_en.htm>.

³⁶ If internally the executive cannot depart from its internal guidelines without a reasonable explanation since otherwise the principle of equality would be infringed (see CJEU, Case 148/73, *Louwage v. Commission* [1974] ECR 81), this could not apply externally since the principle of equality is not applicable. 'Externally substantive equality does not need to be respected unless the EU wishfully commits itself to the respect of the principle of non-discrimination via international treaties or via autonomous measures. The EU can discriminate between third countries and third countries' citizens in terms of which substantive policy to offer.' M. Cremona, 'Structural Principles and their Role in EU External Relations Law', in M. Cremona (ed.), *Structural Principles in EU External Relations Law* (Oxford: Hart Publishing forthcoming).

would mean, however, that in making use of its discretion, it will follow certain rules. This should particularly be the case in view of the Union's obligation to respect the rule of law when acting externally.³⁷ As highlighted in Section II, the Ombudsman has started to operationalise the rule of law by demanding that the administration act according to the mandated procedure.³⁸ However, respecting the rule of law should not stop here. It should also demand from the administration that other duties are complied with when implementing Union policies.³⁹

The following sub-sections propose two duties – mandated by the rule of law – that the administration should comply with when implementing the EU's external action. In addition, a recent case is presented where the General Court has also pushed in this direction. Each subsection first presents each administrative duty as it is currently applicable in EU law and subsequently suggests how it should be operationalised in external relations. It is beyond the scope of this paper to talk about the enforcement of these duties. However, it is important to remember that judicial review is not the only option in enforcing administrative law principles: judges are only called into play as a last resort. The conception of the rule of law must have operational consequences also when the actual prospects of sanction for illegality are remote.⁴⁰

A. The duty to state reasons

The duty to state reasons under the Treaty is limited to legal acts. Article 296 TFEU is clear:

'Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.'

³⁷ I. Vianello, 'Guiding the Exercise of Union's Administrative Power in the EU Wider Neighbourhood: The Rule of Law from Paper to Operationalisation', *EUI Department of Law Research Paper* No. 2015 (2008).

³⁸ The institutional position, the means of action, and the mandate of the Ombudsman to act upon instances of maladministration extending beyond legality facilitate the possibility of reviewing the Union's administrative external action. The Ombudsman has tools and means of action that enable inquiries that are not specifically directed at controlling whether the Union institutions have complied with the law and with legal principles, or at determining what rights of the complainant are and whether they have been respected. C. Harlow and R. Rawlings, *Process and Procedure in EU Administration* (Oxford: Hart Publishing 2014), at 80-84; A. Tsadiras, 'Unravelling Ariadne's Thread: the European Ombudsman's Investigative Powers', 45 *Common Market Law Review* 2003, 757-770.

³⁹ The present paper is primarily interested in the operationalisation of the two principles giving effect to the Union rule of law – as understood by the Court – in one EU sector specific policy area. It does not want to be a critique to the conception of the rule of law in the EU. If internally the Court developed the principles giving effect to the rule of law on the real-life canvas of conflicts arising from EU law and the necessity to protect rights therein; externally this does not seem to be the most immediate solution. I. Vianello, 'The Rule of Law as a Relational Principle: Structuring the Union's Action Towards its External Partners', in M. Cremona (ed.), *Structural Principles in EU External Relations Law* (Oxford: Hart Publishing forthcoming).

⁴⁰ P.M. Shane, 'The Rule of Law and the Inevitability of Discretion', 36 *Harvard Journal of Law and Public Policy* 2013, at 23.

This approach is narrow in scope and does not fully reflect the core rationale for introducing the obligation – at least on the part of the administration – to state reasons for its action. This is particularly true for the Union's external actions, which are increasingly characterised by a plethora of administrative activities, which despite their non-binding nature do influence how the actions of the Union are carried out. The duty to state reasons has many functions: it makes the decision-making process more transparent, it helps to ensure that the rationale for the action has been thought through, it facilitates the judiciary in determining whether a measure is lawful, and it supports individuals in deciding whether they have a real claim in contesting official determinations because they are contrary to their interests.⁴¹ By stating reasons, the Commission has a duty to defend the rationality of its choices and where applicable to state the legal basis for its action. This exercise could be very important both for the administration itself and for its relation with third parties.

The statement of reasons serves the interest of the decisional body insofar as it helps to ensure that all the relevant circumstances have been duly balanced and taken into account.⁴² By stating reasons, the Commission avoids being blamed for acting in an informal and discretionary fashion. Discretion should not necessarily be ruled out, but discretionary decisions are also based on reasons that can be explained. The challenge of upholding the rule of law entails repudiating the inevitability of discretion or relegating the 'Rule of Law' to an empty slogan.⁴³ The task requires articulating a compelling conception of the rule of law, which is well-suited to the inevitability of discretion. Despite reporting on human rights violations in third countries, the Commission ought to start stating reasons as to why it does not recommend that the Council take action. In addition, it ought to state reasons as to why it does not carry out an impact assessment at the initial stage of negotiating an agreement with a third state, despite the Commission's and Council's internal documents on the importance of carrying out impact assessments.⁴⁴ More generally, when acting externally the administration should state reasons as to why it has departed from the numerous internal arrangements that indicate how the Union intends to interact with a third state. This should particularly be the case when these acts are publicly available, since these are capable of raising expectations.

The obligation to state reasons becomes particularly important when individuals directly address the administration, raising doubts as to how it exercised its discretion.⁴⁵ By stating reasons, the Union could try to prevent individuals from

⁴¹ P. Craig, *EU Administrative Law* (Oxford: Oxford University Press 2012), at 341.

⁴² J. Mendes, *Participation in EU Rule-Making: A Right-Based Approach* (Oxford: Oxford University Press 2011), at 249.

⁴³ P.M. Shane, *supra* note 40, at 23.

⁴⁴ E.g., the 2012 Action Plan requires the Commission to incorporate human rights in all Impact Assessment when conducting negotiations on trade agreements that have significant economic, social and environmental impacts. Council Doc 11855/12, *supra* note 17; the European Commission, Trade for All, towards a More Responsible Trade and Investment Policy Strategy (October 2015), at 18, 23 and 26. also stress the importance of carrying out impact assessments.

⁴⁵ 'Reasons are given to negotiate, establish, repair, affirm, or deny relationships.' J.L. Mashaw, 'Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance', *Yale Law School Faculty Scholarship Series* (1 January 2007), at 102.

developing expectations that the Union will always use its administrative instruments. The statement of reasons may indeed have the effect of protecting the so-called third parties in administrative procedures.⁴⁶ In two of the three cases discussed in the previous section, the individuals contacted the Commission before deciding to bring their claims to the Court. In these cases, is it possible to affirm that the Commission's responses to Mr. Mugraby and the coalition of Turkish citizens were sufficient to prevent them from starting a lawsuit? Were the answers sufficient to prevent expectations being raised on the part of the applicants? Did the Commission react sufficiently to the substantive submissions made by the interested parties? In order to answer these questions, it is important to question the quality required from the administration when replying to individual claims. A complete and comprehensive answer helps individuals to fully understand the reasons why the administration decided to act in a certain manner. This then limits the possibility of them raising expectations or starting a lawsuit. As Nehl suggests, the duty to state reasons shares an intimate relation with the duty of care. This relation has the ability to transform a procedural standard into a substantive requirement.⁴⁷ The duty to state reasons for administrative action as a procedural requirement needs to be accompanied by a substantive correctness of the reasoning.

B. The duty of care

Over the years the CJEU has developed the duty of diligent examination as a procedural guarantee in proceedings resulting in administrative rules to counterbalance the wide margin of appreciation that the Commission enjoys when making complex evaluations in the case of economics and risk regulations.⁴⁸ In other words, the principle requires institutions to make decisions on the basis of complete knowledge of all the relevant facts, thereby guarding against arbitrary decisions.⁴⁹ The duty also imposes certain standards as to how information is assessed and how it is collected.⁵⁰ The wide discretionary powers granted to the administration in choosing the most appropriate policy measures is coupled with a duty to place itself in the best possible conditions when assessing the propriety of the decision.⁵¹ It might in fact be argued that the wider the margin

⁴⁶ J. Mendes, *supra* note 42, at 251.

⁴⁷ H.P. Nehl, *Principles of Administrative Procedures in EC Law* (Oxford: Hart Publishing 1999), at 120.

⁴⁸ '[W]here the Community institutions have such a power of appraisal [involving complex technical evaluations], respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case.' CJEU, Case C-269/90, *TU München v. Hauptzollamt München-Mitte* [1999] ECR I-5469, para. 14.

⁴⁹ A.H. Türk, 'Oversight of Administrative Rule Making: Judicial Review', 19 *European Law Journal* 2013, at 141.

⁵⁰ In the *TU München v. Hauptzollamt München-Mitte* case, the Court made clear that whenever the Commission relies on a group to obtain the relevant information, it needs to ensure that the group has the necessary knowledge in the relevant field. *Supra* note 48, paras. 20-21.

⁵¹ H.P. Nehl, *supra* note 47, at 116.

of discretion enjoyed by the administration, the more demanding the procedural constraints stemming from the duty of care should be. Furthermore, the General Court in *Arizona Chemical* highlighted that the duty of care is not only a principle aimed at limiting administrative discretion, but is also 'an essential and objective procedural requirement, imposed in the public interest.'⁵²

The numerous instruments characterising the Union's external actions might not always require technical evaluations, and their rule-making function may not always be evident. However, the assessments involved are rather complex and their impact on third countries cannot be neglected.⁵³ For example, progress reports require the Commission to monitor the level of respect of human rights in third countries whose language it often does not even speak. Moreover, the Commission has to determine which policy areas should receive funding (e.g., projects aimed at supporting women's empowerment, or at improving living conditions of Roma children),⁵⁴ and to establish the impact of the Union's trade policy on human rights.⁵⁵

In a recent case (*Front Polisario*), the General Court extended the respect of the duty of care to the external relations of the Union as a procedural guarantee that needs to be respected even when the EU institutions enjoy a wide margin of appreciation – in this instance deciding whether to conclude an agreement with a third state.⁵⁶ In extending the obligation to the external actions of the Union, it is striking that the General Court makes a direct reference to the foundational case of *TU München*⁵⁷ without determining whether this is a case of proceedings resulting in administrative rules that involve complex evaluations.⁵⁸ In the case at stake, by recognising the effect of the Union's actions in third countries, the General Court established that the EU's institutions are obliged to comply with the duty of care before acting.⁵⁹ The Council has an

⁵² GC, Case T-369/03, *Arizona Chemical and Others v. Commission* [2005] ECR II-5839.

⁵³ See I. Vianello, *supra* note 37, at 12; and more generally A. von Bogdandy, 'Common Principles for a Plurality of Orders: A Study on Public Authority in European Legal Area', 12 *J-CON* 2014, at 988.

⁵⁴ E.g., Strategy papers define the priorities for action towards meeting the general and specific objectives defined in articles 1 and 2 of IPA II in the relevant policy area as listed in article 3 IPA II. In other words, the Commission has the power to identify the priorities for action for each enlargement country within the limits imposed by the regulation itself. Regulation (EU) No. 231/2014 of the European Parliament and of the Council of 11 March 2014 Establishing an Instrument for Pre-Accession Assistance (IPA II), *OJ* [2014] L77/13, 15.3.2014.

⁵⁵ European Commission, Trade for All..., *supra* note 44, at 26.

⁵⁶ GC, Case T-512/12, *Front Polisario v. Council*, ECLI:EU:T:2015:953.

⁵⁷ See *supra* note 46.

⁵⁸ GC, Case T-512/12, *supra* note 56, para. 225.

⁵⁹ '(L)e contrôle judiciaire doit nécessairement se limiter à la question de savoir si l'institution compétente de l'Union, en l'occurrence le Conseil, en approuvant la conclusion d'un accord tel que celui approuvé par la décision attaquée, a commis des erreurs d'appréciation manifestes [...]. Cela étant, en particulier dans les cas où une institution de l'Union dispose d'un large pouvoir d'appréciation afin de vérifier si elle a commis une erreur manifeste d'appréciation, le juge de l'Union doit contrôler si elle a examiné, avec soin et impartialité, tous les éléments pertinents du cas d'espèce, éléments qui appuient les conclusions qui en sont tirées (arrêts du 21 novembre 1991, Technische Universität München, CJEU, C-269/90, EU:C:1991:438, point 14, et du 22 décembre 2010, *Gowan Comércio Internacional e Serviços*, C-77/09, Rec, EU:C:2010:803, point 57).' *Ibid.*, paras. 224 and 225.

obligation to examine all the elements of the case with impartiality, in order to make sure that the Union's actions do not have the effect of violating human rights before concluding an agreement.⁶⁰ By allowing a third state to export its products to EU Member States without making sure that the latter makes its products in compliance with human rights, the Union incurs the risk of indirectly encouraging and taking advantage of possible human rights exploitations.⁶¹ In this specific case, the decision of the Court to expand the duty of care could be related to the current Union's commitment to conduct a human rights impact assessment before the Union concludes an agreement.⁶² The General Court seems to adapt the core function of the duty of care to the context of the case.

Finally – the *Asia Motor France II* case is particularly interesting for the Court cases analysed in section II.B. In this case, the Court established that when approached with an individual complaint, the Commission is required 'to carefully examine the factual and legal particulars brought to its notice by the complainant.'⁶³ This statement implies that the Commission's discretionary power as to whether to wholly or partially reject the complaint remains untouched, provided that the Commission fulfils the requirement of care.⁶⁴ The case law makes it clear that the Commission has a duty to carefully consider each and every complaint it receives before making use of its discretionary power to reject it due to the Union's lack of interest.

The administration's obligation to use all the means available to carefully consider the individual complaints it receives may be particularly relevant in the context of external relations. The Commission and the EEAS should – at least in theory – constantly monitor the third countries with whom the Union has built ties. For example, with its human rights clauses, the Union is committed to take action when human rights are violated in a third country with whom it has concluded an agreement. Moreover, the Commission and the EEAS also

⁶⁰ '[L]e Conseil doit examiner, avec soin et impartialité, tous les éléments pertinents afin de s'assurer que les activités de production des produits destinés à l'exportation ne sont pas menées au détriment de la population du territoire en question ni n'impliquent de violations de ses droits fondamentaux dont, notamment, les droits à la dignité humaine, à la vie et à l'intégrité de la personne (articles 1^{er} à 3 de la charte des droits fondamentaux), l'interdiction de l'esclavage et du travail forcé (article 5 de la charte des droits fondamentaux), la liberté professionnelle (article 15 de la charte des droits fondamentaux), la liberté d'entreprise (article 16 de la charte des droits fondamentaux), le droit de propriété (article 17 de la charte des droits fondamentaux), le droit à des conditions de travail justes et équitables, l'interdiction du travail des enfants et la protection des jeunes au travail (articles 31 et 32 de la charte des droits fondamentaux).' Ibid., para. 228.

⁶¹ '[...] si l'Union permet l'exportation vers ses États membres de produits en provenance de cet autre pays qui ont été fabriqués ou obtenus dans des conditions qui ne respectent pas les droits fondamentaux de la population du territoire dont ils proviennent, elle risque d'encourager indirectement de telles violations ou d'en profiter.' Ibid., para. 231.

⁶² Council Doc 11855/12, *supra* note 17; European Commission, 'Trade for All...', *supra* note 44, at 18, 23 and 26. Finally, DG Trade itself established guidelines as to how to carry out Human Rights impact assessments: Guidelines on the Analysis of Human Rights Impacts in Impact Assessments for Trade-Related Policy Initiatives, available at <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf>.

⁶³ GC, Case T-7/92, *Asia Motor France SA and Others v. Commission* [1993] ECR II-669, para. 35. The Commission recognised this duty also in *T-Mobile*. CJEU, Case C-141/02 P, *Commission v. T-Mobile Austria GmbH* [2005] ECR I-01283, para. 53.

⁶⁴ H.P. Nehl, *supra* note 47, at 140.

have always set up a monitoring procedure in the countries of the Enlargement and Neighbourhood Policy.⁶⁵ Therefore, the obligation to carefully consider the cases brought forward by individuals is not only owed to the individual themselves, but also to the Union's commitment to respect human rights when acting externally, since the information gathered might be important in terms of further action. In other words, it ought not to be sufficient for the Commission to disregard Mugarby's claim based on the fact that the Commission 'was not convinced that suspension of the agreement would constitute an appropriate or effective reaction to the applicant's case'.⁶⁶ In the same manner, the coalition of non-governmental organisations of Turkish citizens should not have been dismissed by the Commission, before it even inquired whether their claims were founded. The principle of careful examination in external relations should require the administration to engage with individuals on the ground and to carefully consider their claims. The fact that the EU's external policies are heavily driven by politics does not exempt the administration from fulfilling those duties that stem from the rule of law.

III. CONCLUSIONS

The recognition that the administration exercises significant power in external relations should not stop the debate. On the contrary, the question remains as to whether administrative law offers ways to solve the tension between the Union's decision to guarantee the respect of human rights in the wider world and the Union's reluctance to enforce the measures in place aimed at actively ensuring their promotion. This should particularly be the case when the power exercised by the administration has the potential to raise the expectations of individuals and to influence the development and implementation of the Union's external policies.

The European Ombudsman has already shown promptness in extending the definition of maladministration in order to accommodate the specificities of the external reality. The lawfulness of the Commission's action was also evaluated against internal guidelines and implied procedures, especially because they are aimed at protecting values of overarching importance such as human rights. The impact of the Ombudsman's recent decision on the importance of carrying out human rights impact assessments is already reflected in a DG Trade document on responsible trade.⁶⁷ The document makes it clear that human rights impact assessments should be carried out any time the EU concludes trade agreements. On the other hand, due to some practical and legal limitations the Court was more reluctant in identifying how to constrain the discretion of the administration in external relations. However, the *Front Polisario* case is a

⁶⁵ The Commission and the EEAS produce every year progress reports for each Enlargement and European Neighbourhood Policy country.

⁶⁶ CJEU, Case C-581/11 P, *supra* note 19, para. 12.

⁶⁷ European Commission, 'Trade for All...', *supra* note 44, at 18, 23 and 26.

first step in operationalising the respect for administrative law principles when the Union acts externally.

Administrative law is definitely not the answer to all the challenges and problems posed by the external human rights policy of the Union. However, through its application, the Ombudsman and the Court have addressed human rights issues. In the *Front Polisario* case, it is evident that through the use of administrative law principles (the duty of care), the Court addressed the Union's obligation to guarantee the respect and protection of human rights in its external actions. Respecting administrative principles has the potential to guarantee a more consistent and serious approach to human rights protection in external actions. This can be achieved in one or more ways, for example, by obliging the administration to justify its departure from internal guidelines requiring the latter to carry out human rights impact assessments, state reasons for its inaction in the case of human rights violations, and carefully examine individual complaints regarding human rights violations in third countries. Ultimately, if operationalised within the domain of external relations law, administrative law principles and procedures can protect individuals from building expectations, and enhance the protection of human rights in the Union's external actions.

HUMANS RIGHTS CLAUSES IN EU AGREEMENTS

Francesca Martines

I. INTRODUCTION

The inclusion of human rights clauses in European Union (EU) international agreements has long been a traditional feature¹ of human rights protection in the EU's external relations. It continues to attract the attention of scholars² due to the problematic issues involved, including the enforcement, scope, and function of the clauses.

In current practice, EU agreements containing³ human rights clauses follow a standard model.⁴ First, there is a reference in the Preamble of the agreement to the 'strong attachment' of the contracting parties to non-trade values, such as democratic principles, human rights, and the rule of law. Second, in the first part of the agreement, there is a provision that defines the respect for human rights and other non-trade values as an 'essential element' of the agreement. Third, a non-execution clause is included in the final part of most EU agreements, which stipulates how the EU is supposed react if an essential element of the agreement is violated.

¹ The Framework Agreement with Argentina of 1990 was the first to include a human rights clause. See Framework Agreement for Trade and Economic Cooperation between the European Economic Community and the Argentine Republic, *OJ* [1990] L 295, 26.10.1990. For a list of agreements containing human rights clauses, see European Union External Action Service, Inventory of Agreements Containing the Human Rights Clause, Doc EEAS/SG2, 12.12.2014.

² See, *inter alia*, E. Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (The Hague: Martinus Nijhof 2003); L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press 2005); *Idem*, 'The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and other Trade Arrangements with Third Countries', European Parliament Directorate for External Relations (November 2008), available at <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2008/406991/EXPO-INTA_ET\(2008\)406991_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2008/406991/EXPO-INTA_ET(2008)406991_EN.pdf)>; *Idem*, 'A Model Human Rights Clause for the EU's International Trade Agreements', German Institute for Human Rights (2014); N. Hachez, 'Essential Elements' Clauses in EU Trade Agreements: Making Trade Work in a Way that Helps Human Rights?', Leuven Centre for Global Governance Studies, *Working Paper* No. 158 (April 2015); A. Egan and L. Pech, 'Respect for Human Rights as a General Objective of the EU's External Action', Leuven Centre for Global Governance Studies, *Working Paper* No. 161 (June 2015); N. Ghazaryan, 'A New Generation of Human Rights Clauses? The Case of Association Agreements in the Eastern Neighbourhood', 40 *European Law Review* 2015, 391-410.

³ This practice has been extended to several sector agreements. According to a document prepared by the Commission in 2011, all fisheries agreements shall include a human rights clause. See Commission Communication, Reform of the Common Fisheries Policy, COM (2011) 417 final, 13.7.2011, section 2.7.

⁴ In 1995, the Council decided to standardise the essential element clause and to include a non-execution clause in all Community Agreements with third countries. See EU Council Press Release, Doc 7481/95, 29.5.1995, cited by M. Jurine, 'Note on Human Rights Clauses in The EU's External Relations', Study requested by the Subcommittee on Human Rights of the European Parliament, Doc DV/576418EN, 27.7.2005, at 10.

It has been observed that the violations of the values mentioned in the essential element clause have only triggered the application of the clause in a limited number of cases, all involving very serious violations of democratic principles and human rights.⁵ This infrequent application might thus call into question the real impact of the clause on the human rights situations in EU partner countries.

However, the usefulness of the clause as a tool for the protection of human rights in the EU's external relations cannot be judged with exclusive reference to its enforcement record. On the one hand, the essential element clause and the non-execution clause establish a 'self-contained regime',⁶ allowing for the adoption of 'appropriate measures' to compel compliance. On the other hand, the essential element clause should also be evaluated *per se*, that is as an autonomous rule that can play a constructive role as a basis for political dialogue and for the adoption of positive measures.

This paper examines the added value of the clause following this interpretative approach and contributes to the discussion of several problematic issues related to the clauses and to their enforcement.

The paper is organised as follows. Section II examines the scope and features of the essential element clause. Section III analyses the structure and content of the non-execution clause. Section IV explores the (possible) application of the human rights clauses contained in the Cotonou Agreement as a consequence of the anti-homosexual legislation adopted by several African countries, which provides a test case for some of the questions posed in previous sections. Finally, conclusions are drawn in Section V on the usefulness of human rights clauses as a tool for the protection of human rights in EU foreign affairs.

II. THE HUMAN RIGHTS ESSENTIAL ELEMENT CLAUSE AND ITS MATERIAL SCOPE

Despite some differences as regards the material scope of the clause,⁷ the structure of the essential element provisions contained in EU Agreements follows a similar pattern. Taking as an example the Framework Cooperation Agreement between the EU and Philippines,⁸ Article 1 (General Principles)

⁵ For a complete list of cases, see the answer given by the Commission Vice-President Federica Mogherini on behalf of the Commission, on the 5th August 2015, to a Member of the European Parliament on the number of EU agreements, containing human rights clauses, suspended in response to human rights violations. Doc E-008626/2015, 5.8.2015. Available at <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-008626&language=EN>>.

⁶ In that the agreement regulates the permissible responses to a breach of its provisions. On this point, see *infra* section III.

⁷ For example, reference to the rule of law is not always included. On this point, see *infra* note 14 and surrounding text.

⁸ Framework Agreement on Partnership and Cooperation between the European Union and its Member States, on the One Part, and the Republic of Philippines, on the Other Part. The agreement was signed in July 2012. Commission Communication, COM (2013) 925 final, 18.12.2013.

reads: 'Respect for democratic principles and human rights, as laid down in the Universal Declaration of Human Rights, and other relevant international human rights instruments to which the Parties are contracting parties, and for the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement'.

The clause refers to both non-binding and binding international law instruments. The former are the General Assembly Universal Declaration on Human Rights (as in the example above), or the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe, or the Charter of Paris for a New Europe of 1990.⁹ According to an author, the reference to these instruments in the human rights clause makes them binding.¹⁰ It is submitted that this conclusion depends on the specific context.¹¹ However, these documents can be used as instruments for interpretation of the clause, since they provide details as regards, for example, the content of democratic principles and of minority rights. It can also be remarked that the above-mentioned instruments often contain principles that are enshrined in other (binding) international law instruments or that are principles of customary international law. As for binding human rights instruments, the clause refers to 'other relevant international human rights instruments to which both Parties are contracting parties'. This latter reference makes it clear that these 'other agreements' are the source of human rights obligations for the parties. It should be noted that this provision is drafted so that it covers legal instruments that the parties might ratify after the conclusion of the EU agreement.¹² This also means that the scope of the

⁹ These last two references are contained in agreements with Eastern countries, recently, with Moldova (Art. 2), Georgia (Art. 2), and Ukraine (Art. 2). The essential element clause of the Association agreements with these countries also includes a reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms of which they are contracting parties. It is also interesting to note that the Association Agreement with Ukraine includes 'Promotion of respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence' as an essential element. The Association Agreement with Georgia contains the same reference but does not qualify respect for those values as an essential element. The Association Agreement with Moldova does not contain such a reference at all. The text of the Agreement with Georgia is reported in *OJ* [2014] L 261/4, 30.8.2014. The text of the Agreement with Moldova is reported in *OJ* [2014] L 260/4, 30.8.2014. The text of the Agreement with Ukraine is reported in *OJ* [2014] L 161/3, 29.5.2014. The essential elements clause in the Stabilisation and Association Agreements with the Former Yugoslav Republic of Macedonia (a candidate country since 2003), *OJ* [2004] L 84/4, 20.3.2004, contains a reference to market economy. This is one of the Copenhagen criteria that candidate countries have to fulfil to join the EU.

¹⁰ C. Hillion, 'The Evolving System of European Union External Relations as Evidenced in the EU Partnerships with Russia and Ukraine', Leiden University (2005), at 87, available at <<https://openaccess.leidenuniv.nl/handle/1887/4338/>>. On the issue of the implications of the reference to non-legal documents in international treaties, see U. Fastenrath, 'The Legal Significance of CSCE/OSCE Documents', *OSCE Yearbook 1995/1996*, at 417.

¹¹ Hillion reaches his conclusions with reference to the Partnership and Cooperation Agreement with Russia and after an analysis of a Joint Declaration attached to the Agreement. *Supra*, note 10.

¹² For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the UN Convention on the Rights of Persons with Disabilities, ratified by Vietnam after signing the Framework Agreement with the EU and its Member States is covered by the essential element clause.

clause may differ depending on the number of international law instruments for human rights protection binding the two contracting parties.

The problem with the application of the clause is not so much the scope of international obligations, but rather the understanding and conception of human rights and the issue of relativism.

It is clear that for the EU, human rights are indivisible and universal. Thus the reference to the General Assembly Universal Declaration on Human Rights is telling: the Declaration symbolises the principles of interrelation, universality, inter-dependency and indivisibility of human rights. The underlined assumption is the existence of a universal legal regime of human rights, which seems not to give any space to cultural, ethnic or religious relativism.¹³

As for democracy and the rule of law,¹⁴ the essential elements clauses usually do not contain a definition¹⁵ of these values. In the EU, democracy and the rule of law are conceived as closely connected to each other and linked with human rights. In fact, EU documents usually refer to the three principles as if they constitute a single concept.¹⁶ If democracy goes hand in hand with political

¹³ For an example of the subordination of human rights to the dictates of Islamic law, see the Cairo Declaration proclaimed in 1990 by the Organisation of the Islamic Conferences. On this issue, see J.D. van der Vyver, 'Universality and Relativity of Human Rights: American Relativism', 4 *Buffalo Human Rights Law Review* 1998, at 62. On the possibility of adopting weak relativism, see C. Good, 'Human Rights and Relativism', 19 *Macalester Journal of Philosophy* 2010, 27-52. Available at <<http://digitalcommons.macalester.edu/philo/vol19/iss1/4>>.

¹⁴ There is not a uniform practice across all EU agreements as regards the reference to this value. The rule of law is, for example, mentioned in Art. 1 of the Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States on the One Part, and the Socialist Republic of Vietnam, on the Other Part, of 2012, available at <http://eeas.europa.eu/delegations/vietnam/eu_vietnam/political_relations/index_en.htm>. In the Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States on the One Part, and the Republic of Indonesia, on the Other Part, the rule of law is not mentioned as one of the essential elements of the partnership (Art. 1.1 refers only to respect for democratic principles and fundamental human rights). A reference is contained in paragraph 4 of Art. 1, which reads: 'The Parties reaffirm their attachment to the principles of good governance, the rule of law, including the independence of the judiciary, and the fight against corruption'. OJ [2014] L 125/16, 26.4.2014. Respect for the rule of law is considered as an essential element in the Association Agreement between the EU and Ukraine (Art. 2), whereas in the Association Agreement with Moldova, respect for the rule of law is mentioned in para. 3 of Art. 1 (General Principles), but not as an essential element. The same model is applied in the Association Agreement with the Republic of Georgia. *Supra*, note 9.

¹⁵ Art. 9 of the Cotonou Agreement is more specific in defining democracy and the rule of law. Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States of the Other Part, OJ [2000] L 317/3, 15.12.2000.

¹⁶ See, for instance, Regulation 235/2014 of the European Parliament and of the Council of 11 March 2014 Establishing a Financing Instrument for Democracy and Human Rights Worldwide, OJ [2014] L 77/85, 15.3.2014. The eleventh indent of the Preamble of the regulation reads: 'Democracy and human rights are inextricably linked and mutually reinforcing, as recalled in the Council Conclusions of 18 November 2009 on democracy support in the EU's external relations. The fundamental freedoms of thought, conscience and religion or belief, expression, assembly and association are the preconditions for political pluralism, democratic process and an open society, whereas democratic control, domestic accountability and the separation of powers are essential to sustain an independent judiciary and the rule of law which in turn are required for effective protection of human rights.' See also Art. 1 (subject matter and objective) and the Annex to the Regulation, point 3 on actions in support of democracy. According to the EU: 'Deep

human rights,¹⁷ the rule of law can be considered as a further specification of democratic principles. Therefore, if one adopts a ‘thick notion’¹⁸ of the rule of law,¹⁹ the respect for democratic principles also covers the respect for the rule of law.²⁰ In some EU Agreements, the connection between human rights and the rule of law is made explicit.²¹

One could distinguish, however, between the individual right ‘to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors’ (as established in Article 25 of the 1966 International Covenant on Civil and Political Rights) and the duty to respect democratic principles. However, since the parties to the EU agreements declare that they share common values and a commitment to human rights, this should inspire their internal organisations to respect the basic tenets of democracy and the rule of law. It should also be recalled that in EU practice, to date, the suspension of the agreement obligations or the adoption of punitive measures have been triggered only in cases of serious violations of the clause, such as coups d’états or the interruption of the democratic process, as in the case of flawed elections,²² that is in cases where there was a clear breach of democratic principles.

On the basis of these observations, it is here submitted that there is no real need to specify the scope and content of the values that are mentioned in the

and sustainable democracy includes judicial independence and democratic control over armed forces’; see European Neighbourhood Policy (ENP) – Fact Sheet (19 March 2013), available at <http://europa.eu/rapid/press-release_MEMO-13-236_en.htm>. It is submitted that the EU’s understanding of democracy spelled out in unilateral instruments cannot but affect the EU’s interpretation of this notion contained in human rights clauses.

¹⁷ The GA Universal Declaration of Human Rights provides for a tight link between democracy and human rights, see Art. 19 (freedom of opinion and expression); Art. 20 (freedom of association); Art. 21 (right to participate in the government and elections); Art. 28 (connecting human rights to a political order where they can be realised).

¹⁸ It has been convincingly demonstrated that the EU adopts a thick understanding of the rule of law and democracy. See the deep analysis made by L. Pech, ‘Rule of Law as a Guiding Principle of the European Union’s External Action,’ *CLEER Working Paper* No. 3 (2012). For an explanation of the ‘thick’ and ‘thin’ conception of rule of law, see N. Hachez and J. Wouters, ‘Promoting the Rule of Law: A Benchmarks Approach’, Leuven Centre for Global Governance Studies, *Working Paper* No. 105 (April 2013).

¹⁹ The rule of law is embedded in the GA Universal Declaration of Human Rights as well: see the Preamble, third indent, and Art. 29, para. 2.

²⁰ Commission Communication, Human Rights, Democracy and Development Cooperation Policy, SEC (1991) 61 final, 25.3.1991, at 6.

²¹ See Art. 1 of the Agreement between the EU and Korea, which reads: ‘The Parties confirm their attachment to democratic principles, human rights and fundamental freedoms, and the rule of law. Respect for democratic principles and human rights and fundamental freedoms as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments, *which reflect the principle of the rule of law*, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement’ [emphasis added]. The text of the Framework Agreement with the Republic of Korea is available at <http://eeas.europa.eu/korea_south/index_en.htm>. For the provisional application of the Agreement, see COM (2009) 631 final, 18.11.2009.

²² C. Portela, ‘Aid Suspensions as Coercive Tools? The European Union’s Experience in the African-Caribbean-Pacific (ACP) Context’, 3 *Review of European and Russian Affairs* 2007, 38-53, available at <http://ink.library.smu.edu.sg/soass_research/1758>.

essential element clause. These could (and should) be clarified or made explicit in the framework of political dialogue and during consultation with the parties according to the specific context and targeted situations.

The extension of the essential element clause to cover human trafficking is a clear example of the potential scope of the clause and of its interpretation.²³ The same could be argued for the violation of human rights in the case of criminalisation of same sex relations (as will be developed in the fourth section of this paper).

In some recently negotiated agreements, the number of non-trade values mentioned in the clause has been extended to cover international law principles and respect for the Charter of the UN,²⁴ and also to include development goals.²⁵ The structure of the clause remains unchanged since it reiterates the parties' obligations, which are legally based on other sources of international law.

Some recently negotiated agreements contain a new essential element clause, which is usually provided for in a separate article,²⁶ and which is aimed at countering the proliferation of weapons of mass destruction²⁷ (WMD) (see *infra* for further comments on this issue).

The essential element clause regarding the non-proliferation of weapons of mass destruction dates back²⁸ to the 'European Strategy against the proliferation of Weapons of Mass Destruction' and in particular to a Council Docu-

²³ According to the Commission Communication, 'trafficking in human beings will continue to be covered under the Human Rights Clauses in the EU's agreements with third countries, including the Free Trade Agreements,' Commission Communication, EU Strategy towards the Eradication of Trafficking in Human Beings 2012- 2016, COM (2012) 286 final, 19.6.2012, at 12.

²⁴ Art. 1 of the Framework Agreement with Vietnam. *Supra*, note 14.

²⁵ Art. 1.2 of the Framework Agreement with Vietnam. *Supra*, note 14.

²⁶ In the Association Agreement between the EU, its Member States and the Republic of Moldova (Art. 2.1), the Association Agreement with Georgia (Art. 2.1) and in the Association Agreement with Ukraine (Art. 2) the countering of proliferation of weapons of mass destruction, related materials and their delivery, is instead included in the essential element clause. *Supra* note 9.

²⁷ See, for example, Art. 4 ('Countering the Proliferation of Weapons of Mass Destruction') of the EU Korea Framework Agreement, *supra* note 21.

²⁸ Council of the European Union, EU Strategy against Weapons of Mass Destruction, Doc 15708/03 10.12.2003, at 13. Since 2003, the EU has developed a strategic framework to identify new threats to security and to define the common interests and objectives of the EU Foreign and Security Policy. WMD are one of the challenges identified by the European Security Strategy (12 December 2003). For an analysis of the origin of the strategy, see L. Grip, 'The EU Non-Proliferation Clause: A Preliminary Assessment', *SIPRI Background Paper* (November 2009), available at <http://books.sipri.org/product_info?c_product_id=394>. *Idem*, 'The European Union's Weapons of Mass Destruction Non-Proliferation Clause: A 10-Year Assessment', EU Non-Proliferation Consortium, *Non Proliferation Papers* No. 40 (April 2014), available at <<http://www.nonproliferation.eu/web/documents/nonproliferationpapers/linagrip53611327371e9.pdf>>.

ment²⁹ that provides for the introduction of such a clause in agreements with third countries.³⁰

The WMD clause³¹ is divided in two parts.³² In the first, the parties agree to cooperate in countering the proliferation of WMD and their means of delivery through compliance with existing treaty obligations.

This is a declaratory provision, replicating the model of the human rights clause. As an essential element of the agreement, it qualifies with respect to international law obligations to countering WMD proliferation, thus connecting it with the non-execution provision,³³ but it does not create additional obligations for the parties.³⁴

It is the second part of the clause that establishes a stronger commitment of the parties,³⁵ that is to 'take steps' for the signing, ratification or accession and full implementation of all other relevant international instruments. Finally, the clause refers to the cooperation of the parties through the 'establishment of an effective system of national export controls', by controlling the export as well as the transit of WMD-related goods, including a WMD end-use control on dual-use technologies and effective sanctions for breaches of export controls.³⁶

According to the Council, the second part of the clause can be considered essential on a case-by-case basis.³⁷ The WMD clause summarises the cornerstones of the non-proliferation strategy of the EU, i.e., the reinforcement of

²⁹ Council of the European Union, Fight against the Proliferation of Weapons of Mass Destruction – EU Policy as Regards the Non-Proliferation Element in the EU's Relationships with Third Countries, Doc 14997/03, 19.11.2003. In this document, the Council considers different hypotheses: the inclusion of the clause in future mixed agreements, the insertion of the clause on occasion of amending agreement in force, or the conclusion of a separate agreement linked to the overall agreement.

³⁰ The first EU agreement including a WMD clause was the EU Partnership and Cooperation Agreement (PCA), with the Republic of Tajikistan, signed in 2004, OJ [2009] L 350/1, 29.12.2009.

³¹ Council of the European Union, Note on the Implementation of the WMD Clause, Doc 5503/09, 19.1.2009.

³² All agreements containing a non-proliferation clause also refer in the Preamble to the parties' commitment towards non-proliferation of weapons of mass destruction.

³³ In cases of non-compliance by one of the parties to the agreement with the commitments under the non-proliferation clause, intensive consultations between the parties would take place similar to the procedure established in Art. 96 of the Cotonou Agreement. Council of the EU, Doc 14997/03, *supra* note 29, at 3.

³⁴ European Parliament, Note on EU Non-Proliferation Clauses Applied To Certain Agreements in the EU's Wider Relations with Third Countries, Doc DGExPo/B/PolDep/Note/2007_172, 21.9.2007.

³⁵ This might explain India's refusal to sign the agreement with the EU containing a non-proliferation clause. The opposition to the inclusion of non-trade issues in negotiations leading to a Free Trade Agreement between the EU and India has been the main roadblocks. See A. Jatkar, 'Human Rights in the EU-India FTA: Is it a Viable Option?', 1 *GREAT Insights Magazine* 2012, available at <<http://ecdpm.org/great-insights/trade-and-human-rights/human-rights-eu-india-fta-viable-option/>>. For an analysis of the evolving relationship between India and the EU, see B. Kienzle, 'Integrating without Quite Breaking the Rules: The EU and India's Acceptance within the Non-Proliferation Regime', EU Non-Proliferation Consortium, *Non-Proliferation Papers* No. 43 (February 2015), available at <<http://www.nonproliferation.eu/web/documents/nonproliferationpapers/integrating-without-quite-breaking-the-rules-the-e-44.pdf>>.

³⁶ The parties agree to establish a regular political dialogue that will accompany and consolidate these elements.

³⁷ As specified in Council of the EU, Doc 14997/03, *supra* note 29, at 4.

compliance and implementation of existing treaty obligations, the promotion of multilateral treaties, and export controls.

The integration of the EU's non-proliferation strategy within its external trade and cooperation policy raises several doubts. The structure of the human rights clause, which was conceived as an incentive for the protection of human rights and other values mostly in the EU partners' domestic legal order, does not seem an appropriate tool for the aims of an external policy strategy in a global context. Moreover, there is a serious risk of undermining the EU's credibility in the case of non-compliance. Another risk could result from the "inflation" of essential element clauses and the ensuing loss of importance of these instruments for the protection of human rights.

Another feature of the essential element clause is that it refers to the parties' commitment to conform to the above-mentioned values and rules 'in the conduct of their international policy.'³⁸ The exact reach of this reference – at least for human rights, democracy, and the rule of law – is not elaborated on further, but since the clause does not create new obligations it could be interpreted not only as restating each party's commitment to respect human rights by public authority action wherever it is exercised,³⁹ but also as complying with *international* rule of law.⁴⁰ This means for example that international disputes have to be settled by pacific means and that the parties have to ensure compliance with the decisions of the International Court of Justice or with other international judgments of the international court or tribunal in settling disputes to which they are parties.

The reference to international policies means that the EU's partners' external behaviour could also be evaluated and discussed within the framework of political dialogue and consultations, and could trigger the adoption of punitive measures.

Finally, the term 'essential' deserves attention. In early EU practice, respect for human rights was defined as the 'basis' of cooperation.⁴¹ This formula was

³⁸ L. Bartels mentions the case of Liberia where 'appropriate measures' were adopted as a consequence, *inter alia*, of Liberian assistance to the Front Revolutionary Uni of Sierra Leone, which has been accused of serious violations of human rights. See L. Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', 25 *European Journal of International Law* 2014, at 1080.

³⁹ Traditionally, the issue of extraterritorial application of human rights treaties has been discussed with reference to situations of military occupation, see, for example, M.J. Dennis, 'ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of Human Rights Treaties in Times of Armed Conflict and Military Occupation', 99 *American Journal of International Law* 2005, at 119. On the question of extraterritorial application of human rights, see L. Bartels, *supra*, note 38, and E. Cannizzaro, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effect: A Reply to Lorand Bartels', 25 *European Journal of International Law* 2014, 1093-1099.

⁴⁰ Respect for international rule of law is reiterated in the Preamble of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, Doc A/RES/25/2625, 24.10.1970; see also the UN Millennium Declaration, Resolution Adopted by the UN General Assembly, A/Res/55/2, 18.9.2000, para. 9, available at <<http://www.un.org/millennium/declaration/ares552e.htm>>.

⁴¹ See Framework Agreement for Trade and Economic Cooperation between the European Economic Community and the Republic of Argentina, *supra* note 1, Art. 1.

interpreted as providing a legal foundation for the suspension or termination of the agreement according to international customary law.⁴² The term 'essential' has the function of connecting the human rights clause with the non-execution clause, but it can be interpreted as expressing the idea that the non-trade values mentioned in the human rights clause are of primary concern for the EU and its partners: they constitute the fundamental element of the relationship and they are to be promoted by means of positive instruments. In other words, the essential element clause provides the legal basis for positive measures.⁴³

If respect for human rights and other values mentioned in the clause are essential elements of the agreement, the idea implied is that they are at the heart of the treaty, and that cooperation between the EU and its partner(s) is possible because the parties share these values,⁴⁴ and therefore protect and observe them.

Thus, one would expect that observance of political values mentioned in the clause should be a precondition to establishing cooperation and thus a criterion for the selection of partner countries.

An *ex-ante* evaluation of the human rights situation in the partner country would present the additional advantage of highlighting to European public opinion, and to European citizens, that the EU's external policy, in particular its trade policy and development cooperation policies, contributes to the protection of human rights and democracy, and that aid⁴⁵ is directed towards those countries that have a satisfactory record of compliance with these values.⁴⁶

The EU should also demonstrate its commitment to human rights by negotiating agreements only with countries that respect, or are said to respect, at least a minimum standard of protection. Should the EU engage with a contracting

⁴² Corresponding either to the customary law principle *inadimplenti non est adimplendum*, or to the *rebus sic stantibus* rule. For a comment see L. Bartels, *A Model Human Rights Clause*, *supra* note 2, at 12. See *infra*, para. III, for further comments.

⁴³ The preference for a positive approach and for promotion of dialogue with third countries was underlined by the Commission, which emphasised the importance of keeping channels of communication open even in difficult situations. See Commission Communication, Human Rights, Democracy and Development Cooperation Policy, *supra* note 20, at 6.

⁴⁴ When the clause is included in agreements with developing countries, respect for democratic principles (at times respect for the rule of law) and human rights is conceived as a prerequisite to economic and social development. See Commission Communication, Increasing the Impact of EU Development Policy: An Agenda for Change, COM (2011) 637 final, 13.10.2011, para. 2. For the up-to-date statement of the connection between rights and development, see Commission Staff Working Document, Rights-Based Approach Encompassing All Human Rights for EU Development Cooperation, SWD (2014) 152 final, 30.4.2014. It should be recalled that the European Court of Justice acknowledged the legality of human rights clauses in development cooperation agreements in CJEU, Case C-268/94, *Council v. Portugal* [1996] ECR I-6177. See B. De Witte, 'The EU and the International Legal Order: The Case of Human Rights', in P. Koutrakos and M. Evans (eds.), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Oxford: Hart Publishing 2011), 127-147; E. Cannizzaro, 'The Scope of EU Foreign Power: Is the EC Competent to Conclude Agreements with Third Countries including Human Rights Clauses?', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (The Hague: Kluwer Law International 2002), 297-320.

⁴⁵ The European Development Fund is financed by direct contributions from Member States.

⁴⁶ Council of the European Union, Increasing the Impact of EU Development Policy: An Agenda for Change, 3166th Foreign Affairs Council Meeting (14 May 2012), para. 2.

party that does not respect human rights, this could be interpreted as an implied endorsement of the political leadership of that country. Human rights clauses could also win the support of civil society for liberalising trade and establishing investment agreements.

In fact, considering that the ratification of the agreement might improve the situation due to EU pressure, the EU has adopted a realist approach⁴⁷ and does not scrutinise its partners strictly. This is proven by the ratification of EU agreements with countries whose human rights records are contentious.

However, the EU adopts a selective approach when it decides whether to provide financial aid to third countries.⁴⁸ Although the EU has more freedom in the selection process in the context of unilateral financial aid allocation, an *ex-ante* evaluation of the human rights situation in partner countries could in the future also affect the EU's approach to agreement negotiations, as suggested by the European Parliament.⁴⁹

The Parliament has urged the Commission 'not to propose free trade agreements and/or association agreements – even containing human rights clauses – to governments of countries where, according to reports by the Office of the High Commissioner for Human Rights of the United Nations, massive human rights violations' take place.⁵⁰ There are cases where the EU has suspended the conclusion of negotiated agreements⁵¹ or has delayed their entry into

⁴⁷ For example, the Council has given its assent to the provisional application of the agreement with Syria as it considered that the agreement could lead to improvements of human rights protection in the country. See Council of the European Union, Council Decision on the Signing, on Behalf of the European Community, and Provisional Application of Certain Provisions of the Euro-Mediterranean Agreement Establishing an Association between the European Community and its Member States, on the One Part, and the Syrian Arab Republic, on the Other Part, Doc 9921/09, 17.8.2009. However, as a consequence of extremely serious violations of human rights in 2011, the Council partially suspended the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic. See Decision 2011/523/EU of 2.9.2011, OJ [2011] L 228/19, 3.9.2011, amended by Decision 2012/123/CFSP, 27.2.2012, OJ [2012] L 54/18, 28.2.2012.

⁴⁸ See Council Conclusion, The Future Approach to EU Budget Support to Third Countries, 3166th Foreign Affairs Meeting (14 May 2012), paras. 7-8.

⁴⁹ The EU Parliament defined respect for human rights and civil liberties as a prerequisite for the conclusion of the agreement with Syria. See European Parliament, Resolution Containing the European Parliament's Recommendation to the Council on the Conclusion of a Euro-Mediterranean Association Agreement between the European Community and its Member States, of the One Part, and the Syrian Arab Republic, of the Other Part, Doc 2006/2150(INI) 26.10.06, para. J.2. The European Parliament in the same resolution suggested a number of specific reforms to the Syrian government to bring the situation in line with democracy and human rights.

⁵⁰ European Parliament, Report on the Evaluation of EU Sanctions as Part of The EU's Actions and Policies in the Area of Human Rights, Doc 2008/2031, 15.7.2008, para. 20.

⁵¹ The EU refused to sign an agreement negotiated with Pakistan as a consequence of the rise to power of General Musharraf (October 1999). The EU reviewed its policy towards Pakistan for security reasons after the attacks in the United States of 11 September 2001, as explained by U. Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (Cambridge: Cambridge University Press 2008), at 219. According to EU Trade Commissioner Cecilia Malmström, 'The EU refuses to sign the Partnership and Cooperation Agreement finalized with Thailand in November 2013 unless the ruling military junta restores a "legitimate democratic process" and "upholds human rights and freedoms, remove censorship and releases all political detainees".' According to the Commission, future trade and investment policy should be based on 'fair and ethical trade and human rights'. See Martin Banks, 'EU's New Trade Policy Intensi-

force.⁵² In case the EU considers a situation to be improved, it can decide to proceed with the conclusion of the agreement.⁵³

The decision to conclude an agreement with a partner who is seriously infringing human rights is not only to be evaluated in terms of political opportunity, as it also raises issues of legality under international and European Union law. A recent case discussed before the General Court of the EU is illustrative in this respect.

The national liberation movement representing the people of Western Sahara, the 'Front populaire pour la libération de la saguia-el-hamra et du rio de oro' known as 'Front Polisario', started an action⁵⁴ requesting the annulment of a decision that concluded an agreement between the EU and Morocco,⁵⁵ which was aimed at furthering reciprocal liberalisation on agricultural products, processed agricultural products, and fish and fishery products. The Agreement replaces some of the provisions of the Euro-Mediterranean agreement that had been concluded between the same parties.⁵⁶

fies Pressure on Thailand to Improve Human Rights', *EU Reporter*, 15 October 2015, available at <<https://www.eureporter.co/frontpage/2015/10/16/eus-new-trade-policy-intensifies-pressure-on-thailand-to-improve-human-rights/>>. The Fishing Protocol with Guinea-Bissau was negotiated and initialled in February 2012. After the military coup of 12 April 2012, the procedure for the conclusion of the protocol was suspended. On 16 October 2014, due to the restoration of democratic order, the provisional application of the protocol was approved by the Council. Decision 2014/782/EU, *OJ* [2014] L 328/1, 13.11.2014.

⁵² The entry into force of the Community Interim (Trade) Agreement with Russia was delayed due to Russia's invasion of Chechnya in 1995 and violations of human rights. European Commission, Press Release, Doc IP/96/696, 5.7.1996.

⁵³ The interim agreement with Russia was later ratified on the basis of supposed progress made as regards the conflict in Chechnya. The procedure for the conclusion of the Cooperation Agreement with Russia was also delayed, but then obtained the European Parliament's consent, motivated by the cease-fire.

⁵⁴ GC, Case T-512/12, *Front Populaire pour la Libération de la Saguia-el-Hamra et du Rio de Oro (Front Polisario) v. Council of the European Union*, ECLI:EU:T:2015:953, available at <http://curia.europa.eu/jcms/jcms/_6/>.

⁵⁵ The Council of the European Union, Council Decision of 8 March 2012 on the Conclusion of an Agreement in the Form of an Exchange of Letters between the European Union and the Kingdom of Morocco Concerning Reciprocal Liberalisation Measures on Agricultural Products, Processed Agricultural Products, Fish and Fishery Products, the Replacement of Protocols 1, 2 and 3 and their Annexes and Amendments to the Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the One Part, and the Kingdom of Morocco, of the Other Part, Doc 2012/497/EU, *OJ* [2012] L 241/2, 7.9.2012. Morocco has been exercising control and *de facto* administering the territory of Western Sahara for 30 years. Western Sahara is listed among non-self-governing territories by the UN, while Morocco considers it an integral part of its territory. On the right to self-determination of Western Sahara, see S. Simon, 'Western Sahara', in C. Walter, A. von Ungern-Sternberg, and K. Abushov (eds.), *Self-Determination and Secession in International Law* (Oxford: Oxford University Press 2014), 255-273. The issue of conclusion of an agreement with Morocco extending to the fishing zone off the coast of Western Sahara was discussed with reference to the Fisheries Partnership Agreement of 2007. See E. Milano, 'The New Fisheries Partnership between the European Community and the Kingdom of Morocco: Fishing too South?', 22 *Anuario Español de Derecho Internacional* 2007, 413-457.

⁵⁶ Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the One Part, and the Kingdom of Morocco, of the Other Part, *OJ* [2000] L 70/2, 18.3.2000.

On the question whether the EU could legitimately conclude an agreement with Morocco⁵⁷ extending its territorial scope to Western Sahara – and considering that Morocco’s claim is not supported by international law – the Court ruled that there is ‘nothing in the applicant’s pleas and arguments to support the conclusion that it is absolutely forbidden by EU law or by international law to conclude with a third State an agreement that would likely be applied in a disputed territory’ (para. 215). The Court’s finding, however, does not seem totally convincing. The conclusion of the agreement – which extends *de facto* to Western Sahara – could be considered as implicit EU recognition of Morocco’s (illegal) occupation of Western Sahara. It could be argued that this is a violation of international customary law requiring states (and international organisations) not to recognise situations arising from serious violations of international *jus cogens*.⁵⁸ Conclusion of an agreement in these circumstances threatens to consolidate the *status quo*. A more legally sound solution would be for the EU to conclude the agreement with Morocco, while excluding Western Sahara from the territorial scope of the agreement, as other states have done before.⁵⁹

Despite the above-mentioned finding on the conclusion of the agreement, the Court annulled the contested decision, holding that the EU Council had not examined ‘carefully and impartially all the relevant elements to ensure that the production of products destined for export activities is not conducted at the expense of the population of the territory in question or implicate violations of fundamental rights’. On the obligation of the Council to proceed to an *ex ante* evaluation, it must be noted that the Court is making clear that it is not only a responsibility of Morocco to ensure that activities related to the natural resources of the country are undertaken to the benefit of the Sahrawi people, and, a point that the Court seems to miss, according to its will.⁶⁰ There is a responsibility of the EU itself to make sure that the application of the agreement does not violate human rights. The conclusion of the Court is important as it makes clear that the conclusion of an agreement cannot be appreciated solely in terms of political realism, and that the lack of a serious and deep *ex-ante* evaluation of the situation can be revised by the Court and have serious diplomatic (and legal) consequences.

As regards the human right clause (contained in the Euro-Mediterranean Agreement), the applicant claimed that the decision concluding the agreement

⁵⁷ For Morocco’s competence to enter into agreements concerning Western Sahara’s natural resources, see E. Milano, *supra*, note 55.

⁵⁸ See Art. 42 of the Draft Articles on the responsibility of international organisations, with commentaries. *Yearbook of the International Law Commission*, 2011, Vol. II, Part Two, ‘No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 41, nor render aid or assistance in maintaining that situation.’ See also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9.7.2004, ICJ Reports 2004, para. 159.

⁵⁹ For example, the EFTA Free Trade Agreement with Morocco does not include Western Sahara. See Western Sahara Resource Watch, ‘Norway: No Way for Western Sahara Free Trade’ (12 May 2010), available at <<http://www.wsrw.org/a105x1411>>. The United States does not apply its FTA with Morocco to Western Sahara. See Congressional Record Proceeding and Debates of the 108th Congress Second Session, Vol. 150, Part 13 (22 July – 14 September 2004), 17273.

⁶⁰ See General Assembly Resolution No. 51/140 of 10.2.1997.

is contrary to those principles. The Court answered as follows: 'even assuming that certain clauses of the agreement, the conclusion of which was approved by the contested decision, conflict with the clauses of earlier agreements concluded between the European Union and the Kingdom of Morocco and relied on by the applicant, that does not constitute any illegality, since the European Union and the Kingdom of Morocco are free at any moment to alter agreements concluded between them by a new agreement, such as that concerned by the contested decision'. The reasoning is puzzling. The essential element clause cannot be amended or repealed by a more recent agreement, the provisions of which merely modify previous trade liberalisation conditions. The clause could certainly be amended or repealed by a subsequent agreement if this were clearly established, but even in this case the obligation to observe fundamental rights and international law would continue to bind the parties. According to the claimant, the conclusion of the new agreement extending to Western Sahara infringes the right to self-determination of the people of this territory and their right over natural resources (unless it is proved that Morocco manages those resources to the benefit of the Western Sahara people). If this claim is correct, the conclusion of the agreement amounts to violation of human rights and the principles of international law to which the clause refers. It is also clear that in these circumstances, the clause would function as a guiding principle for the parties not to conclude an agreement which violates the principles of international law to which the clause refers.

Going back to the negotiations, the EU's insistence on the inclusion of an essential elements clause in the agreement can have a positive and constructive effect during this process. It could make negotiations more difficult, but at least it would raise awareness among the partners regarding the EU's policy priorities and interests, and would highlight human rights issues.

The clause provides a legal basis for discussion and dialogue and makes it impossible for the parties to claim that human rights, democratic principles, the rule of law, and other non-trade values are domestic issues and thus fall within the exclusive jurisdiction of a state.⁶¹ In addition, within the framework of the institutionalised mechanism and procedures, recommendations may be provided regarding measures to be taken and directions to be followed.⁶²

Negotiations on human rights clauses can highlight and bring the issue of the protection of human rights to a country's public arena and stimulate a public

⁶¹ During the negotiation with Mexico, the reference in the essential element clause to international relations was problematic due to the traditional non-intervention doctrine of Mexico. See E. Fierro, *supra* note 2, at 303-304.

⁶² The case of Colombia and Peru is illustrative in this respect. The European Union signed a Trade Agreement with Colombia and Peru in June 2012, provisionally applied since August 2013. See OJ [2012] 354/3, 21.12.2012. As explicitly recognised by the European Parliament 'both Colombia and Peru have made enormous efforts in recent years to improve the general condition of their citizens' lives, including human and labour rights', however, 'despite these enormous efforts, in order fully to achieve the high standards set out and demanded by individual citizens, civil society organisations, the opposition parties and the government, there is still substantial work to be done'. The EP suggested a road map for legislative reforms in the field of human rights and in particular labour rights. European Parliament Resolution of 13 June 2012 on the EU Trade Agreement with Colombia and Peru, Doc 2012/2628 (RSP), 13.6.2012.

debate on, for example, the reasons underlying the EU partner's government's objection⁶³ to the clause when such a refusal is made public. Additionally, a public debate could delay or block the negotiations.⁶⁴

Important as the human rights clause is as a basis for positive measures, it cannot be denied that it is potentially reinforced by inclusion of the so-called non-execution clause in the agreement. This clause provides a connection between human rights violations and the possible suspension or termination of the agreement, as discussed in the next paragraph.

III. THE STRUCTURE AND CONTENT OF THE NON-EXECUTION CLAUSE

EU Agreements contain a 'non-execution clause'⁶⁵ which provides for the application⁶⁶ of 'appropriate measures' by either party⁶⁷ in the case of non-compliance with the agreement by the other contracting party. A consultation procedure is provided for before such measures can be adopted.⁶⁸

⁶³ The EU partners object to the inclusion of the human rights clause in trade agreements for various reasons. For example, Australia contended that human rights protection was better to be dealt with in a multilateral context. See E. Fierro, *supra* note 2, at 288-300. Third countries consider that the human rights clause impinges upon their sovereignty and that it could be misused. For example, Australia feared that trade unions could lobby the EU for action against Australia on the basis of the Universal Declaration of Human Rights' recognition of everybody's right to form and to join trade unions, available at <www.hartford-hwp.com/archives/24/121.html>. The inclusion of the clause in the Strategic Partnership Agreement is making rather difficult the negotiating process with Japan. Japan's opposition is founded on national pride and on the fear that the EU could exert pressure on the abolition of death penalty. On the other hand, the inclusion of a HRC could be accepted, or even requested, by a third country (especially new democracy) as a way of proving its commitments to human rights and democracy and as a means to increase its international reputation and to attract foreign investments.

⁶⁴ See also, for example, the case referred to *supra*, note 35.

⁶⁵ The expression used in the EU agreements to name the clause varies: 'fulfilment of obligations' or 'settlement mechanism' or 'non-execution of the agreement'.

⁶⁶ The parties enjoy a broad margin of discretion in deciding whether to invoke the clause and, in this case, which measures they consider appropriate. See GC (order), Case T-292/09, *Mugraby v. Council and Commission* [2011] ECR II-00255, para. 40, available at <http://curia.europa.eu/jcms/jcms/j_6/>, described in Vianello's paper in this collection.

⁶⁷ Formally, the clause can be activated by EU partner(s) in the case of violation of the essential elements by the European Union and its Member States. The Commission underlined that discussions on human rights 'should be a two-way one, with the EU also agreeing to discuss human rights and democracy within its borders'. Commission Communication, *The European Union's Role in Promoting Human Rights and Democratisation in Third Countries*, COM (2001) 252 final, 8.5.2001, Section 3.1.1. The bilateral character of the clause makes it in principle easier for EU partners to accept it. The bilateral nature of the clause, moreover, distinguishes the EU policy from conditionality policy of other states. It is clear that the EU's developing partners do not have the economic and political strength to threaten the activation of the clause. One has to consider, however, that the clause has been negotiated for the inclusion in agreements with developed (and thus stronger) countries.

⁶⁸ As a general rule, the measures are notified to the other party and a consultation procedure is activated before the adoption of those measures. A Joint or Cooperation Committee set up by the agreement examines the situation and is provided with all information required. See, for example, Art. 45 of the EU Korea Framework Agreement, *supra* note 21.

However, in the case of 'special urgency', which consists of the 'violation of the essential elements of the agreement',⁶⁹ or in the case of a 'particularly serious and substantial violation of an essential element',⁷⁰ the other party is allowed to immediately⁷¹ adopt 'appropriate measures'. Additionally, some agreements provide for a consultation procedure, which has the effect of suspending the application of the measure for a short pre-established period of time.⁷² It is ultimately⁷³ in the power of each party to unilaterally qualify a situation as a violation, or as a serious violation of an essential element.

Although this part of the non-execution clause may seem to reproduce the structure of the international customary rule corresponding to *inadimplenti non est adimplendum* principle,⁷⁴ it is submitted that this is not the correct inter-

⁶⁹ As, for example, specified in the Joint Interpretative Declaration concerning Arts. 45 and 46 of the Framework Agreement with Korea, *supra* note 21. For the purpose of the correct interpretation and practical application of the agreement, the parties agree that the expression "cases of special urgency" in Art. 45 (4) means a material breach of this agreement by one of the parties. A material breach consists in 'either repudiation of this Agreement not sanctioned by the general rules of international law or a particularly serious and substantial violation of an essential element of the Agreement.'

⁷⁰ When referring to 'particularly serious and substantial violations' of an essential element, the agreement establishes a gravity threshold. As mentioned above, the practice to date shows that the EU has triggered the non-execution clause only for grave breaches of an essential element. The Strategic Partnership Agreement with Canada, for example, clarifies in Art. 28 that 'The Parties consider that, for a situation to constitute a "particularly serious and substantial violation" of Art. 2(1), its gravity and nature would have to be of an exceptional sort such as a *coup d'État* or grave crimes that threaten the peace, security and well-being of the international community.' The 'unlikely event' of the particularly serious and substantial violation of an essential element clause would lead to the termination of the relationship.

⁷¹ See, for example, Art. 122 of the Partnership Cooperation Agreement with Iraq. *OJ* [2012] L 204/50, 31.7.2012. In the early practice of the EEC, the so-called Baltic clause authorised immediate partial or total suspension of the agreement in case of serious breach of an essential element of the agreement. This clause was then replaced by the general non-execution clause (so-called Bulgarian clause). See Commission Communication, On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, COM (95) 216 final, 23.5.1995, at 7.

⁷² For example 15 days, in the Partnership and Cooperation Agreement with Singapore, COM/2014/70 final, 17.2.2014. See also the Joint Declaration on Art. 57 of the Framework Agreement with Vietnam, *supra* note 14. The Framework Agreement with Korea, *supra* note 21, provides (Art. 46) for an arbitration procedure. The Cotonou Agreement provides for a consultation procedure if a Party has failed to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in para. 2 of Art. 9. However, in case of a particularly serious and substantial violation of one of the essential elements, immediate reaction is allowed after notification to the other party.

⁷³ That is, even in the hypothesis of a consultation procedure established by the agreement.

⁷⁴ Whereby a material breach of an agreement can be invoked as a cause of suspension or extinction of a treaty. According to the International Court of Justice, Art. 60 of the Vienna Convention on the Law of the Treaties is declaratory of international customary law. See ICJ, Judgment on the *Gabčíkovo-Nagymaros Project* of 25.9.1997, ICJ Reports [1997] para. 99. See also Arbitral Tribunal *Rainbow Warrior Case*, *New Zealand v. France*, Judgment 30.4.1990, U.N.R.I.A.A., Vol. XX, at 251. See E. Fierro, *supra* note 2, at 221; N. Hachez, *supra* note 2, at 24. The Court of Justice also referred to the essential element clause as 'an important factor for the exercise of the right to have a development cooperation agreement suspended or terminated where the non-member country has violated human rights,' (CJEU, Case C-268/94, *Council v. Portugal*, *supra* note 44, para. 27), but it is to be reminded that the human rights clause was not accompanied by a non-execution provision in the agreement examined by the CJEU.

pretation. In the case of a material breach of a treaty,⁷⁵ the above-mentioned international customary law allows the parties only to suspend or terminate the *same* agreement that has been breached, whereas the non-execution clause allows the parties to apply 'appropriate measures', leaving the hypothesis of a suspension of the agreement as a measure 'of last resort'.

Moreover, the *ratio* of the suspension (or termination) of the treaty authorised by the *inadimplenti non est adimplendum* principle is more to restore the balance between obligations disrupted by the violation⁷⁶ than to persuade the other party to put an end to the violation.⁷⁷ It is actually a typical function of the counter-measures, and the aim is to induce the state responsible for the violations to comply with its obligations of cessation of the violation and of reparation.⁷⁸ Thus, it would be more appropriate to consider that the non-execution clause sets up a 'self-contained' regime that is a *lex specialis* regulating the parties' response to a breach of the treaty.

In order to give the parties the greatest freedom, the notion of 'appropriate measures' is not clarified further. However, the agreements lay down general criteria for the measures that may be taken, such as proportionality⁷⁹ and compatibility with international law, that is the standards usually required by international customary law for countermeasures. The reference to measures that 'least disrupt the functioning of the agreement', usually applied as a formula, confirms that the suspension of the agreement is considered a measure of last resort.⁸⁰

The Commission has provided⁸¹ a list of possible measures, some of which do not qualify as countermeasures (they are not illegal in themselves) but rather

⁷⁵ That is a repudiation of the treaty or a violation of a provision 'essential to the accomplishment of the object or purpose of the treaty.' See Vienna Convention on the Law of the Treaties, Art. 60 3(a) and 3(b).

⁷⁶ 'Suspension of the operation of a treaty, in whole or in part, allows the injured state to reach a new equilibrium between its rights and obligations in respect to the defaulting state, being temporarily relieved of the duties under the treaty which remain without counterpart'. L.A. Sicilianos, 'The Relationship between Reprisals and Denunciation or Suspension of a Treaty', 4 *European Journal of International Law* 1993, at 345.

⁷⁷ It cannot be excluded that the suspension of a treaty is applied to obtain remedial release or to exert compulsion on the state author of the breach, as admitted by several authors. See B. Simma, 'Reflections on Article 60 of the Vienna Convention and Its Background in General International Law', 20 *Austrian Journal of Public Law* 1970, at 40.

⁷⁸ Art. 49 of the 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two. Although the prevalent idea in legal literature is of a multifunctional character of counter-measures, the primary aim of countermeasure is cessation of a continuing violation. See D. Alland, 'Counter-Measures of General Interests', 13 *European Journal of International Law* 2002, at 1226; L.A. Sicilianos, *Les Réactions Décentralisées à l'Illicite: Des Contre-Mesures à la Legitime Défense* (Paris: LGDJ 1990), at 58.

⁷⁹ As specified, for example, in the Framework Agreement between the EU, its Member States and Korea, 'proportionate to the failure to implement obligations under this Agreement.' *Supra* note 21.

⁸⁰ See, for example, the Framework Agreement between the EU, its Member States and Korea, Joint Interpretative Declaration concerning Arts. 45 and 46. *Supra* note 21.

⁸¹ See Commission Communication, On the Inclusion of Respect for Democratic Principles and Human Rights in EC Agreements with Third Countries, COM(95) 216 final, 23.5.1995, Annex II, at 17.

as retorsions, such as, for example, the postponements of new projects, or the refusal to follow up on a partner's initiative. Other measures really are counter-measures, such as the suspension of cooperation or of financial aid when this is provided for in the agreement. Measures can include the suspension of financing of budgetary support and support for projects,⁸² or the freezing of funds.⁸³

A very sensitive issue is whether the violation of the essential elements clause contained in a Framework Cooperation Agreement (FCA) could trigger the adoption of trade-related measures.

To overcome the difficulties in trade negotiations,⁸⁴ due to the refusal by some EU partners to accept the inclusion of human rights clauses in Free Trade Agreements and to establish a clearer ground for the possible adoption of trade-related measures,⁸⁵ since 2009,⁸⁶ the EU has been following the practice⁸⁷

⁸² The budget support from EDF might take up to 50% of national budgets. Thus sanctions might have serious consequences for the population, although contributions to operations of a humanitarian nature and projects in support to the population are usually not affected by the measures.

⁸³ The measures adopted as a consequence of the refusal of free elections by the government of Zimbabwe in 2002, covered visa bans. The measures were partially lifted in 2012 as a consequence of the creation of a process leading to free elections. See the reference available at <http://eeas.europa.eu/delegations/zimbabwe/eu_zimbabwe/political_relations/restrictive_measures/index_en.htm>. See also, for another example of 'appropriate measures,' those listed in Commission Communication, Proposal for a Council Decision Amending Decision 2001/131/EC Concluding the Consultation Procedure with Haiti under Art. 96 of the ACP-EC Partnership Agreement, COM (2004) 454 final, 29.6.2004.

⁸⁴ See L. Bartels, 'The European Parliament's Role in Relations to Human Rights in Trade and Investment Agreements', European Parliament Policy Department, EXPO/B/DROI/2012/09 (February 2014), at 7.

⁸⁵ It is interesting to note that the 2014 Association Agreements with Moldova, Ukraine and Georgia, establish that the appropriate measures the parties may adopt in the case of non-fulfilment of the agreement may not include suspensions of provisions contained in the Trade Title of the Agreement, but an exception is carved out in the case of violation of an essential element of the agreements. See, for example, Moldova Association Agreement, Art. 455.3.b, *supra*, note 9.

⁸⁶ See a partially derestricted document of the Council, Reflection Paper on Political Clauses in Agreements with third Countries, Doc 7008/09, 27.2.2009, which provides for a linkage between EU agreements and free trade agreements. It specifies that 'in order to have a comprehensive framework with third countries covering the main areas of cooperation including political cooperation the EU has a preference to enter into framework agreements prior to conclude sector agreements which in principle do not include political clauses'. Cited by L. Bartels, The European Parliament's Role, *supra* note 84, at 6. See the reference to the practice in the Council of the European Union, EU Annual Report on Human Rights and Democracy in the World in 2014, Doc 10152/15, 22.6.2015. It is interesting to note that the Commission included the *passerelle* clause among the different tools and instruments (together with human rights clause, political dialogue, démarches, specific institutional structures created under the FTA allowing for a dialogue) for the promotion of human rights.

⁸⁷ This approach, for example, has been followed in East Asia but also with Canada. The Cotonou Agreement could be considered a model. This agreement defines the general relationships between the EU, its Member States and the ACP countries, leaving the definition of economic (free trade areas and investment) and development cooperation to Economic Partnership Agreement to be concluded between the EU and groups of countries engaged in a regional integrating process. M. Lerch, 'Environmental and Social Standards in the Economic Partnership with West Africa: A Comparison to other EPAs', European Parliament, Directorate General for External Policies, Doc PE 549.040 (April 2015).

of linking a Framework Cooperation Agreement⁸⁸ (FCA) – containing human rights clauses – to the corresponding⁸⁹ Free Trade Agreement (FTA),⁹⁰ – not containing human rights clauses. The linking (or *passerelle*) clause can also be included in the trade agreement.

In order to adopt trade-related measures and suspend the application of provisions contained in the FTA as a result of a violation of the essential element clause included in the FCA, it is advisable that various minimum conditions are satisfied. First, the FCA should contain a non-execution clause triggering the possible adoption of ‘appropriate measures’ in the case of violations of the essential element clause. Second, it should be very clearly stated that the trade agreement could be suspended as a consequence of the non-execution clause contained in the Framework agreement. This is the case for the *passerelle* clause included in the Economic Partnership Agreement with the Member States of CARIFORUM.⁹¹ Indeed, Article 241.2 establishes that ‘Nothing in this Agreement shall be construed so as to prevent the adoption by the EC Party or a Signatory CARIFORUM State of any measures, including trade-related measures under this Agreement, deemed appropriate, as provided for under Articles 11(b), 96 and 97 of the Cotonou Agreement and according to the procedures set by these Articles.’

In other cases, this link is not clear and one party could claim that a serious violation of the human rights clause in the framework agreement cannot be the basis for suspension of the trade agreement. An example of such a clause is Article 105 of the EPA with West African States, where it states: ‘Nothing in this Agreement may be interpreted as preventing the taking by the European Union Party or any of the West African States of any measure deemed appropriate concerning this Agreement in accordance with the relevant provisions of the Cotonou Agreement.’ In this case, there is no expressed reference to the essential element clause or to the non-execution clause of the Cotonou Agreement.

The model of linking two agreements has also been applied to other sector agreements, and in particular to fishery protocols, which traditionally did not include a human right clause. Thus, protocols ‘setting out the fishing opportunities and the financial contribution’ signed by several African countries with the EU have been connected to the essential element and non-execution clauses

⁸⁸ These framework and cooperation agreements aim ‘to bring together, under a single framework, a holistic and coherent vision of relations with a given partner and to identify policies and instruments that will be used to advance bilateral relations’, Commission Staff Working Document, Human Rights and Sustainable Development in the EU-Vietnam Relations with Specific Regard to the EU-Vietnam Free Trade Agreement, SWD (2016) 21 final, 26.1.2016, para. 2.2.1.

⁸⁹ See, for example, Art. 43.3 of the Partnership and Cooperation Agreement with the Republic of Singapore, *supra* note 72.

⁹⁰ For an example, see Art. 15.14., para. 2 of the FTA with Korea: ‘the present Agreement shall be an integral part of the overall bilateral relations as governed by the Framework Agreement. It constitutes a specific Agreement giving effect to the trade provisions within the meaning of the Framework Agreement.’ The Free Trade Agreement was signed in 2010 and was provisionally applied in the same year. OJ [2011] L 127/1, 14.5.2011.

⁹¹ Council Decision of 15 July 2008 on the Signature and Provisional Application of the Economic Partnership Agreement between the CARIFORUM States on One Hand and the European Community and its Member States on the Other. OJ [2008] L 289/1, 30.10.2008.

of the Cotonou Agreement. The provisions contained in the protocols setting up fishing opportunities establish the suspension of EU financial contributions, if the EU ascertains a breach of essential and fundamental elements of human rights as laid out by Article 9 of the Cotonou Agreement, or as a consequence of the activation of the consultation mechanisms laid down in Article 96 of the Cotonou Agreement, owing to a violation of one of the essential and fundamental⁹² elements of human rights and democratic principles as provided for in Article 9 of the Cotonou Agreement.⁹³

This technique, however, does not seem to have overcome the EU partners' objections. For instance, in Africa, the inclusion in some European Partnership Agreements of a provision connected to the Cotonou non-execution clause, let alone the inclusion of a complete human rights clause, has been one of the contentious issues that have delayed the conclusions of full European Partnership Agreements for several years.⁹⁴

In the end, the model described above could create more problems than it tries to solve. If the human rights and non-execution clauses are contained in a framework cooperation agreement that has not been ratified, the FTA (which does not contain an essential element clause and a non-execution clause) cannot be suspended until the ratification process of the FCA is concluded, which could delay the process, especially when the issue has been contentious and difficult for negotiators.

Moreover, the FTA is usually concluded for an indefinite period of time, whereas the FCA is concluded for a limited period.⁹⁵ Thus, after the expiry of the Cooperation agreement, the EU could, in the case of a breach of human rights by its partner state, suspend the FTA provisions as a countermeasure, according to the customary rule on state responsibility.

⁹² The Cotonou Agreement distinguishes between essential and fundamental elements of the agreement. Good governance, as defined in Art. 9.3 is considered a fundamental element of the agreement. Serious cases of corruption trigger the procedure provided for in Art. 97.

⁹³ Protocol setting out the fishing opportunities and the financial contribution provided for by the Fisheries Partnership Agreement between the European Union and the Republic of Seychelles, *OJ* [2014] L 4/3, 9.1.2014 (Arts. 7 and 8.1.f). Similar provisions are contained in the protocol between the European Union and the Republic of Cape Verde (Arts. 7 and 8), *OJ* [2014] L 369/3, 24.12.2014, in the Protocol with Comoros (Arts. 8 and 9), *OJ* [2010] L 335/2, 18.12.2010, and in the Protocol with the Republic of Côte d'Ivoire (Arts. 8 and 9) *OJ* [2013] L170/2, 22.6.2013.

⁹⁴ See Art. 105 of the EPA signed in 2014 with West African States. The text of the agreement is available at <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153867.pdf>. See also the EPA with East African Community Partner States, Art. 136. The text of the agreement was finalised the 16th of October 2014, and is available at <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/eac/>>. For the EPA with Southern Africa Development Community (negotiations were concluded on the 15th of July 2014), see Art. 110, text available at <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153915.pdf>.

⁹⁵ The Cotonou Agreement will expire in 2020, the Framework Agreement with Vietnam is concluded for a period of five years (renewable).

IV. THE CASE OF ANTI-GAY LEGISLATION AND HUMAN RIGHTS CLAUSES

This section examines the adoption of anti-homosexuality legislation by several African countries and the reaction of EU institutions. This will enable the testing of some of the issues discussed in the first part of the paper. More specifically, the following will be assessed: the scope of the clause, that is whether the criminalisation of homosexuality constitutes human rights violations covered by the HR essential elements clause; how the violation of non-trade values could trigger the non-execution clause; and whether the issue of Lesbian, Gay, Bisexual, Transgender and Intersex Persons (LGBTI) rights has affected EPA negotiations or could influence future negotiations for the renewal of the Cotonou Agreement.

Anti-homosexuality legislation is in force in several countries both in Asia and Africa.⁹⁶ In the 34 African countries where homosexuality is outlawed, sexual, consensual, and adult activities with people of the same sex are punishable by fines and/or imprisonment (up to 14 years) and in some cases even by death (Mauritania, Sudan, and Somalia).⁹⁷ Uganda⁹⁸ and Nigeria⁹⁹ have recently modified anti-gay legislation, making the punishment for consensual homosexual relationships more severe compared to the legislation previously in force.¹⁰⁰

⁹⁶ This is a highly sensitive issue in the African continent. Homosexuality is taboo in Africa and in much of the continent there exist strong anti-gay sentiments. See, for example, 'Nigeria Poll Suggests 87% of Population Support Anti-Gay Legislation', *BBC*, 30 June 2015, available at <<http://www.bbc.com/news/world-africa-33325899>>. Moreover, there seems to be a trend towards making those legislations more severe as the idea is spreading that homosexuality is against African values.

⁹⁷ See L. Paoli Itaboray and J. Zhu, 'State Sponsored Homophobia: A World Survey of Laws: Criminalisation, Protection and Recognition of Same-Sex Love', ILGA Annual Report 2014, available at <http://old.ilga.org/Statehomophobia/ILGA_SSHR_2014_Eng.pdf>.

⁹⁸ Uganda adopted a new anti-gay piece of legislation on 24 February 2014, which provides for life imprisonment (the original version of the bill provided for death penalty, while previous legislation punished consensual sexual gay relations with 14 years of imprisonment). Penalties are provided as well for persons or organisations which aid or abet same-sex sexual relationships. Ugandans, who engage in same-sex relations outside of Uganda, may be extradited for punishment back in the country. The Uganda Constitutional Court annulled the law in February 2014 on procedural grounds but a new bill is being proposed. See S. Houttuin, 'Gay Ugandans Face New Threat from Anti-Homosexuality Law', *The Guardian*, 6 January 2015, available at <<http://www.theguardian.com/world/2015/jan/06/sp-gay-ugandans-face-new-threat-from-anti-homosexuality-law>>; P. Johnson, 'Making Unjust Law: The Parliament of Uganda and the Anti-Homosexuality Act', 67 *Parliamentary Affairs* 2015, at 709, 736.

⁹⁹ While in some Northern States Members of the Federal Republic of Nigeria (where the Sharia applies) homosexual activities are punished with death sentence, the Federal State approved on 7th January 2014 the 'Same Sex Marriage Prohibition Law', criminalising same-sex marriage (those involved can be sentenced to up to 14 years imprisonment). The bill qualifies as an offense the support of the same-sex marriages (for instance taking part as witness in a gay-marriage), and it provides for prison sentences of 10 years for persons belonging to a gay organisation. Besides Nigeria, other Members of the Economic Community of West Africa States (ECOWAS) criminalise homosexual sexual relations (Gambia, Ghana, Senegal, Sierra Leone, Togo).

¹⁰⁰ The adoption of the above-mentioned pieces of legislations has prompted severe reactions by the international community: the United States reduced its financial aid to Uganda, imposed visa restrictions and cancelled a regional military exercise. See 'US Cuts Aid to Uganda over Anti-

Does legislation of this type fall within the scope of the clause? Laws criminalising consensual same-sex relationships are considered violations of human rights by UN human rights bodies.¹⁰¹ Criminalisation implies the violation of the right to life, dignity, non-discrimination, security of person, and privacy. These rights are recognised in all human rights treaties to which these countries are parties. It seems irrefutable that the human rights clause covers these rights.¹⁰²

Although it seems that there is no need for an express reference to LGBTI rights in the essential element clause, the European Parliament asked to explicitly introduce a reference to the prohibition to discriminate on the basis of sexual orientation, for example, in a future revision of the Cotonou Agreement, and in particular in Article 8.4, which contains a reference to 'other grounds' of discrimination.¹⁰³

In 2015, the European Parliament called again for the inclusion in the future African, Caribbean, and Pacific Group of States (ACP)-EU agreement (the Cotonou Agreement expires in February 2020) of an 'explicit mention of

Gay Law', *Al Jazeera*, 24 June 2014, available at <www.aljazeera.com/news/Africa/2014/06/>. The World Bank, Sweden, Norway, Denmark and the Netherlands had suspended or redirected aid from the government to ONG., See J. Gettleman, 'Uganda Anti-Gay Law Struck-Down by Court', *The New York Times*, 1 August 2014, available at <<http://www.nytimes.com/2014/08/02/world/africa/>>.

¹⁰¹ UN General Assembly, Human Rights Council, 'Discrimination and Violence against Individuals Based on their Sexual Orientation and Gender Identity', *Report of the Office of the United Nations High Commissioner for Human Rights*, Doc A/HRC/29/23, 4.5.2015.

¹⁰² All the above-mentioned countries are contracting parties to at least of the International Covenant of Political and Civil Rights. The African Charter on Human and People's Rights (binding all African Union States) does not prohibit discrimination based on sexual orientation but Art. 2 prohibits discrimination on several grounds (sex, birth, ethnical origin) and on 'other status'. The list is considered non-exhaustive and it is submitted that it covers sexual orientation. See O. Amato, 'Civil and Political Rights in the African Charter', in M. Ssenyonjo (ed.), *The African Regional Human Rights System* (Leiden: Martinus Nijhof 2012), at 34. In 2014, the African Commission on Human and Peoples' Rights adopted a Resolution on Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity (55th Ordinary Session of the African Commission on Human and Peoples' Rights in Luanda, Angola, 28 April to 12 May 2014). The Resolution states that acts of violence, discrimination and other human rights abuses affecting LGBTI persons and human rights defenders in Africa violate State obligations under the African Charter on Human and People's Rights. Text available at <<http://www.achpr.org/sessions/55th/resolutions/275/>>. Although the Resolution does not target anti-gay legislations, it is considered an important step towards the recognition of rights of persons regardless of their sexual orientation. For an analysis of the African Charter with reference to this issue, see R. Murray and F. Viljoen, 'Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union', 29 *Human Rights Quarterly* 2007, 86-111. For an analysis of the discrimination based on sexual orientation in Africa, see A. Rudman, 'The Protection Against Discrimination Based on Sexual Orientation under the African Human Rights System', 15 *African Human Rights Law Journal* 2015, 1-27.

¹⁰³ See Resolution on the Draft Council Decision on the Conclusion of the Agreement Amending for the Second Time the Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, of the One Part, and the European Community and its Member States, of the Other Part, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005, Doc PE 480.585v02-00, 22.3.2013.

non-discrimination on grounds of sexual orientation or gender identity'.¹⁰⁴ The revision of Article 8.4 would have the advantage of not modifying the essential element clause, while providing an important interpretative tool for the application of the provision.

The ACP partners are not inclined to accept the proposed changes. African leaders defend their sovereign rights to legislate on the matter, referring to 'African moral values', culture, and traditions, claiming that homosexuality is 'inherently non-African' or against the African tradition, thus setting the question in the framework of the Africa-West relationship, neo-colonialism, and the like.¹⁰⁵

Moreover, the ACP Parliamentary Assembly – as a response to the proposed European Parliament Resolution – adopted a Declaration¹⁰⁶ that demonstrates that the initiative of the Parliament is considered an attempt to 'disregard the wishes of the majority of its (ACP) people in the name of democracy and as they perceive it'.¹⁰⁷ The Assembly also stresses that 'the right of a society to determine its own moral values and norms must be understood as a fundamental human right under the principle of sovereign protection'.¹⁰⁸ Finally, 'it calls upon the EU to respect the democratic processes of sovereign States and to refrain from taking action which could undermine the basis of its development partnership with the ACP Group including the attainment of the objectives of poverty eradication and sustainable development, and to desist from tying sexual orientation and homosexuality to development aid and cooperation'.¹⁰⁹

This reaction is a very clear demonstration that one of the most problematic issues raised by the application of the essential element clause concerns the different interpretations of human rights and relativism. There seems to be

¹⁰⁴ European Parliament, Resolution of 11 February 2015 on the Work of the ACP-EU Joint Parliamentary Assembly (JPA), 2014/2154(INI), 27.1.2015. In para. 15 of the Resolution, the EU Parliament 'Reiterates its deep concern over the adoption and discussion of legislation further criminalising homosexuality in some ACP countries; calls on the JPA to place this on the agenda for its debates; calls for reinforcement of the principle of non-negotiable human rights clauses and sanctions for failure to respect such clauses, inter alia with regard to discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation or gender identity and against people living with HIV/AIDS.'

¹⁰⁵ See on the issue, D. Hornsby, 'The Tragedy of Uganda's Antigay Bill', *opencanada.org*, 2 March 2014, available at <<https://www.opencanada.org/features/the-tragedy-of-ugandas-anti-gay-bill>>. An article published online on 2 December 2014, 'Gambia Condemns EU on Anti-Gay Laws', reports a speech of the Gambian Foreign Minister Bala Garba Jahumpa, who warned that 'Gambia's government will not tolerate any negotiation on the issue of homosexuality with the EU or any international block or nation'; available at <<http://www.liberianews.net/index.php/sid/228132703>>. In August 2014, the Gambian Assembly passed a bill tightening the already severe anti LGBTI legislation and providing for life imprisonment for some homosexual acts. This article is available at <<http://www.lgbt-ep.eu/press-releases/gambian-national-assembly-passes-severe-anti-lgbt-bill/>>.

¹⁰⁶ Declaration of the ACP Parliamentary Assembly on Recent Proposals Adopted by the European Parliament with Regard to Uganda and Nigeria, The Parliamentary Assembly of Africa Caribbean and Pacific States, Meeting at its 35th Session in Strasbourg (14-19 March 2014), available at <<http://www.acp.int/content/declaration-acp-parliamentary-assembly-recent-propos-als-adopted-european-parliament-regard-u->>.

¹⁰⁷ Ibid., Preamble, Letter I.

¹⁰⁸ Ibid., Preamble, Letter G.

¹⁰⁹ Ibid., para. 6.

no space for a discourse on the relativism of human rights with respect to the pieces of legislation at stake, which provide for imprisonment and even death penalty for consensual same sex relations. The principle of the universality of human rights cannot be derogated on the grounds of moral or cultural diversity.

One possible solution requires first engaging the countries concerned in a close and intensive dialogue so as to exercise an influence on them. For the time being, according to the EU, political dialogue under Article 8 covers human rights situations of LGBTI persons¹¹⁰ and is the best instrument for the EU to engage in a dialogue with its partners.

In practice, discrimination based on sexual orientation is being discussed in the framework of informal human rights dialogue¹¹¹ and during official visits and in meetings of EU local working groups.¹¹²

Should the EU wish to invoke the non-execution clause of the Cotonou Agreement, it would have to qualify the criminalisation of the same-sex consensual sexual relations as a breach of the essential element clause.

In a resolution dealing with Uganda's and Nigeria's legislation,¹¹³ the European Parliament required the immediate adoption of 'appropriate measures' under Article 96 without holding Article 8 consultations, as the EP considers this case to be of 'special urgency'.

Although the European Parliament has requested the Commission to suspend aid or to redirect financial support and even to consider the adoption of targeted sanctions,¹¹⁴ a request was also made to the Commission to strengthen the dialogue with the countries concerned. This demonstrates that although the European Parliament clearly considers anti-gay legislation as a serious viola-

¹¹⁰ Council of the European Union, Guidelines to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex Persons (LGBTI), Foreign Affairs Council Meeting, Luxembourg (24 June 2013). para. B. 31.7 of the document explicitly refers to dialogue under Art. 8 of the Cotonou Agreement.

¹¹¹ See J. Bossuyt et al., 'Political Dialogue on Human Rights under Article 8 of the Cotonou Agreement', Study requested by the European Parliament's Development Cooperation Committee, Doc EXPO/B/DEVE/2013/31 (June 2014). See, in particular, the reference to dialogue with Cameroon and Uganda, at 17 and 27.

¹¹² See for Nigeria, EU Annual Report on Human Rights and Democracy in the World in 2012, Doc 9431/13, 21.5.2013, at 131; for Uganda, the issue was raised during high level meetings, *Ibid.*, at 157. In 2014, besides engaging in dialogue with some countries over the issue of anti-gay legislation, statements were issued by the EU calling countries such Uganda, Nigeria to repeal anti-homosexual legislation. See EU Annual Report on Human Rights and Democracy in the World in 2014, Doc 10152/15, 22.6.2015, at 76. The EU prefers the use of diplomatic tools, demarches and political dialogue: 'The EU continued to advocate the promotion and protection of human rights for LGBTI persons through human rights dialogues, quiet diplomacy, EIDHR support to LGBTI human rights defenders and to NGOs implementing projects to fight discrimination against LGBTI persons, and discussions on ways to improve the situation of LGBTI persons with like-minded partners and civil society organisations', *Ibid.*, at 76.

¹¹³ European Parliament, Resolution of 13 March 2014 on Launching Consultations to Suspend Uganda and Nigeria from the Cotonou Agreement in View of Recent Legislation Further Criminalising Homosexuality, Doc 2014/2634(RSP), 13.3.2014. Para. 4 of the resolution declares: 'Governments of Uganda and Nigeria failed to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law, referred to in Art. 9(2) of the Cotonou Agreement'.

¹¹⁴ *Ibid.*, paras. 7 and 10.

tion of human rights, dialogue on the topic is still considered useful. However, to date, the European Parliament's requests have not been taken up.

The issue of anti-gay legislation was apparently discussed in the framework of political dialogue with Uganda, as reported by the EEAS website,¹¹⁵ but to date, this has not led to any changes. The EU is aware that the issue is very sensitive for its partners.¹¹⁶

In the hypothesis of serious violations of human rights or democratic principles by the parties to an Economic Partnership Agreement, trade-related measures could be adopted provided that a *passerelle* clause is contained in the EPA that clearly links this Agreement to the Cotonou human rights clause.¹¹⁷

A further noteworthy issue raised by the anti-gay legislation is whether the clash of the EU and the concerned third countries' values is likely to affect the conclusion of EPAs.

We have not been able to find any reference to a discussion of the issue during EPA negotiations. However, in February 2014, the EPA with ECOWAS was concluded and the EPA with Eastern African Countries (EAC, of which Uganda is a member state) was initialled. In October 2014, the EU concluded the European Partnership Agreement with EAC (Uganda, Burundi, Kenya, Rwanda and Tanzania).¹¹⁸ These actions and developments confirm that the EU prefers inclusion to sanctions.

It is also possible that the Cotonou Agreement, which will be revised by 2020, will be affected by the adoption of anti-gay legislation by some of the ACP countries. This issue is on the agenda of the European Union and of its member states.¹¹⁹ Negotiations and a preliminary dialogue should offer the

¹¹⁵ Available at <http://eeas.europa.eu/uganda/index_en.htm>.

¹¹⁶ ACP, Declaration of the 21st Session of the ACP Parliamentary Assembly on the Peaceful Co-Existence of Religions and the Importance Given to the Phenomenon of Homosexuality in the ACP-EU Partnership (28 September 2010), available at <<http://www.lgbt-ep.eu/>>. The ACP Parliamentary Assembly asked for 'due respect for the cultural differences and social diversity of the two Parties'.

¹¹⁷ Some EPAs explicitly refer to Art. 96 of Cotonou. See, for example, EU-Cariforum, Art. 241.2; EU – Eastern and Southern Africa (Interim EPA of 2012), Art. 65.1. Other agreements make a more general reference to the possible adoption of measures in accordance with provisions of the Cotonou Agreement: EU-Western Africa EPA, Art.105; EU-East Africa Community (EAC) EPA, 2014, Art. 136. The Interim EU-EAC EPA (initialled in 2007 but not yet signed) refers in the Preamble to principles of the Cotonou Agreement, specifies to be 'built on the *acquis* of Cotonou' (Art. 3) and contains a *passerelle* clause (Art. 49).

¹¹⁸ The Burundi Penal Code punishes sexual relations with persons of the same sex with imprisonment up to three months and a fine. In Kenya (162 Section of the Penal Code revised in 2006), same-sex sexual practices are punished with 14 years of imprisonment, up to 21 in aggravated circumstances. A debate was held in Rwanda on the adoption of an anti-gay legislation in 2009 similar to the Uganda's legislation. Mainland Tanzania 1945 Penal Code was revised by the Sexual Offences Special Provisions Act in 1998, section 154, which provides for gay sexual relationships imprisonment for 30 years. E. Muga, 'Dar Plans to Introduce Tougher Anti-Gay Bill', *The East African*, 29 March 2014, available at <<http://www.theeastafrican.co.ke/news/Dar-plans-to-introduce-tougher-anti-gay-Bill-/-/2558/2262374/-/iq7xix/-/index>>.

¹¹⁹ Cf. T. Tindemans and D. Brems, 'Post Cotonou: Preliminary Positions of EU Member States', *ECDPM Briefing Note 87* (February 2016), available at <www.ecdpm.org/bn87>. The relevance of the issue has been underlined by the participants to several Round Tables organised by the Office for Economic Policy and Regional Development (ERP) to discuss the future of the ACP and EU relations. See European Commission, ACP-EU Relations after 2020: Issues for the

EU the opportunity to clarify its critical position on the adoption of the laws concerned and to provide the contracting party with more specific benchmarks.

V. CONCLUDING REMARKS

Human rights clauses are tools of the EU's foreign policy, which EU partners reluctantly accept, and which are rarely enforced. In principle this could lead to the conclusion that the EU should drop these clauses altogether. In practice, however, it is clear that these clauses are here to stay.

These clauses have thus become an identity-creating feature of EU external policy.¹²⁰ The rationale of the human rights clause, in other words, lies in the self-representation of the EU as a global actor that defines its role and its foreign policy as a human rights and democracy promoter, its foreign relations being guided – according to the EU Treaty – by the same ‘principles that have inspired its own creation’.¹²¹

By incorporating human rights provisions in the agreements it concludes, the EU proposes its own and distinct model as a human rights promoter in foreign policy, highlighted by some of the specific features that have been underlined in this paper: the notion of the indivisibility of human rights,¹²² the bilateral nature of the clause, and the setting up of preventive mechanisms for dialogue and cooperation as a means to influence the partners' behaviour.

However, the flagship function of the clauses does not seem sufficient. The EU could try to make the best use of the non-trade value clauses by reinforcing the use of the essential element clause as a legal basis for positive measures. The added value of the essential element clause is that it creates the opportunity for diplomatic discussions and dialogue with the states concerned.

Human rights clauses also conceptualise the traditional political conditionality, linking aid and benefits derived from the agreement to observe civil and political human rights, and can also be interpreted as extending to second generation human rights. Rewards in terms of trade and economic financial benefit are increasingly linked to different political objectives, such as the elimination of weapons of mass destruction, sustainable development, and environmental protection. The extension of the essential element clause model to other forms

EU in Consultation Phase 1. Final Report, Doc 2014/353799, 10.7.2015, at 8 and 28, available at <http://ec.europa.eu/europeaid/sites/devco/files/eprd-acp-eu-post-cotonou-final-report_en.pdf>.

¹²⁰ Even if Art. 3.5 and Art. 21 TEU do not create a legal obligation to include a human rights clause in EU agreements, they compel the Union to promote its values in its international relationships. As underlined above, human rights clauses are one of the EU's human rights policy instruments.

¹²¹ Art. 21 TEU. This connection has been explicitly mentioned, for example in the third indent of the Preamble of the Association Agreement with Moldova which reads: ‘Recognising that the common values on which the EU is built – namely democracy, respect for human rights and fundamental freedoms, and the rule of law – lie also at the heart of political association and economic integration as envisaged in this Agreement’, *supra*, note 9.

¹²² For instance, the US promotes mainly labor rights. See for an analysis of a different approach, S.A. Aaronson, ‘Human Rights’, in J.P. Chauffour and J.C. Maur (eds.), *Preferential Trade Agreements Policies for Development: A Handbook* (Washington: The World Bank 2011), 429-452.

of conditionality has some inherent danger, however, from the perspective of non-application of the clause, although it could have some potential for dialogue.

The inclusion of human rights clauses in EU agreements can reinforce the existing political dialogue, even before an agreement is entered into force.¹²³ Negotiations and consultations are the right means to define benchmarks and to set up a road map to restore the respect for human rights. For example, the future negotiations for the renewal of the Cotonou Agreement could be an opportunity to clarify the scope of human rights protection as regards rights to LGBTI people, and for the EU to formulate what measures (positive and negative) it may be ready to apply in the case of (continuous) serious violations of these rights.

As for dialogue, in the framework of the non-execution clause, it is clear that the possibility of adopting 'appropriate measures', in the various forms they may take, can give teeth to unproductive consultation. At the same time, however, it is important to not be naive and to realise that dialogue is not a panacea, and that some results must be based on the interest and goodwill of the other parties.

Whether the EU is successful in exerting pressure on third countries clearly depends on the specific context.

In the case of failure, the non-execution clause could be used as a tool of negative conditionality, which might involve a rethinking of the content and structure of the measures.

This of course will only happen if the EU is ready to adopt appropriate measures not only in the case of coups d'état, but also in the case of serious violations of human rights. In this hypothesis, consultations would lose their *raison d'être*, and the clause would merely become a tool certifying the impossibility, at least for the time being, of continuation of the relationship.

¹²³ See Commission Staff Working Document, *supra* note 81, at 5, also for an illustration of the issues included in the EU-Vietnam Human rights dialogue agenda.

EU GUIDELINES ON HUMAN RIGHTS AS A FOREIGN POLICY INSTRUMENT: AN ASSESSMENT

Jan Wouters and Marta Hermez

Human rights are not only one of the founding values of the European Union ('EU' or 'Union'), but they are also among the guiding principles and objectives of its action on the international scene.¹ In order to put human rights at the core of its external relations and to promote them globally, the Union has developed a broad range of legal and policy instruments. Since 2012, the 'EU Strategic Framework and Action Plan on Human Rights and Democracy'² constitutes the backbone of the Union's external action on human rights, establishing principles, objectives and priorities that must guide that action. The new Action Plan, which the Foreign Affairs Council (FAC) adopted in July 2015 for the 2015-2019 period, 'Keeping Human Rights at the Heart of the EU Agenda',³ confirms the centrality of human rights for the EU's external relations. Together with the Strategic Framework, the Action Plan and a variety of other policy documents,⁴ EU guidelines on 'key human rights issues'⁵ (Guidelines) formulate the 'human rights and democracy agenda' of the EU.⁶

Since 1998 eleven sets of Guidelines have been adopted, some before the adoption of the Strategic Framework, others based on the 2012 Action Plan.⁷

¹ Arts. 2, 3(5) and 21, Treaty on European Union.

² Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy, Doc 11855/12, 25.6.2012, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf>.

³ Council of the European Union, Council Conclusions on the Action Plan on Human Rights and Democracy 2015-2019, Doc 10897/15, 20.7.2015, available at <<http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdf>>.

⁴ This includes Council conclusions identifying human rights priorities for the cooperation with other multilateral fora, such as the United Nations or the Council of Europe; see e.g. the Council Conclusions on EU Priorities at UN Human Rights Fora in 2015, Doc 5927/15, 9.2.2015 or the EU Priorities for Cooperation with the Council of Europe in 2016-2017, Doc 5339/16, 18.1.2016.

⁵ *Ibid.*, at 2, para. 2.

⁶ *Ibid.*, at 3, para. 4.

⁷ Council of the European Union, Guidelines to EU Policy towards Third Countries on the Death Penalty, 29.6.1998, available at <<http://www.consilium.europa.eu/uedocs/cmsUpload/Guidelines%20DeathPenalty.pdf>>; Council of the European Union, Guidelines to EU Policy towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Doc 7369/01, 9.4.2001; Council of the European Union, EU Guidelines on Human Rights Dialogues with Third Countries, Doc 14469/01, 13.12.2001; Council of the European Union, EU Guidelines on Children and Armed Conflict, Doc 15634/03, 4.12.2003; Council of the European Union, Ensuring Protection – European Union Guidelines on Human Rights Defenders, Doc 10056/04, 2.6.2004; Council of the European Union, European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL), OJ [2005] C 48/8, 23.12.2005; Council of the European Union, EU Guidelines on the Promotion and Protection of the Rights of the Child, Doc 16031/07, 10.12.2007; Council of the European Union, EU Guidelines on Violence against Women and Girls and Combating All Forms of Discrimination against Them, Doc 16173/08,

Table 1: EU Human Rights Guidelines

Full title	Date of Adoption	Date of Revision	Abbreviated title
Guidelines to EU policy towards third countries on the death penalty	29 June 1998	12 April 2013	Guidelines on the death penalty
Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment	9 April 2001	18 April 2008 20 March 2012	Guidelines on torture
EU Guidelines on human rights dialogues with third countries	13 December 2001	19 January 2009	Guidelines on human rights dialogues
EU Guidelines on children and armed conflict	4 December 2003	5 June 2008	Guidelines on children and armed conflict
Ensuring protection – European Union Guidelines on human rights defenders	2 June 2004	8 December 2008	Guidelines on HRD
European Union Guidelines on promoting compliance with international humanitarian law (IHL)	5 December 2005	1 December 2009	Guidelines on IHL
EU Guidelines on the promotion and protection of the rights of the child	10 December 2007	NA	Guidelines on rights of the child
EU guidelines on violence against women and girls and combating all forms of discrimination against them	8 December 2008	NA	Guidelines on violence against women and girls
EU Guidelines on the promotion and protection of freedom of religion or belief	24 June 2013	NA	Guidelines on FoRB
Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons	24 June 2013	NA	Guidelines on LGBTI persons
EU Human Rights Guidelines on freedom of expression online and offline	12 May 2014	NA	Guidelines on freedom of expression

Out of the eleven existing Guidelines, six have been revised between 2008 and 2014 (table 1).

The present contribution aims to provide an analysis and assessment of the Guidelines as an instrument of the EU's external relations. We first provide a brief overview of their functions (section 2) and of the process in which they are developed and adopted (section 3). Subsequently, we analyse the objectives of the Guidelines, the policy toolbox they set out and the normative framework in which they are embedded (section 4). This also includes an exploration of their normative value (section 5). Finally, we briefly address the implementation of the Guidelines (section 6) and assess their added value. In particular, we examine whether the Guidelines can be considered as a useful and effective instrument and whether there might be a need for the adoption of additional Guidelines (section 7).

1. FUNCTIONS OF EU HUMAN RIGHTS GUIDELINES

Guidelines are adopted on specific procedural or thematic human rights issues in order to contribute to formulating and implementing a more coherent policy, and to providing legal and operational guidance to the Union's work in its external relations.

The objectives and functions of the Guidelines can be best illustrated depending on the targeted addressees. These addressees are the EU institutions, the EU Member States and external stakeholders.

For the EU institutions and EU Member States, the Guidelines should be considered in the framework of the need for internal-external coherence of Union policies.⁸ In line with the internal-external coherence argument, the Guidelines may contribute to the strengthening of the 'one voice' the EU it is so much in need of. Indeed, one of the main issues of EU external action is often the lack of unison positions and actions towards third States, diminishing the EU's credibility on the external plane. In this respect, the Guidelines' goal is not to export European norms and practices but to put in practice what the Union preaches.⁹

As some of the Guidelines state, they are also an '[explanation of] the international human rights standards' which the EU upholds, underlining or illustrating

8.12.2008; Council of the European Union, EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief (FoRB), Doc 11491/13, 24.6.2013; Council of the European Union, Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons, Doc 11492/13, 24.6.2013; Council of the European Union, EU Human Rights Guidelines on Freedom of Expression Online and Offline, Doc 9647/14, 12.5.2014,.

⁸ Interview with EU official, Brussels, 14 September 2015. This can also be illustrated by the reference in some of the Guidelines to the EU's own internal situation. See for example: Guidelines on LGBTI Persons, *supra* note 7, para. 8, and Guidelines on Rights of the Child, *supra* note 7, II Political Chapeau: Purpose of the Guidelines, 6th and 7th indent.

⁹ The only exception perhaps being the Guidelines on the Death Penalty (*supra* note 7), considering that they state 'to work towards universal abolition of the death penalty as a strongly held policy agreed by all EU Member States.'

the EU's commitment to promote compliance with these standards in a visible and consistent manner in its external action.¹⁰

In the EU's own perception, the Guidelines serve as a framework for the Union's work to promote and protect human rights in its external relations.¹¹ They are to give clear political lines to officials of EU institutions and Member States to be used in their contacts and work with third countries.¹² As some of the Guidelines explicitly state, their purpose is to provide the EU with an operational tool to be used in contacts with third countries at all levels, as well as in multilateral human rights fora, to provide practical suggestions for enhancing EU action in relation to the thematic human rights issues covered by particular Guidelines, and to assist Union Delegations in their approach to it.¹³ The most recent Guidelines specify that they provide officials with practical guidance on how to seek to prevent violations on the human right concerned, to analyse cases and to react effectively to violations wherever they occur.¹⁴ Two Guidelines, namely those on human rights defenders and those on torture, state that the operational parts of the Guidelines are meant to establish ways and means to effectively work towards achieving the goals set by particular Guidelines within the Common Foreign and Security Policy (CFSP).¹⁵

By laying down minimum standards and principles (through reference to international and regional human rights instruments) to be invoked in relation to third countries and by providing training, the Guidelines can also be said to provide the staff of EU missions – in EU Member State embassies or in headquarters – on the ground with legal background on particular human rights issues.¹⁶ This is crucial since not all staff members are trained as lawyers, let alone as human rights experts. As Sanchez Barrueco rightly pointed out in relation to CSDP operations, effectively fostering human rights during missions requires that staff members have or receive strong background training in human rights (see also *infra*, section 6).¹⁷

When it comes to the individual EU Member States, even though this can be hampered by internal challenges and differences among Member States, the rationale behind the Guidelines is the common values that overarch possible discrepancies. An example of such internal challenges and differences can be seen in the Guidelines on LGBTI persons. As some EU Member States are

¹⁰ E.g.: Guidelines on FoRB, *supra* note 7, para. 8; Guidelines on Freedom of Expression, *supra* note 7, para. 9; Guidelines on IHL, *supra* note 7, para 1.

¹¹ Guidelines on Rights of the Child, *supra* note 7, para. 3.

¹² E.g.: Guidelines on FoRB, *supra* note 7, para. 8; Guidelines on Freedom of Expression, *supra* note 7, para. 9.

¹³ E.g.: Guidelines on Torture, *supra* note 7, para. 1; Guidelines on HRD, *supra* note 7, para. 1; Guidelines on IHL, *supra* note 7, para 1.

¹⁴ E.g.: Guidelines on FoRB, *supra* note 7, para. 8; Guidelines on LGBTI Persons, *supra* note 7, para. 6; Guidelines on Freedom of Expression, *supra* note 7, para. 10.

¹⁵ E.g.: Guidelines on Torture, *supra* note 7; Guidelines on HRD, *supra* note 7, para. 7.

¹⁶ Almost all Guidelines provide for training as a tool for achieving the objective(s) of the Guidelines concerned: see *infra*, section 6.

¹⁷ M.L. Sanchez Barrueco, 'The Promotion and Protection of Human Rights During Common Security and Defence Policy Operations', in J. Wetzel (ed.), *The EU as a 'Global Player' in Human Rights?* (London: Routledge 2012), at 164.

more progressive on LGBTI rights than others, the EU has been criticised for not always practicing internally what it preaches internationally. Still, Guidelines were adopted on this subject-matter by the Council in 2013.¹⁸ This can be explained by the fact that their goal is not to make same-sex marriage an export product, but to determine and defend common values and standards, both among EU Member States and in the EU's relations with third countries. They also illustrate that the adoption of Guidelines serves an internal purpose as well, i.e. finding a common moral ground between EU Member States on certain human rights issues, which is not only to be defended externally but also serves to enhance internal protection by deepening a common understanding on a particular fundamental right.

It can thus be held that Guidelines serve the purpose of strengthening both the internal and external human rights policies of the EU and, in doing so, safeguarding the internal-external coherence of the EU's policy in the human rights field. Some Guidelines even state explicitly that the objective is to improve coherence between activities undertaken by Member States and the EU's overall external action.¹⁹ However, the Guidelines on IHL form a remarkable exception. They seem to explicitly deny any internal effect by stating that

[t]hese Guidelines are in line with the commitment of the EU and its Member States to IHL, and aim to address compliance with IHL by third States, and, as appropriate, non-state actors operating in third states. Whilst the same commitment extends to measures taken by the EU and its Member States to ensure compliance with IHL in their own conduct, including by their own forces, such measures are not covered by these Guidelines'.²⁰

An explanatory footnote holds that '[a]ll EU Member States are Parties to the Geneva Conventions and their Additional Protocols and thus under the obligation to abide by their rules'. This denial of internal applicability of the Guidelines on IHL does, however, not diminish the claim that EU Human Rights Guidelines in general also serve the purpose of safeguarding internal-external coherence. On the one hand, the Guidelines on IHL do not deny that the EU is bound to abide by IHL (as laid down in the Geneva Conventions and their additional protocols). On the other hand, this lack of internal effect can be explained by the fact that Guidelines are primarily instruments of EU foreign policy and not EU domestic policy. Except for the Guidelines on IHL, all the Guidelines were developed in COHOM, the working party on human rights of the Foreign Affairs Council, and not within the Justice and Home Affairs configuration of the Council. Interestingly, the Guidelines on IHL have been developed by the Council Working Group on International Law (COJUR) (see *infra*, section 2).²¹

¹⁸ Guidelines on LGBTI Persons, *supra* note 7.

¹⁹ E.g. Guidelines on Rights of the Child, *supra* note 7. Similarly, at the AHRI Conference on 21-22 September 2015 in Belgrade, Ms. Eva Maria Lassen held that the Guidelines on LGBTI Persons attempt to ensure a consistent approach of the EU and the Member States.

²⁰ Guidelines on IHL, *supra* note 7, para. 2.

²¹ See on COJUR, which is composed of the legal advisers of the Foreign Affairs ministries of EU Member States or the heads of their international law departments and a representative of

The main external stakeholders are naturally third states. Towards these external stakeholders the Guidelines can be considered to send a message, stressing the EU's commitment to promote the protection of human rights in its external policies, as a treaty obligation.²²

2. DRAFTING AND ADOPTION PROCESS

There appears to be no standard formula for the development of Guidelines. Their drafting and adoption depends to a large extent on the human rights theme they address and on the pre-existing policy and legal frameworks.

The selection of topics to be covered by Guidelines can often be explained by reference to the EU's own values or recurring matters of concern on the global level. For example, the Guidelines on the death penalty have a very unique *raison d'être*, considering that the Union is a death penalty-free area, rendering opposition against the death penalty a part of the EU's DNA.²³ The EU holds a strong and principled position against the death penalty, and its abolition constitutes a key objective for the Union's human rights policy. Furthermore, abolition of the death penalty is also a precondition for accession of States to the EU.²⁴

The Guidelines on IHL were initially a Swedish initiative, resulting from 'an old desire for enhanced oversight in IHL'.²⁵ The Guidelines on FoRB generated from a general concern of the EU in the UN Human Rights Council and in the UN General Assembly, following events throughout the globe. Their adoption was foreseen in the 2012 Action Plan.²⁶ The initiative was strongly backed by the UK (based on its experience with its own 'Freedom of Religion or Belief toolkit'²⁷) and by Austria, who initiated the drafting process. Other Guidelines were developed on the basis of pre-existing policy documents. For example,

the Commission, F. Hoffmeister, 'Comité Juridique (COJUR)', *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press 2013).

²² Arts. 2, 3(5) and 21 Treaty on the European Union.

²³ See, *inter alia*, E. Vandebroek and F. Verbruggen, 'The EU and Death Penalty Abolition: The Limited Prospects of Judicial Cooperation in Criminal Matters and an External Policy Tool', 4 *New Journal of European Criminal Law* 2013, at 482-484; J.R. Schmidt, 'The EU Campaign against the Death Penalty', 49 *Survival* 2007, 123-134.

²⁴ Art. 6 Treaty on European Union *juncto* Art. 2 (2) Charter of Fundamental Rights. As is known, with the Treaty of Lisbon, the Charter has the same legal value as the Treaties. It thus forms part of the EU *acquis*, which is to be respected by candidate countries. The death penalty is prohibited by law in all EU Member States, and in Protocols 6 and 13 to the European Convention on Human Rights, which all EU Member States have ratified. The abolition of the death penalty as a precondition for accession is reiterated in the introduction of the Guidelines on the Death Penalty, *supra* note 7.

²⁵ P. Wrangé, 'The EU Guidelines on Promoting Compliance with International Humanitarian Law', 78 *Nordic Journal of International Law* 2010, at 542.

²⁶ Council of the European Union, Action 23 (a), EU Action Plan on Human Rights and Democracy 2012-2014, Doc 11855/12, 25.6.2012, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf>.

²⁷ United Kingdom, Freedom of Religion or Belief – How the FCO Can Help Promote Respect for this Human Right (2009), available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35443/freedom-toolkit.pdf>.

the Guidelines on LGBTI persons were based on the 2010 Toolkit to Promote and Protect the Enjoyment of all Human Rights by LGBT people.²⁸ The development of Guidelines on human rights dialogues was in turn brought about by the rapid expansion of this policy tool by the EU in its relations with third countries since the late 1990s.²⁹

In line with their diverse origins, the drafting and negotiation processes of Guidelines also take different forms. The Guidelines on IHL, for example, were drafted by Sweden and negotiated in COJUR. A first proposal was introduced in COJUR in 2004, launching the negotiations, which were conducted with extensive involvement of the ICRC.³⁰ The negotiations of the Guidelines on FoRB started with the formation of an informal task force, which identified the most urgent thematic and country-specific issues under the broader theme of freedom of religion or belief. The first draft was prepared by the EEAS.

All negotiations take place within the Council at working group level. So far, all Guidelines have been negotiated in the Council's Human Rights Working Group (COHOM), with the exception of the Guidelines on IHL. After initial discussions, the latter was ultimately finalised in COJUR, due to their specific subject matter.³¹ Following the preparation of the first draft, EU Member States are generally invited to react in writing. Subsequently, general and paragraph-by-paragraph meetings are held in the respective Council working group. When an agreement is reached, the final draft is sent to the Political and Security Committee (PSC). Once the PSC has endorsed the draft text, it is sent to COREPER for its approval and submission to the Council for adoption. Ultimately, the Guidelines are adopted by the FAC. Following the adoption of the Guidelines in the FAC, instructions are sent by the EEAS to Union Delegations and by the Member States to their diplomatic missions in third countries. According to the EU Annual Report on Human Rights and Democracy in the World in 2014, civil society was consulted on several policy developments, including on the elaboration or revision of Guidelines.³²

COHOM is responsible for monitoring the implementation of and reviewing the Guidelines. Monitoring implementation takes place twice per year, the review exercise every three years. Consequently, some Guidelines have been updated since their adoption. In preparation for the publication of a booklet on the Guidelines in 2009,³³ some of the older Guidelines were subjected to a review to reflect changes within the EU and in the external environment since 2005.

²⁸ COHOM, Toolkit to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender and Intersex (LGBTI) People, Doc 11179/10, 17.6.2010.

²⁹ A. Egan and L. Pech, 'Respect for Human Rights as a General Objective of the EU's External Action', Leuven Centre for Global Governance Studies, *Working Paper* No. 161 (June 2015), at 13.

³⁰ P. Wrangé, *supra* note 25, at 543.

³¹ *Ibid.*, at 544.

³² Council of the European Union, EU Annual Report on Human Rights and Democracy in the World in 2014, Doc 10152/15, 22.6.2015, at 26.

³³ Council of the European Union, *EU Guidelines: Human Rights and International Humanitarian Law* (Brussels: General Secretariat of the Council 2009), available at <http://eeas.europa.eu/human_rights/docs/guidelines_en.pdf>.

As is well-known, the role of the European Parliament in the Union's CFSP is very limited. The Parliament has called on the Commission to define, in conjunction with it and civil society, the criteria for selecting the topics covered by such Guidelines, so as to bring clarity to the selection process.³⁴ Moreover, it has also called for greater participation of civil society in the development, evaluation and review of Guidelines.³⁵

3. DO GUIDELINES FOLLOW A TEMPLATE?

With some nuances most of the Guidelines follow a similar structure.³⁶ They usually consist of three main parts: (i) an introduction, which elaborates on the purpose of the Guidelines and defines their scope; (ii) an operational section setting out the objectives of the Guidelines and the policy instruments to achieve them; and (iii) if applicable, annexes including norms, standards and principles which the EU may invoke or use in its relations with third countries. Some Guidelines also contain a separate section on their evaluation and review.³⁷

a. Objectives

Through the Guidelines, the EU pursues three overarching goals: (1) ending on-going and preventing future human rights violations; (2) combatting the impunity of the perpetrators of human rights violations; and (3) providing protection of and support for victims of human rights violations. To achieve these objectives, the EU urges its bilateral partners to take a number of measures, ranging from cooperation at the international level, to adapting the domestic legal and public policy framework, and ensuring its effective implementation.

In line with its commitment to 'effective multilateralism', the EU places considerable emphasis on the cooperation with international human rights mechanisms. It encourages third countries to accede to relevant international or regional human rights instruments, to withdraw reservations that are incompatible with the purpose of the treaties, and to accept individual and inter-state complaints mechanisms under the treaties' optional protocols. The EU also urges third countries to cooperate with international human rights mechanisms,

³⁴ European Parliament, Resolution of 12 March 2015 on the Annual Report on Human Rights and Democracy in the World 2013 and the European Union's Policy on the Matter, Doc (2015)0076, 12.3.2015, para. 43. One may wonder why the European Parliament did not address this recommendation to the EEAS. In para. 46 of the same Resolution reference is made to the EEAS, but only 'to take appropriate action to implement and evaluate the EU guidelines at the country level.'

³⁵ *Ibid.*, para. 45.

³⁶ However, considering that the Guidelines on human rights dialogues relate to a specific, existing policy instrument as such of the EU instead of to a certain thematic human rights issue, they do not follow this general pattern. Consequently, these guidelines focus more on the process of these dialogues: they set out some basic principles, objectives, the procedure for the initiation of the dialogues and some practical arrangements for the dialogues.

³⁷ This is the case for the Guidelines on FoRB, the Guidelines on LGBTI Persons, the Guidelines on Children and Armed Conflict, and the Guidelines on IHL (*supra* note 7).

in particular the UN treaty bodies and Special Procedures, as well as with regional institutions, for example relevant Council of Europe or OSCE mechanisms. This cooperation should include extending invitations for country and thematic missions to UN Special Procedures, consenting to the publication of their visit reports, and complying with the recommendations made by the above-mentioned mechanisms and in the framework of the Universal Periodic Review.

At the national level, the EU urges third states to make the necessary changes to ensure that domestic law and public policy respect, protect and fulfil human rights. This includes firstly the criminalisation of human rights violations and the abolition of discriminatory laws and policies. It also includes the decriminalisation of the exercise of human rights, such as holding or expressing an opinion or engaging in consenting same-sex relations between adults. Regarding the protection of the victims of human rights violations, the EU urges third states to enact a legal framework which provides for the rehabilitation and for reparations for victims and which protects them during criminal proceedings, so that they can provide testimony without fear of repercussions.

Finally, the EU encourages third states to ensure the effective implementation of human rights laws and policies. This presupposes firstly the creation of an effective institutional framework on all levels of government, including a strong judicial system and independent monitoring bodies. The EU furthermore urges third states to publicly denounce human rights violations, to raise awareness for human rights issues and to allow for an exchange of best practices between the various institutional actors. Prosecutions of human rights violators should proceed 'swiftly, thoroughly, impartially and seriously'.³⁸

b. Policy instruments

In its external relations the EU has a variety of policy instruments at its disposal, ranging from diplomatic, to economic and military means. The latter has only recently been added to the EU's foreign policy toolbox.³⁹ The Guidelines identify a range of these instruments to be used to implement the Union's external human rights policies. They focus on diplomatic instruments and rely less on economic or military tools.

A central instrument that is referred to in all Guidelines is the engagement at the multilateral level. The Guidelines refer to a variety of international and regional organisations, including the United Nations (and its wider framework), the Council of Europe, the OSCE and the ICRC. They commit the EU not only to support these fora – e.g. financially or politically –, but also to collaborate with them, to shape their agenda and to use their mechanisms to promote human rights. The latter may for example include the delivery of public statements or the tabling of resolutions. Several Guidelines also commit the EU member

³⁸ Guidelines on Violence against Women and Girls, *supra* note 7, at 4.

³⁹ K. Smith, *European Union Foreign Policy in a Changing World* (London: Polity Press 2013), at 54.

states to address certain human rights issues in their recommendations in the Universal Periodic Review at the UN Human Rights Council.⁴⁰

The central instrument in the Union's bilateral relations is political dialogue. In its political dialogues with third countries, the EU intends to push its counterparts towards taking the measures identified above. It will address 'serious or systemic' human rights violations⁴¹ and raise individual cases. In addition, almost all Guidelines refer to demarches and public statements as tools to address either general or specific human rights issues. Statements and demarches can be issued both preventively and reactively; they can be used to address negative and positive developments. Most Guidelines also list the collaboration with civil society among the tools to promote EU human rights policy bilaterally. This includes political and financial support, but also close collaboration and consultation, and exchanges of best practice. Other instruments, which are referred to less frequently, include awareness raising and public education, support for human rights defenders and national human rights institutions, high-level visits, trial observation and prison visits, exchange of good practices, and involvement in judicial proceedings, e.g. by submitting *amicus curiae* briefs. Only the Guidelines on freedom of expression refer to the EU's enlargement policy. They identify freedom of expression as a priority for candidate countries, highlight the necessity of raising media freedom issues early and regularly during accession negotiations, and provide for financial and technical support by the EU.

From the range of economic measures which the EU has at its disposal, the Guidelines refer most frequently to the Union's financial instruments (in particular EIDHR). Only few Guidelines include trade measures in their toolbox, namely embargoes and export controls, invoking the human rights clauses of trade agreements and withdrawing GSP+ benefits. Finally, only the Guidelines on IHL and on children in armed conflict refer to military missions of the EU. They provide that human rights and humanitarian law must be observed during the planning and implementation of missions and that the rights of children, as a vulnerable group, must be given particular attention.

The Guidelines also refer to a number of policy tools that the EU can use internally for strategy development and policy formulation. A central element here is the monitoring and reporting carried out by the Heads of Mission, or – if applicable – by Heads of Mission of civilian operations, EU Military Commanders, EU Special Representatives or EU member state embassies. Their task includes monitoring of the human rights situation (at the systemic level and at the level of individual cases), collecting data on human rights violations and providing an analysis of the particular human rights issue through periodic or *ad hoc* reports. Most Guidelines also provide that the human rights country strategies should contain a section on the respective human rights issue. A number of Guidelines identify the necessity to train EU and member states personnel in the field and at headquarters. Only the Guidelines on torture point towards the importance of the EU's internal track record for its external credibility. It

⁴⁰ See e.g. Guidelines on FoRB, *supra* note 7, para. 63.

⁴¹ Guidelines on FoRB, *supra* note 7, para. 39.

commits the EU to ‘maximize its influence by having Member states’ laws and practices meet or exceed international standards against torture and other ill-treatment in all respects’.⁴²

Taken together, the Guidelines provide the EU and member state officials tasked with their implementation with a comprehensive policy toolbox. At the level of the individual Guideline, however, gaps remain. For example, few Guidelines refer to human rights conditionality, to technical assistance or capacity building. Although the selection of policy tools is context-sensitive (e.g. prison visits and trial observation will be more relevant with regard to certain human rights issues), some omissions may result in ‘blind spots’ in the application of the policy toolbox and may by obfuscating potentially promising policy instruments reduce the effectiveness of the Union’s external action.

c. Normative framework

The Guidelines are not adopted in a normative void. Instead they build upon a dense framework of international and regional legal and policy instruments. Most Guidelines contain extensive annexes of norms, standards and principles which the EU can invoke in its relations with third countries. These annexes usually list a plethora of global and regional human rights instruments, including treaties, declarations, resolutions, protocols, etc. The Guidelines generally refer to what is already international law on the issue concerned. Consequently, the normative framework to which Guidelines refer is very broad and varied.

It is noticeable that references to EU law – both primary and secondary – play a minor role compared to the references to international law. Only six Guidelines refer to the EU Charter of Fundamental Rights, three to the Treaty on the Functioning of the EU and two to the Treaty on European Union. There are a few isolated references to EU secondary law.⁴³ Instead, most Guidelines contain extensive references to international human rights treaties (in particular CRC, ICCPR, CERD and CEDAW), to international humanitarian law (in particular the four Geneva Conventions and their Additional Protocols), and to the statutes of international courts and tribunals (in particular the Rome Statute of the ICC). Seven Guidelines refer to the Universal Declaration of Human Rights. Most Guidelines are also based on European regional human rights instruments of the Council of Europe, in particular the European Convention on Human Rights, but also its Protocols No. 6 and 13, the European Social Charter, the Istanbul Convention, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the Framework Convention for the Protection of National Minorities. Compared to that, references to other regional human rights instruments are less frequent and focus mostly on the African and the American region (African Charter on Human and Peoples’ Rights, American Convention on Human Rights, Conven-

⁴² Guidelines on Torture, *supra* note 7, at 15.

⁴³ Particularly the Guidelines on LGBTI Persons and the Guidelines on Freedom of Expression refer to EU internal standards (*supra* note 7).

tion of Bélem do Pará, and the African Charter of the Rights and Welfare of the Child). Only two Guidelines refer to the ASEAN Human Rights Declaration⁴⁴ and only one to the Arab Charter on Human Rights.⁴⁵ These references come with a qualification. The Guidelines on FoRB state that ‘some regional standards offer limited or insufficient protection to freedom of religion or belief in comparison to international standards’ and advise ‘EU staff [to] be aware of such limitations when referring to them’.⁴⁶

As the Guidelines are external policy instruments for the EU, it should not come as a surprise that they predominantly contain references to established international human rights law, and that EU law itself does not figure prominently in them. By invoking universally accepted international standards, the EU emphasizes that the Guidelines do not aim to export European values globally, but that they correspond to global human rights standards. The extensive references to international and regional human rights instruments therefore provide a normative basis for the Guidelines and strengthen their legitimacy. In that sense, the Guidelines do not strive to create new standards. Rather, they synthesise and contextualise existing standards, setting out how these could be used as a basis for EU action.⁴⁷

4. LEGAL/NORMATIVE VALUE

Even though the Guidelines themselves serve the purpose, *inter alia*, of providing legal guidance to Union Delegations and Member State diplomatic missions, they are not in and of themselves legal instruments. They are not legally binding. However, since they are adopted by the FAC, i.e. by an EU institution engaging the foreign affairs ministers of the Member States, they can be considered to constitute a strong political expression of EU priorities on human rights. They could also be considered relevant elements of combined practice and *opinio juris* of the EU and its Member States from the viewpoint of customary international law.⁴⁸

Keukeleire and Delreux have described the Guidelines as ‘the backbone of a more targeted EU human rights diplomacy within CFSP [...] [providing] EU representatives in the field with operational goals and tools to intensify initia-

⁴⁴ Guidelines on FoRB, *supra* note 7, at 17, and Guidelines on Freedom of Expression, *supra* note 7, at 26.

⁴⁵ Guidelines on FoRB, *supra* note 7, at 17.

⁴⁶ *Ibid.*, at 16.

⁴⁷ T. McGonagle, ‘Council of the EU: Human Rights Guidelines on Free Expression On- and Offline’, *IRIS* No. 8:1/8 (2014), available at <<http://merlin.obs.coe.int/iris/2014/8/article8.en.html>>.

⁴⁸ See for a number of reflections in this respect, *inter alia*, Sr Michael Wood, ‘Second Report on Identification of Customary International Law’, Doc A/CN.4/672, 22.5.2014, at 29-30, para. 44, and the many sources referred to, available at: <http://legal.un.org/ilc/documentation/english/a_cn4_672.pdf>. Earlier in the same report (at 8, para. 24), the ILC Special Rapporteur refers to the Guidelines on promoting compliance with IHL as a relevant indication of the enduring importance of the two elements needed for the establishment of a norm of customary international law (state practice and *opinio juris*).

tives in multilateral fora and in bilateral contacts, resulting in some intensive lobbying campaigns to promote specific human rights'.⁴⁹

They are an integral part of the EU's human rights policy and as such play a central role in the formulation of the Union's human rights and democracy policy in its external action.⁵⁰ The Guidelines serve as policy documents and are meant to be pragmatic instruments of EU human rights policy, providing practical tools to help EU Delegations and diplomatic missions of the Member States in the field to better advance that policy. They provide officials and staff with practical guidance on how to contribute to preventing violations of human rights and how to analyse concrete cases and to react effectively when violations occur.⁵¹ Moreover, the EU Special Representative for Human Rights is tasked with contributing to the implementation of the Guidelines.⁵²

Considering that the Guidelines are adopted as part of the CFSP, which is governed by intergovernmental modes of decision-making and over which the Court of Justice of the European Union (CJEU) has no jurisdiction, it is hard to attribute a specific legal value under EU law to them. Explicit and specific references to human rights in decisions establishing a CFSP/CSDP operation have been rather scarce.⁵³ One example is Joint Action 2005/355/CFSP, which endowed EUSEC-DR Congo with the mandate to promote policies compatible with *inter alia* human rights and international humanitarian law. In the case of CSDP, Sanchez Barrueco has argued that there is increasing awareness that the effectiveness of military and civilian operations is directly linked to a greater commitment to fostering human rights on the ground.⁵⁴ However, she points out that ensuring human rights promotion by staff participating in a CSDP mission is mostly enshrined in soft law instruments such as the Guidelines, and that further normative development is needed to ensure better implementation to prevent them from becoming empty words in practice. Of the six ongoing military operations and missions⁵⁵ only two decisions establishing such an operation make explicit reference to human rights: the Council Joint Action establishing EUNAVFOR ATALANTA stipulates that

'[n]o persons referred to in paragraphs 1 and 2 may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human

⁴⁹ S. Keukeleire and T. Delreux, *The Foreign Policy of the European Union* (London: Palgrave Macmillan 2014), at 136.

⁵⁰ Council of the European Union, *supra* note 33, at 3.

⁵¹ It is noteworthy that the Guidelines on Human Rights Dialogues are the only ones addressing the use of a particular policy instrument as opposed to EU policy on a particular human rights issue, see A. Egan and L. Pech, *supra* note 29, at 13.

⁵² Art. 3 Council Decision 2014/385/CFSP of 23 June 2014 Extending the Mandate of the European Union Special Representative for Human Rights, *OJ* [2014] L 57/66, 24.6.2014.

⁵³ M.L. Sanchez Barrueco, *supra* note 17, 157-173.

⁵⁴ *Ibid.*, 163-166.

⁵⁵ In October 2015, the EU had six ongoing military operations/missions: EUFOR Althea in Bosnia and Herzegovina, EUNAVFOR ATALANTA in Somalia, EUTM Somalia, EUTM Mali, EUNAVFOR MED in the Mediterranean, and EUMAM RCA in the Central African Republic.

rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment’.⁵⁶

The Council Decision establishing EUNAVFOR MED in turn holds in its preamble that ‘the Union CSDP operation will be conducted in accordance with international law, in particular with [...] international human rights law’, without reference to any specific human right(s).⁵⁷ When it comes to civilian CSDP operations, explicit references to human rights are once again scarce and vague if any. Moreover, nowhere in the decisions establishing respectively military and civilian CSDP missions are the Guidelines mentioned. For example, the Council decision continuing the EU monitoring mission in Georgia (EUMM Georgia) lists the monitoring, analysing and reporting on violations of human rights as one of the mission tasks.⁵⁸ However, the Guidelines are not mentioned nor are they listed under ‘key documents’ on the EUMM website, even though most Guidelines elaborate upon monitoring and reporting and some even set out checklists to that end.⁵⁹

There is however an area in which the Guidelines could potentially have a very tangible impact. When it comes to the conclusion of agreements by the EU (and especially in the case of mixed agreements), one could argue that these Guidelines represent (the beginning of) a common EU strategy, triggering far-reaching obligations for the Member States under the duty of sincere cooperation.⁶⁰ The CJEU has ruled in the *IMO* and *PFOS* cases that as soon as there is an EU strategy, there is a restriction on unilateral Member State action, even in cases of shared EU-Member State competence.⁶¹ Moreover, in the *PFOS* case, the CJEU held that this strategy is not subject to any formalities and may take any form.⁶² Consequently, one could argue that once adopted, the Guidelines represent an expression of such a strategy and thus normatively influence the scope for individual Member State action on the external plane under the duty of sincere cooperation.

However, considering that Guidelines are CFSP instruments and that there is generally no jurisdiction for the CJEU in these matters, they are not likely to generate much case-law. Moreover, as Guidelines rarely lay down concrete

⁵⁶ Art. 12 Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Somali Coast, *OJ* [2008] L 301/33, 12.11.2008.

⁵⁷ Point (6) Preamble Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR MED), *OJ* [2015] L 122/31, 19.5.2015.

⁵⁸ Art. 3 (1) Council Decision 2010/452/CFSP on the European Union Monitoring Mission in Georgia, *OJ* [2010] L 213/43, 13.8.2010.

⁵⁹ E.g.: Annex I Guidelines on Freedom of Expression and Annex II Guidelines on LGBTI Persons (*supra* note 7).

⁶⁰ As laid down in, *inter alia*, Art. 4(3) Treaty on European Union, and as specifically formulated for CFSP in Art. 24(3) Treaty on European Union.

⁶¹ CJEU, Case C-45/07, *Commission v. Hellenic Republic* [2009] *ECR* I-701; CJEU, Case C-246/07, *Commission v. Kingdom of Sweden* [2010] *ECR* I-03317.

⁶² CJEU, Case C-246/07, *Commission v. Kingdom of Sweden* [2010] *ECR* I-03317, para. 77.

measures and actions, it is rather unlikely to find instances in which EU Member States individually act contrary to them.

5. IMPLEMENTATION

Considering the Guidelines' objective to serve as practical guidance for EU Delegations and Member State diplomatic missions, their implementation is crucial. The Guidelines foresee a number of recurring tools for the implementation of the policy they set out. Diplomatic tools include political dialogues, declarations and démarches, both general, individual and bilateral as well as in multilateral fora. As far as dialogues are concerned, some Guidelines refer to political dialogues, others to the human rights component of political dialogues, and some to specialised dialogues such as human rights dialogues.⁶³ The main external financial instrument the Guidelines refer to is the European Instrument for Democracy and Human Rights (EIDHR). For Union Delegations and CSDP missions, the Guidelines also foresee monitoring, assessment and reporting as a tool.⁶⁴ Lastly, almost all Guidelines prescribe training on the subject matter concerned for the staff in the field, in the headquarters, the law, police or military enforcement officials and sometimes even for the whole population.⁶⁵

The implementation of the Guidelines faces a number of difficulties and challenges. For example, the European Parliament has indicated that the implementation of the Guidelines on torture remains insufficient and at odds with EU statements and commitments to address torture as a matter of priority, and called for an 'effective and results-oriented' implementation. Similarly, EDRi, an umbrella organisation which gathers 33 organisations campaigning for civil rights and fundamental freedoms in the digital environment, noted in a 2015 report that it had seen little evidence of projects implementing certain commitments the EU set itself in the Guidelines on freedom of expression.⁶⁶

⁶³ The Guidelines on the Death Penalty refer to 'dialogues and consultations'; the Guidelines on Torture, those on Children and Armed Conflict and those on HRD refer to 'the human rights component of the political dialogue'; the Guidelines on the Rights of the Child, on IHL, on FoRB and on Freedom of Expression refer to 'political dialogue'; the Guidelines on Violence against Women and Girls to 'its specific dialogues on human rights'; lastly, the Guidelines on LGBTI Persons refer to 'the human rights component of political dialogues' and to 'specialised dialogues' such as human rights dialogues (*supra* note 7).

⁶⁴ Most Guidelines primarily charge the EU Heads of Missions (HoMs) with this task: see, for example, Guidelines on Violence against Women and Girls, *supra* note 7, para. 3.2.5.; Guidelines on Children and Armed Conflict, *supra* note 7, para. 11; Guidelines on HRD, *supra* note 7, para. 8 and Guidelines on IHL, *supra* note 7, para. 15 (b). However, some of the Guidelines also refer to Heads of Missions of Civilian Operations, EU Military Commanders as well as 'appropriate EU representatives, including [...] EU Special Representatives', viz. 'EU Special Representatives': see e.g. Guidelines on Children and Armed Conflict, *supra* note 7, para. 11; Guidelines on IHL, *supra* note 7, para. 15 (b). The Guidelines on FoRB and those on Freedom of Expression also refer to relevant CSDP missions: Guidelines on FoRB, *supra* note 7, para. 47; Guidelines on Freedom of Expression, *supra* note 7, para. 41.

⁶⁵ See, for example, Guidelines on IHL, *supra* note 7, para. 16 (h).

⁶⁶ EDRi, 'EDRi Comments on Article 24 of the EU Action Plan on Human Rights and Democracy and the EU Human Rights Guidelines on Freedom of Expression Online and Offline' (August

A first challenge concerns the knowledge of the Guidelines by the officials on the ground. In its aforementioned report, EDRI submitted that the communication of the Guidelines [on freedom of expression] still had potential to be greatly improved, arguing that very few organisations knew of their existence, and calling for the strengthening of communication and engagement with civil society.⁶⁷ Similarly, when studying the implementation of the Guidelines on HRD, Bennett found that the recommendations laid down in the Guidelines had not been systematically implemented by all Member States and that implementation was inconsistent.⁶⁸ Knowledge of the Guidelines varies greatly from diplomatic mission to mission, depending on the diplomats on the ground and their background knowledge: not all of them are human rights specialists.⁶⁹ Secondly, people on the ground matter. Diplomatic missions often charge juniors in embassies with dealing with the Guidelines and do not always bring the Guidelines to the attention of other members of the mission. Consequently, 'guidance notes' on the Guidelines are now being circulated, offering a brief explanation of best practices regarding their implementation.⁷⁰ Lastly, the Guidelines suffer from the gap that exists between 'headquarters' and field missions. Some diplomats prefer focusing on their primary task – fostering bilateral relations – and tend to attach less attention to the Guidelines so as not to hamper bilateral ties. In this regard, frustrations have been noted on the lack of coherent planning for the implementation of the Guidelines, with human rights too often being side-lined by other EU policy priorities.⁷¹

The difficulties involved in the implementation of the Guidelines could explain why the adoption of new Guidelines is not foreseen in the new Action Plan 2015-2019. However, in a 2015 Resolution the European Parliament has hinted at the adoption of more Guidelines, calling on the Commission [sic.] to define, in conjunction with the Parliament and civil society, the criteria for selecting the topics covered by Guidelines, so as to bring clarity to the selection process.⁷²

Nowadays the Guidelines are being complemented by the EU's human rights country strategies. The main advantage of these country strategies compared to the Guidelines lies in their bottom-up approach. Whereas the Guidelines are often perceived by Delegations and Missions on the ground as being imposed on them by 'Brussels', the EU human rights country strategies originate from the experience and input of the EU Delegations themselves, creating a sense of greater ownership. Since the country strategies are complementary to the

2015), at 6, available at <https://edri.org/files/EEAS_freedom_of_expression_EDRI_comments.pdf>.

⁶⁷ *Ibid.*, at 3.

⁶⁸ K. Bennett, 'European Union Guidelines on Human Rights Defenders: A Review of Policy and Practice towards Effective Implementation', 19 (7) *The International Journal of Human Rights* 2015, at 1.

⁶⁹ C.C. Muguza et al., 'Report Mapping Legal and Policy Instruments of the EU for Human Rights and Democracy Support,' Frame Deliverable No. D12.1, 31.7.2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf>>.

⁷⁰ Interview with EU official, *supra* note 8.

⁷¹ K. Bennett, *supra* note 63, at 6.

⁷² European Parliament, *supra* note 34, para. 43. See the remark regarding the EEAS, *supra* note 32.

Guidelines, their first section always refers to the relevant Guidelines in the relation with the country concerned.

6. DO EU HUMAN RIGHTS GUIDELINES HAVE ADDED VALUE?

Although Guidelines are instruments of policy formulation and not legally binding, they are supposed to play an important role in the EU's external human rights actions. They ought to provide EU Delegations and Member State diplomatic Missions with practical tools and information in order to foster priority areas of human rights in their work. However, in some crucial areas such as economic, social and cultural (ESC) rights, the EU has not (as of yet) developed any Guidelines. Considering that the Union's silence on ESC rights is one of the most frequent criticisms it faces externally,⁷³ it could be argued that Guidelines on this topic – if properly implemented – would strengthen the EU's credibility and underline its commitment to the indivisibility of human rights, as stated in Article 21(1), first para. TEU.

As noted above, there are obstacles to be overcome in the implementation of the Guidelines, such as the lack of knowledge on the Guidelines, staff rotations and a general 'Guideline fatigue' among officials. Partly for the same reasons there is currently no strong advocacy for the development of new Guidelines. Moreover, in relation to the development of new Guidelines the issue of selectivity arises. This selectivity can be considered a natural result of the applicable decision-making process in the Council. In cases such as the death penalty, where there is a great common ground within the EU, agreeing on Guidelines is rather obvious. Finding consensus on issues such as migration or ESC rights is much more challenging, given the conflicting interests and visions of Member States.

These considerations do not imply that the instrument of Guidelines should be discarded. On the contrary, Guidelines still constitute the basis for policy and action on the ground. However, a recurrent and overarching challenge for the EU lies in the mainstreaming of human rights throughout the Union's policies. So far the EU cannot be deemed to live up to this theme, taken up in the 2012 Strategic Framework, which stated:

'The EU will promote human rights in all areas of its external action without exception. In particular, it will integrate the promotion of human rights into trade, investment, technology and telecommunications, Internet, energy, environmental, corporate social responsibility and development policy as well as into Common Security and Defence Policy and the external dimensions of employment and social policy and the area of freedom, security and justice, including counter-terrorism policy. In the area of development cooperation, a human rights based approach will be used to

⁷³ J. Wouters and K. Meuwissen, 'The European Union at the UN Human Rights Council: Multilateral Human Rights Protection Coming of Age?', 135 *European Journal of Human Rights* 2014, at 146.

ensure that the EU strengthens its efforts to assist partner countries in implementing their international human rights obligations'.⁷⁴

In this respect, knowledge and implementation of the Guidelines should be fostered among EU actors in general and not only among actors involved exclusively in human rights activities and/or the EU's external relations.

In 2006, the Council issued a paper on mainstreaming human rights across CFSP and other EU policies, which also pays attention to the Guidelines, holding that their implementation should be strengthened further.⁷⁵ The paper indicated several means for doing so: (i) Capitals, Heads of Missions and the Commission should give wider publicity to the Guidelines, for example by postings/links on Member States' and EU Delegations' websites, public events, and translation of Guidelines and other major human rights documents into key foreign languages (*inter alia* Russian, Chinese, Farsi, Arabic); (ii) geographical working parties, in consultation with COHOM, should consider supporting thematic focus actions under the Guidelines; (iii) COHOM should continue to ensure effective implementation and follow up to the Guidelines; and (iv) COHOM should continue the practice of reviewing implementation of the Guidelines on a regular basis.

In our view, special attention ought to go to a more rigorous, systematic and effective training of officials in the field, both in EU Delegations and in Member State diplomatic missions. This idea was endorsed by the European Parliament, when it urged the EEAS and the Member States to engage in continued training and awareness-raising among EEAS and EU Delegation staff, and among Member State diplomats, so as to make sure that the Guidelines have the intended effect in shaping actual policies on the ground.⁷⁶ This indeed poses a serious challenge: a study by Bennett on the implementation of the Guidelines on HRD revealed that the training available to diplomats on human rights does not consistently include an effective implementation of the Guidelines and that, even where EU Member States provide mandatory human rights training, some diplomats remain left out or are personally not committed.⁷⁷ A commitment to further elaborating systematic training and developing useful training methodologies thus becomes crucial. For example, the EEAS could extensively utilise the experiences of EU human rights focal points to share best practice examples in trainings.⁷⁸

⁷⁴ Council of the European Union, *supra* note 2.

⁷⁵ Council of the European Union, Mainstreaming Human Rights across CFSP and other EU Policies, Doc 10076/06, 7.6.2006, available at <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/hr/news66.pdf>.

⁷⁶ European Parliament, *supra* note 34, para. 46.

⁷⁷ K. Bennett, *supra* note 63, at 13.

⁷⁸ The 2012 Strategic Framework and Action Plan on Human Rights and Democracy provided for the completion of a network of focal points on human rights and democracy in EU Delegations and CSDP missions and operations (Action 5 (b)). These focal points are responsible for dealing with democracy and human rights issues in the countries of the respective delegations, including contact with and support to local civil society organisations and launching and selecting proposals through calls open to local civil society organisations, see European Union External Action Service, EU Action Plan on Human Rights and Democracy 2015-2019 (20 July 2015), available

7. CONCLUDING REMARKS

From our analysis, EU Human Rights Guidelines emerge as valuable policy instruments with the potential to strengthen EU human rights diplomacy and to provide EU representatives on the ground with the tools to intensify and steer human rights-related aspects of their work.

Considering their lack of legally binding force, but importance as steering instruments for the EU's external human rights objectives, the Guidelines are to be considered mere policy instruments. This is in line with the EU's preference for positive measures in pursuing its human rights objectives in relation to third countries. However, as has been pointed out by several scholars, the question of how and when to resort to negative measures has not been comprehensively addressed in the EU's official discourse, rendering the EU an easy target for accusations of incoherence and selectivity in the choices it has made.⁷⁹ This can also apply to the Guidelines: there are certain fields in which the EU has not (yet) adopted any Guidelines, arguably because of pragmatic considerations based on self-interest rather than ideological convictions in terms of human rights protection.

Although EU Human Rights Guidelines can be considered valuable policy instruments, they need to be implemented more rigorously, especially by EU Member States in their external action, in order to unlock their full potential. Lack of awareness, lack of training and lack of capacities are the main hurdles for effective implementation. Furthermore, the current range of Guidelines risks giving the impression of selectivity, thereby potentially undermining the Union's credibility.

at <http://eeas.europa.eu/factsheets/news/150720_eu_action_plan_on_human_rights_and_democracy_2015-2019_factsheet_en.htm> and <<http://www.eidhr.eu/focal-points#>>.

⁷⁹ A. Egan and L. Pech, *supra* note 29.

THE PROMOTION OF SOCIAL RIGHTS AND LABOUR STANDARDS IN THE EU'S EXTERNAL TRADE RELATIONS

Samantha Velluti

1. SETTING THE CONTEXT AND FOCUS OF ANALYSIS

At European Union (EU) level, there has been a growing realisation that trade and international economic law can have a significant impact on much more than economic activity and that they can raise profound questions of social concern. As a consequence, the EU has increasingly been employing a social conditionality approach, which aims to secure compliance with specified international labour standards. The methods used as conditionality are made up of two elements: the “stick”, i.e. a punitive method in order to punish proven breaches of human rights standards with the elimination of trade preference, by imposing trade sanctions against third countries that do not observe them (negative conditionality) and the “carrot”, i.e. an incentive method that provides for additional preferential treatment through reduced tariffs and market access, to reward achievements in respecting and promoting human rights and social and environmental standards (positive conditionality).

The focus of analysis of this paper is on the EU's increased practice of promoting social rights and international labour standards in its external trade relations, unilaterally through the Generalised System of Preferences (GSP; and largely under its incentive scheme, namely the GSP+), and at regional and bilateral levels via international agreements, which encompass reciprocal or non-reciprocal preferential trade links with third countries. Many EU trade agreements include social incentive clauses and condition trade concessions and market access on the respect and implementation of internationally recognised human rights and social and environmental standards. In this context, the paper intends to unpack the tensions in the discourse and practice of the EU's promotion of social rights in its external trade relations.

EU social trade has received both much praise and much criticism. The European Commission has claimed that it provides the greatest possible contribution to strengthening the social dimension of development cooperation.¹ In a similar vein, some have argued that there is evidence showing an improvement in labour rights in the signatory countries of EU preferential trade agreements, which is exhibited *ex post* as a result of learning by civil society actors dur-

¹ European Commission – ILO, Memorandum of Understanding Concerning the Establishment of a Strategic Partnership between the International Labour Organisation and the Commission of the European Communities in the Field of Development, Brussels, 17.7.2004, and Geneva, 16.7.2004, available at <https://ec.europa.eu/europeaid/sites/devco/files/memorandum-of-understanding-ec-ilo-2004_en.pdf>.

ing the implementation phase of labour provisions.² At the other end of the spectrum, it has been argued that the GSP programme has allowed the EU to provide significant trade benefits to countries that have abhorrent human and labour rights records,³ and that the GSP+ scheme and its conditionality has not yet resulted in significant changes in the situation “on the ground” in beneficiary countries.⁴

The above diverse if not opposing views about EU social conditionality immediately present us with the controversy surrounding the trade-labour linkage and a certain degree of scepticism in relation to the effectiveness of any policy, agreement, measure or arrangement aimed at linking non-commercial objectives to trade. It also brings to light issues of legitimacy and credibility of EU external action, particularly in relation to the EU’s normative mission as a global human rights actor, which has been reinforced by the 2009 Treaty of Lisbon. Despite the major changes introduced by this treaty in relation to the constitutional design of the EU’s external relations,⁵ particularly in relation to the EU Common Commercial Policy (CCP),⁶ the EU’s authority to act on external matters of trade and labour is all but clear. Even though the scope of the EU’s CCP has been interpreted broadly by the Court of Justice of the European Union (CJEU),⁷ labour issues in trade agreements remain within the Member States’ competence, giving rise to the phenomenon of mixed agreements.⁸

Equally problematic is another key change introduced by the Treaty of Lisbon, namely, the injection of a normative approach into the EU’s external relations via Article 3(5) and 21 TEU. Here, issues of consistency and coherence in the EU external action inevitably remain, which are explained to a great extent by the extant complexity of the EU’s external relations framework originating in the duality between its Common Foreign and Security Policy (CFSP) and

² E. Postnikov and I. Bastiaens, ‘Does Dialogue Work? The Effectiveness of Labor Standards in EU Preferential Trade Agreements’, 21 *Journal of European Public Policy* 2014, 923-940.

³ J. Vogt, ‘A Little Less Conversation: The EU and the (Non) Application of Labour Conditionality in the Generalised System of Preferences (GSP)’, 31 *International Journal of Comparative Labour Law and Industrial Relations* 2015, 285-304.

⁴ CARIS, ‘Mid-Term Evaluation of the EU’s Generalised System of Preferences’, Report commissioned by the EC, Centre for the Analysis of Regional Integration at Sussex, University of Sussex (2010), available at <<http://www.sussex.ac.uk/caris/projects>>. The final report is available at: <http://trade.ec.europa.eu/doclib/docs/2010/may/tradoc_146196.pdf>.

⁵ T. Ramopoulos and J. Wouters, ‘Charting the Legal Landscape of EU External Relations Post-Lisbon’, Leuven Centre for Global Governance Studies, *Working Paper* No. 156 (March 2015), available at <https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp151-160/wp156-ramopoulos-wouters.pdf>.

⁶ E.g. Arts. 3(1)e TFEU, 206, 207 and 218 TFEU; see further: G. Villalta Puig and B. Al-Haddab, ‘The Common Commercial Policy after Lisbon: An Analysis of Reforms’, 36 *European Law Review* 2011, at 289; M. Bungenberg and C. Hermann (eds.), ‘Common Commercial Policy after Lisbon’, *European Yearbook of International Economic Law/Special Issue* (Heidelberg: Springer 2013).

⁷ P. Koutrakos, *EU International Relations Law* (Oxford: Hart Publishing 2015), chs. 2-3.

⁸ C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited – The EU and its Member States in the World* (Oxford: Hart Publishing 2010); C. Timmermans, ‘The Court of Justice and Mixed Agreements’, in A. Rosas, E. Levits and Y. Bot (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (The Hague: TMC Asser Press 2013), 659-674.

the non-CFSP competences, which was maintained by the Treaty of Lisbon.⁹ The uneven balance between “high” and “low” politics of EU external actions¹⁰ still justifies the selection of two different sets of substantive policy-making and implementation procedures to cover “political” and “economic” aspects of EU external action, in spite of the single procedure envisaged in Article 218 TFEU for the adoption of international agreements. This unclear EU external relations framework has been made most visible by a series of inter-institutional disputes in the field of external representation and conclusion of international agreements.¹¹

When it comes to issues that go beyond trade, as most international agreements of the EU do, potential conflicts are not limited to the content of the agreements, but also extend to the very objectives pursued by these agreements. To put it shortly, is linking trade to labour a way of protecting domestic industries or promoting EU values? In this context, other questions arise concerning the way the EU furthers the trade-labour linkage, such as: what are the reasons for the EU's reluctance to include a legally enforceable social clause in trade agreements?¹²

This paper takes as a starting point the fact that, while the EU portrays itself externally as speaking with a “single voice” to its trade partners, internally the lack of a clear division of competences shows that it operates as a “pluralistic entity” through a pooling of international representation of various internal actors. As a “conflicted trade power”¹³ the EU cannot always exert real influence externally particularly when the trading partner is a powerful global economic or geopolitical player. Linked to this, EU external trade policy is highly driven,

⁹ Art. 24(1), para. 2 TEU, which stipulates that the CFSP ‘is subject to specific rules and procedures.’

¹⁰ The term “high” politics refers to foreign policy *sensu stricto* and it concerns international or national security; “low” politics refers to policies and measures that are not essential to world or national security, such as economic or social policies and development aid.

¹¹ P. Van Elswege, ‘The Potential for Inter-Institutional Conflicts before the Court of Justice: Impact of the Lisbon Treaty’, in M. Cremona and A. Thies (eds.), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Oxford: Hart Publishing 2014), at 123-24. The *Mauritius* case (CJEU, Case C-658/11, *European Parliament v. Council* [2014] ECR I-01469), concerning the action for annulment by the European Parliament against a Council Decision on the signing and conclusion of an agreement with Mauritius on the conditions of transfer of suspected pirates and associated seized property from the EU-led naval force to Mauritius, and their treatment subsequent to their transfer (Council Decision 2011/640/CFSP, OJ [2011] L 254/1, 30.9.2011), shows that the CFSP is no longer isolated from the rest of the EU legal order, even though no control of substance is possible other than that envisaged in Art. 275(2) TFEU in connection with Art. 40 TEU (the so-called “mutual non-affectation clause”) and Art. 215 TFEU (concerning restrictive measures against natural or legal persons). In particular, the case shows how Art. 218 TFEU provides for a single procedure for negotiating and concluding international agreements, spanning the supranational pillar and the former intergovernmental pillar of the CFSP and Area of Freedom, Security and Justice (AFSJ).

¹² The only exceptions are the GSP scheme and the 2008 EU-CARIFORUM Economic Partnership Agreement (EPA) with Caribbean countries (CARICOM and the Dominican Republic), where a weak form of conditionality is envisaged.

¹³ S. Meunier and K. Nicolaidis, ‘The European Union as a Conflicted Trade Power’, 13 *Journal of European Public Policy* 2007, at 906.

albeit not exclusively, by domestic-societal vested interests with exporters being key drivers of the EU's recent leverage agenda.¹⁴

For the above reasons, EU discourse and practice in relation to social conditionality in trade offer a rather complicated picture. On the one hand, they seem to indicate that the EU utilises the trade-labour linkage as an invaluable development tool. On the other hand, the absence of a uniform and coherent understanding and approach to the trade-labour linkage and the reticence to rely on hard conditionality in certain cases of serious labour violations seems to suggest that the EU utilises the trade-labour linkage instrumentally, and in a carefully planned manner as part of broader strategic geo-political, economic and foreign policy objectives. In the latter instance, this reticence seems to demonstrate that the EU is not willing to go beyond the realm of rhetoric.

Against this background, the paper intends to investigate whether a deeper analysis of the EU's social conditionality discourse and practice shows a strong commitment of the EU towards the promotion of social rights and labour standards in its external trade relations that transcends any form of reticence and goes beyond the realm of rhetoric. With the changes introduced by the Treaty of Lisbon, social clauses in trade agreements are not mere EU foreign policy instruments, but rather mechanisms that the EU should use to comply with its obligations under the EU treaties, particularly in the light of Articles 3(5) and 21(1) TEU which recognise economic and social rights as a matter of justice that must be extended to external trade relations.

The paper starts by looking at the importance of the EU's role as a global human rights actor within the broader framework of 21st century globalisation. This analysis is important as it helps us to better understand and evaluate the way the EU promotes social rights and labour standards in its external trade relations. The paper then proceeds to examine the main rationales of the trade-labour linkage, followed by a critical evaluation of social conditionality in EU external trade relations, drawing examples from previous and current EU practice at unilateral, regional and bilateral levels. The conclusion brings together and reflects on the main findings of the paper.

2. THE EU AS A REGIONAL ENTITY WITH A "GLOBAL VOCATION" AND A "SOCIAL AMBITION"

As a supranational entity, the EU has an important role in the context of new globalisation and transnational forces that dominate the 21st century, which involve a new geography of trade and a trend towards growing multipolarity. As global trends have come to dismantle barriers, bringing about destabilisation and imposing changes at domestic level, law inevitably has had to follow suit. This, in turn, has led to a scenario whereby not only legal techniques

¹⁴ For further discussion in the context of domestic politics and how the former shapes different strategies of the EU and the United States (US) towards social standards, see T. Leeg, 'Carrots or Sticks? Social Standards in Preferential Trade Agreements of the EU and the US', Paper Presented at the Young Researchers' Master Class, European Union in International Affairs (EUIA) Biennial Conference, Brussels (11-13 May 2016).

have become outmoded and the need for change has become conspicuous, but also, the aspirations of law and policy have themselves undergone significant transformation¹⁵ Lobel notes that 'in many contexts, the interconnections between the object of regulation (the economy) and the strategy by which it is regulated (law) motivate the push for renewal through the adoption of market practices in the public sphere'.¹⁶ This overarching change has established a link between contemporary problems in the organisation of the economy and innovative legal theory on regulation and governance to react to increasing heterogeneity.

The EU may thus provide a forum for the effective systematisation of these new transnational processes by providing non-state actors with a specific role in the policy-making process. In addition, the EU can foster the protection of economic and social rights by assigning the role of "guarantor" and "organiser" to national legislation. Externally, the EU forms an integral part of a postmodern trend in international capitalism, which increases processes of privatisation of the law and promotes a stronger legal culture of contract. In this context, the EU has acquired a unique role, acting on the one hand as a liberalising force for international capitalism and, on the other, as a regulator of globalising economic forces.¹⁷ In this context, the new forms of governance that have come to life should therefore be seen as a product of the contingencies of history and transnationalism, with multiple overlapping and conflicting jurisdiscape.¹⁸ The blurring of the public-private divide has significant implications in relation to the question of the EU's polity identity as it raises questions on whether government is public, private or a combination of the two. In this broad and fluid "fusion zone" the public sector becomes more open to the dynamics, techniques and language of the market, whereas private actors have to deal with conditions set by public authority or integrate broader citizen concerns on their own initiative and to improve their market position, often under the banner of corporate social responsibility.¹⁹

This new scenario in global governance can be seen in the context of social trade, where the EU has started to deploy a mixture of law and policy instruments and to interact with different actors to foster the trade-labour linkage, particularly in the context of the new generation of free trade agreements (FTAs), where organised civil society has been given an important role in the implementation and monitoring of the Trade and Sustainable Development chapter of these agreements. As Reddy puts it:²⁰

¹⁵ O. Lobel, 'The Renewal Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought', 89 *Minnesota Law Review* 2004, at 364.

¹⁶ *Ibid.*, at 366.

¹⁷ S. Velluti, *New Governance and the European Employment Strategy* (London: Routledge 2010), at 15.

¹⁸ A. Appadurai, *Modernity at Large: Cultural Dimensions of Globalisation* (Minneapolis, MN: University of Minnesota Press 1996).

¹⁹ S. Smismans, 'Governance: The Solution for Active European Citizenship, or the End of Citizenship?', 13 *Columbia Journal of European Law* 2007, 619-620.

²⁰ S. Reddy, 'Foreword. International Trade as a Means to Diverse Ends: Development, Workers, the Environment, and Global Public Goods', in O. De Schutter (ed.), *Trade in Service of Sustainable Development* (Oxford: Hart Publishing 2015).

'it is reasonable to suggest that the world trading system must be evaluated, at least in part, according to the consequences that it generates, and that these can in turn be assessed according to criteria which are, at least in part, public and shared. [...] International human rights instruments and global development goals, imperfect though they are, testify to the possibility of such concurrence.'

The EU constitutes a formidable platform for developing an integrated system to further diverse goals through the coordinated action of various institutions. It is a regional body with an embedded integrated approach to goals as evidenced increasingly by its Internal Market law and policy, which relies on a common institutional structure and the combined use of negative and positive forms of harmonisation to achieve them. Moreover, as a regional entity with a "global vocation"²¹ to promote human rights, the EU now has a regulatory framework enabling it to mobilise various instruments of governance in a social perspective.²²

The EU stands as a model of a highly competitive social market economy²³ 'reflecting the ambition of furthering diverse economic and social aims simultaneously, however much that model is both incomplete and under threat.'²⁴ The Treaty of Lisbon has refocused attention on a holistic approach to European integration, and the goals of full employment, social progress and cohesion have been relaunched in the context of a new 'highly competitive social market economy'.²⁵ These goals cannot be ignored when seeking to promote fair and sustainable market growth. Article 9 TFEU promotes social mainstreaming for the attainment of these non-economic goals and may thus be defined as a "horizontal social clause", which is in line with other horizontal clauses in the TFEU concerning gender equality, environmental protection, consumer protection and the fight against discrimination,²⁶ and has to be taken into account in the adoption and implementation of all EU actions and policies,²⁷ including external relations.

Article 3 TEU and Articles 34-36 in Chapter IV on 'Solidarity' of the EU Charter of Fundamental Rights and Freedoms, which can be considered the main provisions for adopting redistributive social policies, while not justiciable²⁸

²¹ M. Cremona, 'Rhetoric and Reticence: EU External Commercial Policy in a Multilateral Context', 38 *Common Market Law Review* 2001, 359-396.

²² A. Perulli, 'Fundamental Social Rights, Market Regulation and EU External Action', 30 *The International Journal of Comparative Labour Law and Industrial Relations* 2014, at 37.

²³ Art. 3(3) TEU.

²⁴ See S. Reddy, *supra* note 20, at xv; for further analysis, see D. Damjanovic, 'The EU Market Rules as Social Market Rules: Why the EU Can Be a Social Market Economy', 50 *Common Market Law Review* 2013, 1685-1718.

²⁵ See A. Perulli, *supra* note 22, at 34.

²⁶ Arts. 8, 10, 11 and 12 TFEU.

²⁷ See A. Perulli, *supra* note 22, at 34.

²⁸ The main reason of their lack of justiciability is that they are mainly construed as principles; the difference between rights and principles is enshrined in Articles 51(1) and 52(5) of the EU Charter. In particular, the latter speaks about principles being 'judicially cognisable' only in relation to the interpretation of their implementing acts and the ruling on their legality. For further examination, see M. Delfino, 'The Court and the Charter: A "Consistent" Interpretation of Fundamental Social Rights and Principles', 6 *European Labour Law Journal* 2015, 86-99; S. Robin-Olivier,

or not creating new competences for the Union with regard to these welfare areas,²⁹ remain nevertheless legal norms which can be used within the negative welfare integration process and thus be employed for developing the EU social market economy.³⁰ EU market rules, namely competition and state aid law, the free movement rules and the public procurement rules, can also be read as enabling social market rules for the creation of a social market economy, particularly after the revisions of the Treaty of Lisbon.³¹ This is not to deny that at present the way labour rights are balanced against economic rights, such as, for example, the right to provide services in the Internal Market, remains problematic, or that labour law standards are somewhat restricted because they need to comply with economic paradigms. *Laval*,³² *Rüffert*,³³ *Bundesdruckerei*³⁴ and *Regiopost*³⁵ illustrate how socially responsible public procurement remains difficult to pursue and thus confirm the downgrading of labour law standards' relevance. However, the argument that this could change in the future should not be entirely dismissed. That the EU is, or better-said, portrays itself as a model of social market economy, can be seen by the fact that the promotion of non-commercial objectives through trade relations has gained significant prominence in EU external action, particularly since the entry into force of the Treaty of Lisbon. The latter reinforced the EU's external commercial competence³⁶ whilst, at the same time, injecting a normative dimension in its international relations via Articles 3(5) and 21(1) TEU, thus advancing values, principles and objectives that are emphatically presented as "European" and whose universal application is sought via explicit reference to compliance with international law.³⁷ Further, the objective of consistency has also been included in the CCP with the obligation for the Union to conduct its policy in the broader context of the principles and objectives of the Union's external action.³⁸ In addition, there is an obligation to respect human rights externally pursuant to Article 21(3)(1)

'The Contribution of the Charter of Fundamental Rights to the Protection of Social Rights in the European Union: A First Assessment after Lisbon', 1 *European Journal of Human Rights* 2013, 109-134.

²⁹ Art. 51(2) of the EU Charter.

³⁰ See D. Damjanovic, *supra* note 24, at 1715.

³¹ *Ibid.*, at 1689.

³² CJEU, Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

³³ CJEU, Case C-346/06, *Dirk Rüffert v. Land Niedersachsen* [2008] ECR I-01989.

³⁴ CJEU, Case C-549/13, *Bundesdruckerei GmbH v. Stadt Dortmund*, ECLI:EU:C:2014:2235.

³⁵ CJEU, Case C-115/14, *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*, ECLI:EU:C:2015:760. The decision in *Regiopost* highlights once again the complexities of using contracts to pursue contract-unrelated policies such as social considerations. While it reverses *Rüffert* thus opening new horizons for the protection of posted workers and space for regional protection, collective negotiation and action remain restricted.

³⁶ Art. 3(1)e TFEU and Arts. 206 and 207 TFEU and 218 TFEU (in relation to the increased powers of the EU Parliament in the CCP).

³⁷ S. Velluti, 'Human Rights Conditionality in the EU GSP Scheme: "A Focus on Those in Need or a Need to Refocus?"', in N. Ferreira and D. Kostakopoulou (eds.), *The Human Face of the European Union: Is EU Law and Policy Humane Enough?* (Cambridge: Cambridge University Press forthcoming).

³⁸ Arts. 207(1) TFEU; 3(5) TEU.

TEU.³⁹ Through the insertion of foreign policy objectives, the EU's "common ideology", enshrined largely in the TEU, has now acquired an external dimension, which also expresses the core principles of how its community is to shape the international order and a particular vision of global governance itself.⁴⁰

3. THE FOUNDATIONS OF THE TRADE-LABOUR LINKAGE

3.1. The trade-labour linkage rationales

Various rationales for including labour provisions in trade agreements have been put forward, namely, a social, economic and human rights rationale⁴¹ The overarching reason is the existence of interdependence between different sets of problems and objectives.⁴² Following on from this is the other equally important rationale of creating incentives for actors and, in particular, states to take actions that are desirable or to refrain from taking actions that are undesirable in terms of labour standards.⁴³ The social rationale aims at providing redress against the negative social effects of globalisation processes and it is meant to ensure the enforcement of domestic labour laws concerning the protection of workers in compliance with common international labour standards, thus reflecting a broader concern for safeguarding social protection. The economic rationale is premised by the idea of using labour provisions as tools to prevent unfair competition by ensuring a level playing-field to encourage labour standards in the exporting country that are comparable with those in the importing country. In this context, fair trade is thus a means to implement free trade.⁴⁴ The International Labour Organisation (ILO) Constitution Preamble provides that: 'the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.'⁴⁵ Arguably, any WTO member could claim that another member's failure to respect social rights impedes its ability to uphold social rights within its

³⁹ L. Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', 25 *European Journal of International Law* 2014, 1071-1091; cf. E. Cannizzaro, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels', 25 *European Journal of International Law* 2014, 1093-1099.

⁴⁰ J. Larik, 'Entrenching Global Governance: The EU's Constitutional Objectives Caught between a Sanguine World View and a Daunting Reality', in B. Van Vooren et al. (eds.), *The EU's Role in Global Governance* (Oxford: Oxford University Press 2013), at 20.

⁴¹ ILO, Report: The Social Dimensions of Free Trade Agreements (6 November 2013), at 6-7, available at <http://www.ilo.org/global/research/publications/WCMS_228965/lang--en/index.htm>; see also European Commission, Final Report: The Use, Scope and Effectiveness of Labour and Social Provisions and Sustainable Development Aspects in Bilateral and Regional Free Trade Agreements (15 September 2008), ch. 2, available at <<http://ec.europa.eu/social/main.jsp?catId=89&furtherNews=yes&langId=en&newsId=480>>.

⁴² See S. Reddy, *supra* note 20, at vi-xi.

⁴³ *Ibid.*, at ix-xi.

⁴⁴ See A. Perulli, *supra* note 22, at 31.

⁴⁵ International Labour Organisation (ILO), Constitution of the International Labour Organisation (ILO), 1.4.1919.

own territory.⁴⁶ The reason would be that a state's tolerance of labour violations could significantly undermine another state's protection of labour by increasing the pressure on that state to tolerate similar labour abuses or risk losing investments to the violation.⁴⁷ In the 2008 ILO Declaration on Social Justice for a Fair Globalization,⁴⁸ it is stated that: 'the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage.' The Declaration recognised the impact of trade and financial policies on employment and social rights and referred to the need to develop and employ an integrated approach in the promotion of decent work, through the cooperation with other international and regional organisations.⁴⁹ The human rights rationale uses labour provisions as a means for ensuring respect for labour-related human rights that reflect values universally accepted by the international community, and also for improving labour standards generally.

The existence of such diverse rationales underlying the labour-trade linkage requires us to acknowledge that there isn't a single, privileged form of justification for rights. To date, there has been a tendency to believe that engaging philosophically with human rights equates to engaging with them as a by-product of some commitment to a broader moral theory.⁵⁰ As Tasioulas aptly points out, this is a limitative and privileged vision of how to conceive a philosophical account of human rights' justification, and such an approach must be challenged, precisely because there may be overlapping strands that go towards justifying each right.⁵¹ What matters, is that we attempt to make sense of human rights⁵² and abandon the philosophical mistake to reduce everything to a system where everything follows from a set of given principles.⁵³

3.2. The EU context and the democratising role of the European Parliament

Three broad forces have maintained and increased the demand for EU social measures linked to transnational trade processes: the pace of globalisation; the risk of trade policy failure and associated adjustment measures, as well as changes in the institutional framework of key international organisations⁵⁴ The EU Parliament's increased role and visibility in the EU's external relations

⁴⁶ C. Thomas, 'The WTO and Labour Rights: Strategies of Linkage', in S. Joseph et al. (eds.), *The World Trade Organisation and Human Rights: Interdisciplinary Perspectives* (Cheltenham: Elgar 2009), at 257.

⁴⁷ Ibid.

⁴⁸ Available at <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf>.

⁴⁹ See A. Perulli, *supra* note 22, at 31.

⁵⁰ J. Tasioulas, 'On Human Rights', interview with Five Books, available at <<http://fivebooks.com/interview/human-rights/>>.

⁵¹ Ibid.

⁵² J. Nickel, *Making Sense of Human Rights* (Oxford: Wiley-Blackwell 2007).

⁵³ See J. Tasioulas, *supra* note 50.

⁵⁴ S. Velluti, 'The EU's Social Dimension in its External Trade Relations', in A. Marx et al. (eds.), *Global Governance of Labour Rights: Assessing the Effectiveness of Transnational Public and Private Policy Initiatives* (Cheltenham: Elgar 2015), 42-62.

following the changes introduced by the Treaty of Lisbon also constitutes an important factor in furthering the social dimension of EU international trade agreements. According to a study that looks at why the EU Parliament is such a strong supporter of linking social norms to EU trade policy, the notion of social trade is a story-line around which coalitions in the EU Parliament can unite, because its construction is vague and can thus be subject to different interpretations.⁵⁵ This is good in terms of yielding a broad consensus among very different political groups within the EU Parliament, but it is bound to generate provisions in legislative measures or clauses in international agreements that are watered down in terms of their legal enforceability, to the extent that it will be harder to ensure effective implementation and coherence in terms of results, of which the Trade and Sustainable Development Chapter in the new FTAs is a case in point. As the analysis shows further below, what we end up having is an asymmetric relationship between the labour and trade provisions, whereby the former are either not prescriptive in nature or not legally enforceable.

The EU Parliament remains a strong advocate of the trade-labour linkage. This flows from its ongoing commitment to the protection of human rights *lato sensu*, as well as its democratic legitimation function that may be said to be independent and separate from that of the Member States. The Treaty of Lisbon has given the EU Parliament a stronger role in relation to the conclusion of international agreements, which is of great significance given that it constitutes a formally independent voice for EU citizens.⁵⁶ The EU Parliament has been given a right to be informed at all stages of the procedure for adopting international agreements.⁵⁷ It has also acquired a wide power of approval of international Treaties.⁵⁸ It is noticeable, however, that the EU Parliament cannot introduce amendments to the text of the proposed agreement, but can only entirely approve it or entirely reject it. There is thus no *ex ante* formal control of the EU Parliament envisaged in Article 218 TFEU.⁵⁹ In spite of this limitation, since the entry into force of the Treaty of Lisbon, the EU Parliament has used

⁵⁵ L. Van den Putte, 'Divided We Stand – The European Parliament's Position on Social Trade in the Post-Lisbon Era', in A. Marx et al. (eds.), *supra* note 54, 63-82.

⁵⁶ On the powers of the EU Parliament in the external relations of the EU post-Lisbon, see C. Eckes, 'How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures', *Jean Monnet Working Paper* No. 12/14, available at <<http://jeanmonnetprogram.org/paper/how-the-european-parliaments-participation-in-international-relations-affects-the-deep-tissue-of-the-eus-power-structures/>>; K. Raube and J. Wouters, 'The Many Facets of Parliamentary Involvement and Interaction in EU External Relations', Leuven Centre for Global Governance Studies, *Working Paper* No. 174 (April 2016).

⁵⁷ Art. 218(10) TFEU (and specifically for international trade agreements Article 207(3) TFEU); see also the Framework Agreement on Relations between the European Parliament and the Commission, OJ [2010] L304/47, 20.11.2010, Annex 11, which goes beyond the strict wording of the Treaty on the Functioning of the EU, thereby strengthening the EU Parliament's role in the negotiations and conclusion of international agreements. It could be argued that this agreement is an expression of the duty of sincere cooperation under Art. 4(3) TEU and the principle of inter-institutional balance as per Art. 13(2) TEU; see also CJEU, Case C-658/11 (the *Mauritius* case), *supra* note 11.

⁵⁸ Art. 218(6)(a) (i)-(v) TFEU; compare with former Art. 300(3) subpara. 2 TEC.

⁵⁹ A. Ripoll Servent, 'The Role of the European Parliament in International Negotiations after Lisbon', 21 *Journal of European Public Policy* 2014, 568-586.

its increased powers forcefully, and it has refused to give its consent to various international agreements such as the Terrorist Finance Tracking Program (TFTP) with the United States,⁶⁰ in order to protect data protection rights of EU citizens,⁶¹ and the multilateral Anti-Counterfeiting Trade Agreement (ACTA),⁶² due to a potential threat to civil liberties.⁶³ Similarly, the EU Parliament has refused to give its consent to, *inter alia*, the EU-Morocco Fisheries Partnership Agreement,⁶⁴ because further to the 2002 Opinion of the UN Legal Counsel Hans Corell, there was no evidence in the agreement that the fishery activities were to the benefit of, and according to, the wishes of the people of Western Sahara.⁶⁵ In *Frente Polisario*, the EU General Court (GC) has ordered the partial annulment of a Council Decision on the conclusion of an agricultural, processed agricultural and fisheries products agreement with Morocco insofar as it is applied to Western Sahara.⁶⁶ As explained by Vidigal,⁶⁷ this landmark ruling is important in a number of respects. First, the EU is under an obligation to ensure respect for the fundamental rights of non-EU nationals in non-EU territory.⁶⁸ Second, “entirely neutral” agreements, which do not require the violation of fundamental rights, may still fail to conform to this obligation if they favour the occurrence of such a violation.⁶⁹ Third, the fact that an agreement

⁶⁰ Agreement between the European Union and the United States of America on the Processing and Transfer of Financial Messaging Data from the European Union to the United States for Purposes of the Terrorist Finance Tracking Program, OJ [2010] L8/11, 13.1.2010.

⁶¹ European Parliament, Legislative Resolution of 11 February 2010 on the Proposal for a Council Decision on the Conclusion of the Agreement between the European Union and the United States of America on the Processing and Transfer of Financial Messaging Data from the European Union to the United States for Purposes of the Terrorist Finance Tracking Program (05305/1/2010 REV 1 – C7-0004/2010 – 2009/0190(NLE)), Doc P7_TA(2010)0029, 11.2.2010.

⁶² Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America, Doc 12195/11, 23.8.2011.

⁶³ European Parliament, Legislative Resolution of 4 July 2012 on the Draft Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America, 12195/11, 2011-C7-0027/2012-2011/0167(NLE)), Doc P7_TA-PROV(2012)0287, 4.7.2012.

⁶⁴ European Parliament, Legislative Resolution of 14 December 2011 on the Draft Council Decision on the Conclusion of a Protocol between the European Union and the Kingdom of Morocco Setting out the Fishing Opportunities and Financial Compensation Provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco (11226/2011-C7-0201/2011-2011/0139(NLE)), Doc P7_TA(2011)0569, 14.12.2011.

⁶⁵ Letter Dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, Addressed to the President of the Security Council, United Nations Security Council, Doc S/2002/161, 12.2.2002, available at: <<http://www.arso.org/UNlegaladv.htm>>.

⁶⁶ Council Decision 2012/497/EU, 8.3.2012; GC, Case T-512/12, *Frente Polisario v. Council of the European Union*, ECLI:EU:T:2015:953. An appeal against this decision has been lodged before the CJEU; CJEU, Case C-104/16 P, *Council v. Frente Polisario* [pending case].

⁶⁷ G. Vidigal, ‘Trade Agreements, EU Law, and Occupied Territories (2): The General Court Judgment in *Frente Polisario v Council* and the Protection of Fundamental Rights Abroad’, EJIL: Talk!, 11 December 2015, available at <<http://www.ejiltalk.org/13901-2/>>.

⁶⁸ CJEU, Case C-104/16 P, paras. 227-228.

⁶⁹ *Ibid.*, paras. 239-241 and 246.

may 'indirectly encourage' the violations of fundamental rights, or that the EU 'benefits from them', is sufficient to trigger the duty to take into account the specific elements of the agreement.⁷⁰ In other words, even if a violation of fundamental rights is not an object of the agreement, such a violation may be its *consequence* or an *effect*.⁷¹ With regard to the ILO Conventions and in particular CLS, in December 2011, the EU Parliament voted to block the textile agreement between the EU and Uzbekistan due to the country's continuous use of a state-sponsored system of cotton production based on forced labour of children and adults.⁷²

From the above, we can see that with the Treaty of Lisbon, the EU Parliament has acquired renewed democratic legitimation and monitoring control functions in relation to international agreements that it clearly intends to exercise. Combined with its general promotion of human rights, the EU Parliament has undoubtedly acquired an increasingly important role in relation to social trade.

3.3. Social trade as an "unobjectionable norm" and the EU's new common commercial policy

The analysis carried out in the preceding sections helps us to understand the reasons for the widening and deepening of labour provisions in EU trade agreements, and why social trade has rapidly become an "unobjectionable norm" in the EU context, which has also been used to find public support in the face of criticism against FTAs.⁷³ The status of "unobjectionable norm" acquired by social trade has become embedded in EU discourse and practice not only externally but also internally. The EU is integrating social, labour and environmental standards in important areas of the Internal Market, such as, for example, public procurement, as illustrated by Directive 2014/24/EU.⁷⁴ The Directive links public procurement with sustainable development and injects an approach based on social responsibility and solidarity. At all stages of the procedure there is now an obligation for Member States and contracting authorities to comply with social and environmental legislation and labour law

⁷⁰ *Ibid.*, paras. 231 and 238.

⁷¹ See G. Vidigal, *supra* note 67.

⁷² EU Parliament Resolution of 15 December 2011 on the Draft Council Decision on the Conclusion of a Protocol to the Partnership and Cooperation Agreement Establishing a Partnership between the European Communities and their Member States, of the One Part, and the Republic of Uzbekistan, of the Other Part, Amending the Agreement in Order to Extend the Provisions of the Agreement to Bilateral Trade in Textiles, Taking Account of the Expiry of the Bilateral Textiles Agreement (16384/2010 – C7-0097/2011 –2010/0323(NLE)), Doc P7_TA(2011)0586, 15.12.2011.

⁷³ L. Van den Putte and J. Orbie, 'EU Bilateral Agreements and the Surprising Rise of Labour Provisions', 31 *International Journal of Comparative Labour Law and Industrial Relations* 2015, 263-283.

⁷⁴ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC, OJ [2014] L94/65, 28.3.2014; for further analysis, see E. Van den Abeele, 'Integrating Social and Environmental Dimensions in Public Procurement: One Small Step for the Internal Market, One Giant Leap for the EU?', *ETUI Working Paper* No. 8 (2014), available at <<http://www.etui.org/Publications2/Working-Papers>>.

and to combat excessively low tenders.⁷⁵ Another example is the Renewable Energy Directive,⁷⁶ which introduces “social sustainability criteria”, and linked to the latter a reporting system concerning the ratification and implementation of certain conventions of the ILO.⁷⁷

The Treaty of Lisbon has constitutionalised this complementarity and parallelism between the internal and external dimension of EU action first developed by the Court of Justice of the European Union (CJEU).⁷⁸ With regard to the scope of the CCP, this entails that when the EU exercises its powers under the CCP, it is subject to the same limitations on its competence that exist in the Internal Market with regard to the same subject matter. However, as Dimopoulos posits: ‘this does not mean that the lack of exercise of Union internal competences poses a limitation on the existence or the exercise of external competence’.⁷⁹ New Article 207 TFEU somewhat differs from its predecessor,⁸⁰ as it enables the EU to depart from a strict parallelism between internal and external economic relations,⁸¹ thus marking a new approach of the CJEU to the objectives of the EU in the context of the CCP, from “evolutionary” to “global”.⁸²

⁷⁵ Art. 18(2) and Recital 37; Annex X, which lists the International Social and Environmental Conventions mentioned in Art. 18(2), Art. 69; see also Art. 71, which is aimed at preventing sub-contracting chains.

⁷⁶ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives, Doc 2001/77/EC and Doc 2003/30/EC, OJ [2009] L 140/16, 5.6.2009.

⁷⁷ For further analysis, see A. Lendle and M. Schaus, ‘Sustainability Criteria in the EU Renewable Energy Directive: Consistent with WTO Rules?’, *ICTSD Information Note No. 2* (September 2010), available at <<http://www.ictsd.org/downloads/2011/12/sustainability-criteria-in-the-eu-renewable-energy-directive-consistent-with-wto-rules.pdf>>; L. German and G. Schoneveld, ‘Social Sustainability of EU-Approved Voluntary Schemes for Biofuels: Implications for Rural Livelihoods’, Center for International Forestry Research, *Working Paper No. 75* (2011), available at <http://www.cifor.org/publications/pdf_files/WPapers/WP75German.pdf>; S. Bigerna, C.A. Bollino and S. Micheli, *The Sustainability of Renewable Energy in Europe* (Heidelberg: Springer 2015); information on national action plans and progress reports is available at <<https://ec.europa.eu/energy/en/topics/renewable-energy/renewable-energy-directive>>.

⁷⁸ Judgment of the Court of 14 July 1976 in Joined Cases 3, 4 and 6/76, *Cornelis Kramer and Others* [1976] ECR 1279; Opinion of the Court of 26 April 1977, n. 1/76 *Draft Agreement Establishing a European Laying-Up Fund for Inland Waterway Vessels* [1977] ECR 741. Art. 21(3) TEU provides that the Union’s general external policy objectives should be respected and pursued also in “the development and implementation of the external aspects of its other policies”, and Art. 207 (3)-(2) TFEU provides that the EU’s CCP agreements shall be compatible with internal Union policies and rules; Art. 207(6)(a) TFEU establishes explicit parallelism between internal and external EU competences. External powers cannot be used to override the limits of internal Union competence with regard to the same subject matter.

⁷⁹ A. Dimopoulos, ‘The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Relations?’, 4 *Croatian Yearbook of European Law and Policy* 2008, at 118.

⁸⁰ Former Art. 133 EC.

⁸¹ See A. Dimopoulos, *supra* note 79.

⁸² H.H. Voogsgeerd, ‘The Nature of the Asymmetry between Trade and Labour Rights in Trade Agreements of the EU’, Paper Presented at the European Union in International Affairs (EUIA) Biennial Conference, Brussels (11-13 May 2016). This interpretative approach of the CJEU can be seen in the *Daiichi Sankyo* case where an act of the EU concerning intellectual property issues was in dispute; CJEU, Case C-414/11, *Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v. DEMO Anonymos Viomichaniki kai Emporiki Etairia Farmakon*, ECLI:EU:C:2013:520.

The shift towards a “global approach” in its interpretation of Treaty provisions is particularly salient for the purposes of the present analysis as the CJEU’s departure from the confines of the Internal Market can be of aid in broadening the scope of the EU’s CCP, provided that a given EU measure falls within the remit of international trade and, more generally, is also in line with post Lisbon EU policy developments.

The overarching changes brought about by the new globalisation forces of the 21st century has also led to a new conceptualisation of EU trade policy, which was first envisioned in the 2010 Trade, Growth and World Affairs (TGWA) Strategy.⁸³ This Communication signalled a departure from EU trade policy largely based on trade in goods and customs tariffs to one based on the three pillars, of trade in goods, trade in services and investment with a focus on non-tariff barriers, standards, domestic taxation and competition. At the same time, the TGWA recognised that globalisation processes negatively impact certain sectors of the economy and specific categories of workers, and cause environmental damage (thus suggesting the European Globalisation Adjustment Fund (EGAF) as a means to provide some form of redress). In the new EU trade strategy Trade for All – Towards a More Responsible Trade and Investment Policy,⁸⁴ this shift in focus has been further expanded in order to include a parallel concern for the environment, human rights, including social rights with explicit reference to the EGAF as a meaningful remedy for consumers, workers and small and medium enterprises (SMEs). In addition, there is explicit reference to using trade agreements and trade preference programmes as levers to promote around the world values such as sustainable development, human rights, fair and ethical trade and the fight against corruption, as well as improving the responsibility of supply chains.

4. EU TRADE EMBEDDED DEVELOPMENT MODELS

4.1. Unilateral trade arrangements: The GSP scheme

The EU’s GSP is an autonomous non-contractual and non-reciprocal trade arrangement, which was first set up in 1971 (and since then subject to periodical revision) through which the EU provides preferential access to the EU market to a certain number of developing countries and territories, in the form of reduced tariffs for their goods when entering the EU market. To this end, it accords tariff preferences to countries, which fulfil certain economic criteria in terms of poverty and non-diversification of exports. Social considerations, however, were inserted in the scheme only in January 1995, when the new GSP scheme for industrial products entered into force. The first objective pursued by the GSP is to contribute to the growth of developing countries’ economies by helping them reduce poverty. Secondly, it also aims at improving their political and social situation by promoting good governance and sustainable development.

⁸³ Commission Communication, COM (2010) 612 final, 9.11.2010.

⁸⁴ Available at <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf>.

In 2005, the GSP+ incentive regime was set up following the decision handed down by the WTO Appellate Body in January 2004, which upheld the findings of the WTO adjudicating panel concluding the WTO-inconsistency of the EU's GSP scheme in relation to its drug arrangements.⁸⁵ The incentive scheme offers additional benefits under certain conditions to support vulnerable countries in their ratification and implementation of international conventions, including ILO Conventions. To qualify for GSP+, countries must ratify and effectively implement international standards in the field of human rights, Core Labour Standards (CLS), sustainable development and good governance.⁸⁶ In particular, since 2005 GSP+ beneficiaries need to ratify and effectively implement all eight ILO fundamental conventions that together make up the four CLS,⁸⁷ which enhances the legitimacy of the ILO labour standards laid down in these conventions.

The preferences granted by the GSP+ may be withdrawn from the beneficiary if the latter fails to implement the necessary Conventions. There is also the special EBA arrangement, pursuant to which the Least Developed Countries (LDCs) receive full duty and quota-free access to the EU market with the exception of arms and armaments. The EU pursues a two-fold objective with these unilateral trade reference schemes: on the one hand, it rewards countries that are vulnerable but willing to ratify and implement key International Conventions on sustainable development, including human rights and CLS, with additional tariff reductions under GSP+; on the other hand, it will temporarily withdraw GSP preferences in case of serious and continued violations of these Conventions. As will be seen in the next section, the EU has used its power to withdraw access from beneficiary countries very rarely, and only in response to grave violations of ILO labour standards rather than human rights more generally. The above buttresses arguments according to which, despite the EU's purported development goals, in particular its efforts to improve the value of preferences for the "neediest", the GSP scheme is used as a tool to improve the EU's leverage in trade negotiations with emerging economies.

Assessing the effectiveness of the trade-labour linkage in EU unilateral trade arrangements: the case of the GSP+

Benefits under the GSP+ incentive scheme are seldom withdrawn. Where they are withdrawn, this is temporary, reflecting the EU's intention to use GSP

⁸⁵ European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WTO Doc WT/DS246/R (2003) [7.161] (Report of the Panel) ('*Tariff Preferences Panel Report*'); WTO Doc WT/DS246/AB/R, AB-2004-1 (2004) (Report of the Appellate Body) ('*Tariff Preferences Appellate Body Report*').

⁸⁶ For a list of the 27 core conventions, see Annex VIII of Regulation (EU) No. 978/2012 of the European Parliament and of the Council of 25 October 2012 Applying a Scheme of Generalised Tariff Preferences and Repealing Council Regulation (EC) No. 732/2008, OJ [2012] L303/1, 31.10.2012, at 1.

⁸⁷ The eight ILO Conventions are: (i) freedom of association and the right to collective bargaining (Conventions 87 and 98); (ii) the elimination of all forms of forced or compulsory labour (Conventions 29 and 105); (iii) the effective abolition of child labour (Conventions 138 and 182); and (iv) the elimination of discrimination in respect of employment and occupation (Conventions 100 and 111).

conditionality as a “carrot”, namely, as an incentive to make progress on human rights, sustainable development and good governance.

The effects of withdrawal of GSP+ benefits have varied. For example, in 2008, the Commission opened an investigation into El Salvador, following a judgment of the El Salvador Supreme Court that El Salvador’s ratification of ILO Convention No. 87 on freedom of association and the right to organise was unconstitutional.⁸⁸ The prospect of loss of access to GSP+ benefits appears to have been instrumental in persuading the El Salvadorian government to amend the Constitution so as to render ratification of the Convention constitutional. The Commission therefore terminated the investigation, as it found that there was no longer reason for justifying the temporary withdrawal of the GSP+.⁸⁹ Similarly, the Commission initiated an investigation into Bolivia concerning the effective implementation of the United Nations Single Convention on Narcotic Drugs⁹⁰ following Bolivia’s decision to withdraw from the said Convention as of 1 January 2012. However, Bolivia continued to give effect to the Convention, and on 10 January 2013, Bolivia’s request to re-accede was accepted. Consequently, the Commission stopped its investigation in March 2013.

The case of Sri Lanka differs from those of El Salvador and Bolivia. A Commission investigation, drawing on United Nations (UN) reports and statements as well as findings of human rights non-governmental organisations (NGOs), found widespread violations of the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1984 Convention against Torture (CAT), and the 1989 Convention on the Rights of the Child (CRC). The Commission proposal to withdraw access to the GSP+ from Sri Lanka that followed this investigation was not sufficiently persuasive to convince the Sri Lankan government to take adequate measures to address the violations identified by the investigation. Sri Lanka was then temporarily suspended from the GSP+ scheme in August 2010.⁹¹ Prior to this, the Commission had offered to delay the entry into force of the withdrawal by six months (decision was made in January 2010) in exchange of ‘tangible and sustainable progress on a number of outstanding issues’.⁹²

⁸⁸ European Commission, Decision 2008/316/EC of 31 March 2008 Providing for the Initiation of an Investigation Pursuant to Article 18(2) of Council Regulation (EC) No. 980/2005 with Respect to the Protection of the Freedom of Association and the Right to Organise in El Salvador, *OJ* [2008] L 108/29, 18.4.2008.

⁸⁹ Commission Communication, Report of the Investigation Pursuant to Article 18(2) of the Council Regulation (EC) No. 980/2005 with Respect to the Protection of the Freedom of Association and the Right to Organise in El Salvador, C (2009) 7934, 2009.

⁹⁰ European Commission, Implementing Decision 2012/161/EU of 19 March 2012 Providing for the Initiation of an Investigation Pursuant to Article 17(2) of Council Regulation (EC) No. 732/2008 with Respect to the Effective Implementation of the United Nations Single Convention on Narcotic Drugs in Bolivia *OJ* [2012] L 80, 20.3.2012, at 30.

⁹¹ European Commission, Implementing Regulation (EU) No. 143/2010 of 15 February 2010 Temporarily Withdrawing the Special Incentive Arrangement for Sustainable Development and Good Governance Provided under the Regulation (EC) No. 732/2008 with Respect to the Democratic Socialist Republic of Sri Lanka, *OJ* [2010] L 45/2010, 22.7.2010, at 1.

⁹² European Commission, Press Release, ‘EU Regrets Silence of Sri Lanka Regarding Preferential Import Regime’ (5 July 2010), Doc IP/10/888, available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=589%20>>.

While it is not clear whether the EU's GSP+ scheme is fully WTO compliant – particularly with the Most-Favoured Nation (MFN) principle (Article I:1 GATT) on the basis of the exceptions provided under Article XX GATT- questions have arisen concerning the lack of transparency in the decision-making process pursuant to which third countries are granted GSP+ preferences, as well as issues of selective conditionality and double standards.⁹³ There have also been questions concerning the review of implementation of the relevant Convention requirements for the granting of GSP+ benefits. In particular, the monitoring of the GSP+ has been subject to criticism due to various GSP+ beneficiary countries having a particularly poor record as regards one or more CLS. Infringements of CLS have often been reported⁹⁴ and the EU Parliament has continuously called upon the Commission to monitor more strictly the compliance with ILO labour standards, and asked for the suspension of preferences in respect of countries that breach fundamental rights. In addition, according to a study conducted by CARIS,⁹⁵ the GSP+ scheme and its conditionality has not yet resulted in significant changes in the situation “on the ground” in beneficiary countries.

Some of these problems have been addressed by the revised GSP which entered into force in 2014, examined below.

Reform of the GSP

In 2012, the EU adopted a reformed GSP law with the aim of strengthening the overall effectiveness of the GSP scheme.⁹⁶ The reform tackled some of the above problems. It reduced the number of beneficiaries focusing on those developing countries most in need and reinforcing the incentives in respect of core human and labour rights, and environmental and good governance standards.⁹⁷ With regard to the labour criteria for the GSP+, according to Article 9(1) of the 2012 GSP Regulation a beneficiary country can now benefit from the enhanced preferences if:

- (1) it has ratified all the conventions listed in Annex VIII and the most recent available conclusions of the relevant monitoring bodies do not identify a ‘serious failure’ to effectively implement any of these conventions;

⁹³ See S. Velluti, *supra* note 37.

⁹⁴ EU Parliament, Report on the External Dimension of Social Policy, Promoting Labour and Social Standards and European Corporate Social Responsibility (2010/2205(INI)), Committee on Employment and Social Affairs, Doc A7-0172/2011, 20.4.2011.

⁹⁵ See CARIS, *supra* note 4, at 166.

⁹⁶ Regulation (EU) No. 978/2012 of the European Parliament and of Council of 25 October 2012 Applying a Scheme of Generalised Tariff Preferences and Repealing Council Regulation (EC), No. 732/2008, OJ [2012] L303/1, 31.10.2012.

⁹⁷ The list of beneficiaries has been modified several times to reflect the exit from and the entry of countries newly meeting the eligibility conditions for each of the three types of arrangements since the first modifications effected with the 2012 reform, which at the time of writing is as follows: 30 GSP, 13 GSP+ and 49 EBA beneficiaries; European Commission, Report from the Commission to the European Parliament and the Council, Report on the Generalised Scheme of Preferences Covering the Period 2014-2015, COM (2016) 29 final, 28.1.2016.

- (2) it gives a binding undertaking to maintain ratification of the conventions listed in Annex VIII and to ensure their effective implementation;
- (3) it accepts without reservation the reporting requirements imposed by each convention and gives a binding undertaking to accept regular monitoring and review of its implementation record in accordance with the provisions of the conventions listed in Annex VIII; and
- (4) it gives a binding undertaking to participate in and cooperate with the monitoring procedure referred to in Article 13.

For Vogt,⁹⁸ the revised eligibility criteria is a step back from the previous labour criteria as an applicant country could be deemed eligible for the GSP+ so long as the relevant monitoring bodies have not identified a “serious failure” to effectively implement the Conventions. He also argues that the standard of “serious failure” is too low and reference to most recent reports of monitoring bodies is limitative. Specifically, the Commission will consider whether there is a “serious” violation for purposes of entry into the GSP+ only if there is a “special paragraph” in the report of the ILO Committee on Application of Standards (CAS) to the International Labour Conference. There is no textual support in the 2012 GSP Regulation for such a narrow interpretation and reference is made only in staff working documents of the Commission. Moreover, the restrictive interpretation of the entry criteria for the GSP+ does not take into account the overall supervisory system of the ILO which is made up of various committees of experts. This constitutes a significant limitation of the GSP+ scheme as it allows countries that do not comply with the ILO Conventions to become or remain GSP+ beneficiaries. For example, in 2014 Pakistan and Guatemala – two notorious labour rights violators – were granted GSP+. While the decision to include Pakistan in the GSP+ may have justification on humanitarian grounds further to the devastating flooding of 2010, thus showing a willingness on the part of the EU to support the economy of this country through trade measures, the inclusion of Guatemala in the GSP+ is more difficult to justify. It is particularly disconcerting considering that this country has appeared before the CAS more than any other country (including Myanmar which was suspended from the standard GSP scheme in 1997 for forced labour practices and reinstated only in 2012) and is faced with the continuous threat of a Commission of Inquiry at the ILO for serious and systematic violations of the Freedom of Association and Protection of the Right to Organize Convention (No. 87).⁹⁹ In 2011, the US initiated arbitration against Guatemala under Article 16(2)a of the 2004 Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR).¹⁰⁰ The US v. Guatemala arbitration should have been a fairly expedited process further to Chapter 20 of the CAFTA-DR

⁹⁸ See J. Vogt, *supra* note 3.

⁹⁹ Further information is available at <http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:3088000,en:NO> and <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_419599.pdf>.

¹⁰⁰ Further information is available at <<http://www.dol.gov/ilab/trade/agreements/guatemala/sub.htm>>.

which provides for a fast-track arbitration procedure. However, after initiating this punitive approach, the US subsequently moved to a more cooperative approach further to a series of enhanced labour enforcement measures that Guatemala agreed to pursue. These measures included the hiring of significant numbers of new labour inspectors and the creation of fast-track processes for labour courts to adopt fines recommended by Guatemala's Ministry of Labour for labour law violations. Hence, the filing of a CAFTA state-to-state arbitration used as a "stick" clearly led to the diplomatic "engagement" between the US and Guatemala. In September 2014, the US announced that it would finally proceed to arbitration against Guatemala.

Guatemala has ceased to be a GSP+ beneficiary country from January 1, 2016. However, the reason for this is that it benefits from preferential market access under the 2012 EU-Central America trade agreement, and not because of a decision of the Commission to withdraw GSP+ preferential treatment for labour rights abuses.

The monitoring of GSP+ compliance has been enhanced and the Commission has a key monitoring function in relation to the status of ratification and effective implementation of the Conventions, as well as ensuring that the beneficiaries cooperate with the Conventions' monitoring bodies. Together with the European External Action Service ('EEAS'), the Commission has set up a structured monitoring process: an ongoing "GSP+ dialogue" with the beneficiary authorities, formalised through annual lists of issues known as "scorecards". Every two years the Commission reports to the EU Parliament and the Council on the fulfilment status of those conditions using scorecards for each GSP+ recipients.¹⁰¹ These scorecards are an important source of information for the Commission as it enables it not only to establish a form of cooperation with beneficiary countries through the so-called "GSP+ dialogue" but also to constructively discuss beneficiaries' commitments to the ILO Conventions within the relevant international organisations, such as the ILO Tripartite Committee on the Application of Standards or the ILO Governing Body.¹⁰² The limitation of this monitoring system is that it lacks transparency as the evaluation contained in these scorecards is not publicly available. In addition, since it involves only state actors, it is difficult to know whether these scorecards actually lead to government consultations.¹⁰³

In its 2016 report on the revised GSP scheme to the European Parliament and the Council,¹⁰⁴ which also includes an analysis of the GSP+ the Com-

¹⁰¹ Art. 14(1) of Regulation (EU) No. 978/2012, *supra* note 96.

¹⁰² European Commission, The EU Special Incentive Arrangement for Sustainable Development and Good Governance ('GSP+') Covering the Period 2014–2015. Accompanying the document: Report from the Commission to the European Parliament and the Council Report on the Generalised Scheme of Preferences During the Period 2014–2015 (COM (2016) 29 final), SWD (2016) 8 final, 28.1.2016.

¹⁰³ L. Van den Putte et al., 'What Social Face of the New EU Trade Agreements? Beyond the 'Soft' Approach', *ETUI Policy Brief* No. 13 (2015), at 3, available at <file:///C:/Users/Utente/Downloads/Policy%20Brief%202015.13%20Van%20den%20Putte%20et%20al.%20(1).pdf>.

¹⁰⁴ European Commission, Report from the Commission to the European Parliament and the Council, Report on the Generalised Scheme of Preferences Covering the Period 2014–2015, COM (2016) 29 final, Brussels, 28.1.2016.

mission emphasised the importance of strengthening the EU's engagement with other international organisations, and their local offices in the beneficiary countries, such as the ILO and the United Nations (UN) to ensure that GSP+ monitoring and evaluation by the EU continuously takes into account their views and experiences. It also recognised the significance of a wide range of sources for gathering information including civil society, social partners, the European Parliament and the Council. GSP+ monitoring visits by the Commission, together with the assistance of EU Delegations, have also proven to be beneficial in this respect. The Commission has also stressed the importance of beneficiary countries taking ownership of the monitoring process and becoming more proactive in addressing the issues in the scorecards. In addition, the Commission has been funding cooperation projects in beneficiary countries such as the GSP+ pilot project on capacity building in partnership with the ILO in Pakistan, Mongolia, Guatemala and El Salvador to support local administrations to put administrative structures in place.¹⁰⁵

The GSP+ status shall be withdrawn temporarily in respect of all or certain products originating in the beneficiary country if the beneficiary country does not respect its binding undertakings.¹⁰⁶ The burden of proof of compliance with the Conventions is now on the beneficiary country. If the Commission has a 'reasonable doubt' that the country is not respecting its binding undertakings, it shall adopt a decision to initiate the procedure for withdrawal and shall inform the European Parliament and the Council of the EU. The Commission shall state grounds for the reasonable doubt, and specify a time not greater than six months for beneficiary country to submit its observations, during which the Commission will give every opportunity to cooperate. The Commission shall seek all information it considers necessary, *inter alia*, the conclusions and recommendations of the relevant monitoring bodies, and in drawing its conclusions, it shall assess all relevant information.

To sum up, the reform has addressed some of the concerns previously raised by reducing the number of beneficiaries and by strengthening the monitoring of compliance. That said, the revised eligibility criteria, particularly those for the GSP+, are problematic as they can allow a country with a record of serious labour rights abuses to become eligible for the GSP+ scheme.

4.2. Regional and bilateral trade agreements

After the failure at multilateral level to include a social clause in the WTO, the EU has been increasingly including labour provisions in its bilateral and regional agreements. Since the 1990s, most EU preferential agreements con-

¹⁰⁵ As part of its on-going collaboration and cooperation with the ILO (ILO 2013), the European Commission has provided a grant to the ILO for a 2-year pilot-project to strengthen the capacity of public administrations to apply the eight Fundamental ILO Conventions. The project was launched on 1 October 2015 and consists of ILO technical assistance, workshops, trainings, as well as awareness-raising activities.

¹⁰⁶ As referred under Art. 9, see Art. 15 of Regulation (EU) No. 978/2012, *supra* note 96.

tain provisions on labour standards and cooperation in social affairs.¹⁰⁷ In the early agreements, social norms have been taken up as issues for cooperation between the EU and its trading partners. In subsequent agreements, social norms have been raised to the status of human rights.¹⁰⁸ The EU approach largely relies on cooperation and dialogue with a reluctance to use sanctions and a preference for civil society involvement.

The 2000 Cotonou Partnership Agreement (CPA)¹⁰⁹ occupies a particularly prominent position as it is the most comprehensive partnership agreement between developing countries. The CPA, which provides the framework for Economic Partnership Agreement (EPA) negotiations, reflects a policy shift in EU development policy from preferential market access to mutual free trade between the EU and African, Caribbean and Pacific (ACP) regions, in which development is the overriding goal. However, this shift to differentiated reciprocity is partially based on the EU's own commitment to make its trade agreements compatible with the WTO rules. So this change is guided, to a certain extent, by self-interest. Nevertheless, it is still noteworthy that both the EU and the ACP countries have equally committed themselves to respect CLS and to enhance cooperation in this area, for example, through the adoption and enforcement of legislation and, at the same time, rejecting the use of labour standards for protectionist purposes, as provided in Article 50, which is the key labour clause of the agreement. The latter is mainly promotional in nature, reaffirming standards that do not create binding obligations and which, according to Alston, may undermine ILO's supervision.¹¹⁰

Kenner maintains that Article 50 should not be viewed in isolation, but within the broader context of the agreement's trade and development regime.¹¹¹ In particular, the labour clause 'entrenches the CLS within the partnership as recommended by the World Commission on the Social Dimension of Globalization (WCSDG).' This is based on the view that the objectives of the ILO can be best achieved with the cooperation of regional actors and through transposition

¹⁰⁷ Full text access to European FTAs and their labour provisions can be found at <http://ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/WCMS_115822/lang-en/index.htm#P4_728>.

¹⁰⁸ For example, the Preambles of the 1997 EU's Cooperation Agreements with Cambodia and Laos, Yemen and the Former Yugoslav Republic of Macedonia refer to the need to complement economic with social development as well as the respect for basic social rights. The 1999 EU-South Africa Trade, Development and Cooperation Agreement with South Africa and the 2005 EU-Algeria Association Agreement also refer to the need to respect fundamental social rights and provide for dialogue and cooperation in social matters.

¹⁰⁹ The CPA was concluded for a 20-year period from 2000 to 2020 between the EU and 79 ACP countries. Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the Other Part, signed in Cotonou on 23 June 2000, OJ [2000] L317, 15.12.2000, at 3. It has been revised twice: in Luxembourg on 25 June 2005 (OJ [2005] L 209, 11.8.2005, at 27) and in Ouagadougou on 22 June 2010 (OJ [2010] L 287, 4.11.2010, at 3).

¹¹⁰ P. Alston, "Core Labour Standards" and the Transformation of the International Labour Rights Regime', 15(3) *European Journal of International Law* 2004, at 511.

¹¹¹ J. Kenner, 'Economic Partnership Agreements: Enhancing the Labour Dimension of Global Governance?', in B. Van Vooren, S. Blockmans and J. Wouters (eds.), *The EU'S Role in Global Governance: The Legal Dimension* (Oxford: Oxford University Press 2013), at 316.

into the CPA of those obligations stemming from the 1998 ILO's Declaration, which in turn are 'subject to the oversight of the parties and coordinated action under the EU-ILO strategic partnership.'¹¹² This is reflected in Article 8, which clearly states that priority is given to political dialogue in relation to the essential elements (Annex VII) to avoid scenarios in which a party might deem it justified to activate the non-execution clause provided in Article 96. The latter foresees the holding of consultations, excepted in the cases of 'special urgency', in circumstances where a party considers that the other party has failed to fulfil an obligation stemming from the essential elements clause. It is only when these consultations between the parties fail that appropriate measures may be taken. In any event, these measures shall be revoked as soon as the reasons for taking them have disappeared.

Article 9 envisages several features that link development and human rights to labour standards and social policies.¹¹³ First, development is 'centred on the human person', who is seen as the protagonist and beneficiary for development, entailing 'respect for and promotion of all human rights.' Respect for human rights is regarded as integral to sustainable development.¹¹⁴ Second, the definition of human rights includes respect for fundamental social rights. In addition, the CPA provides for the use of dispute settlement in relation to the interpretation and application of their human rights clauses, including appropriate measures adopted under these clauses.¹¹⁵ However, what is problematic is that the essential elements clause in Article 9(2) has been invoked to initiate a consultation procedure mainly for coups d'état or flawed election processes with a reluctance to use it in relation to social and economic rights.¹¹⁶ Besides these more technical legal aspects of the agreement, the CPA seems to have had a negative impact on local communities, as tariff liberalisation has led to an increase in unemployment levels in certain key agriculture sectors and, in some instances, to their collapse such as in the case of poultry meat production.¹¹⁷ The CPA, therefore, seems to be instrumental to the EU's need to have access to the markets of emerging economies, rather than to the development needs of third countries.

¹¹² Ibid.

¹¹³ See J. Kenner, *supra* note 111, at 315.

¹¹⁴ Ibid.

¹¹⁵ Cf. with the EU-Central America Association Agreement, which provides that an affected party can request that an urgent meeting be called to bring the parties together within fifteen days for a thorough examination of the situation with a view to seeking a solution acceptable to the parties, see Art. 355(5).

¹¹⁶ E.g. the coup d'état in Guinea Bissau in 2003, the coup d'état in Central African Republic in 2003, and flawed elections in Togo in 2003, for further analysis, see L. Mbangi, 'Recent Cases of Article 96 Consultations', European Centre for Development Policy Management (ECDPM), *Discussion Paper No. 64C* (August 2005).

¹¹⁷ A. Kwa, P. Lunenburg and W. Musonge, 'African, Caribbean and Pacific (ACP) Countries' Position on Economic Partnership Agreements (EPAs)', Study for the EU Parliament, Directorate-General for External Policies of the Union, Directorate B, Policy Department, Doc EXPO/B/DEVE/2013/30 (April 2014); J.T. Gathii, 'The Cotonou Agreement and Economic and Partnership Agreements', United Nations Human Rights, Office of the High Commissioner, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (New York, Geneva: United Nations 2013), 259-273.

In addition, with the exception of Article 50 of the CPA, social norms in EU agreements seem to have been included as objectives to be achieved under the umbrella term of “sustainable development” rather than enforceable legal commitments as they do not provide for genuine enforcement mechanisms. As Bartels points out ‘it is notable that the principle of sustainable development has never been treated as a concrete obligation in itself: none of the agreements admit the possibility of violating the principle of sustainable development.’¹¹⁸ This is because ‘the exact implications of sustainable development for trade agreements are far from clear due to the normative uncertainty surrounding the concept of sustainable development, which has played out differently in varied contexts and is still subject to evolution.’¹¹⁹ The agreements contain provisions on cooperation and obligations to respect and “strive” to improve multilateral and domestic labour and environmental standards.¹²⁰ In particular, a first set of obligations contain minimum obligations to implement certain multilateral obligations and other obligations, which require the parties to the agreement not to reduce their levels of protection and encouraging them to raise their levels of protection, subject to a proviso that this is not done for protectionist purposes.¹²¹ With the turn in the 1990s to social trade at the regional and bilateral levels, sustainable development has become increasingly important in the EU's trade policy¹²² and the Treaty of Lisbon has elevated it to one of the key principles underlying EU external action.¹²³

This overarching legal commitment has been given further effect with the adoption of so-called “new generation” of trade agreements containing a “trade and sustainable development” chapter, which includes provisions for the respect of labour and environmental standards. Examples of such agreements are the 2011 EU-Korea FTA,¹²⁴ the 2012 EU-Central America Agreement,¹²⁵ and the

¹¹⁸ L. Bartels, ‘Human Rights and Sustainable Development Obligations in EU Free Trade Agreements’, 40 *Legal Issues of Economic Integration* 2013, at 306.

¹¹⁹ G.M. Durán, ‘Innovations and Implications of the Trade and Sustainable Development Chapter in the EU–Korea Free Trade Agreement’, in J. Harrison (ed.), *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations* (Edinburgh: Edinburgh University Press 2013), at 126.

¹²⁰ For further analysis, see L. Bartels, ‘Social Issues: Labour, Environment and Human Rights’, in S. Lester and B. Mercurio (eds.), *Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies* (Cambridge: CUP 2009), at 342.

¹²¹ L. Bartels, *supra* note 118, at 307-309.

¹²² The first of the EU's agreements to make reference to the principle of sustainable development was the 1993 EU-Hungary Europe Agreement, see L. Bartels, *supra* note 118, at 306.

¹²³ Arts. 21(2)d and (3) TEU.

¹²⁴ Free Trade Agreement between the European Union and its Member States of the One Part, and the Republic of Korea of the Other Part (EU-Korea FTA), OJ [2011] L127/6, 14.5.2011, at 6. It entered into force in July 2011 and it is the EU's first trade agreement with an Asian country. It is also the first completed agreement in a new generation of FTAs launched by the EU in 2007 as part of its strategy to create “deep and comprehensive” free trade agreements (DCFTA) with selective partners following the Doha round stand-still at the WTO. On this point see, F. Hoffmeister, ‘The European Union as an International Trade Negotiator’, in J. Koops and G. Macaj (eds.), *The European Union as a Diplomatic Actor* (London: Palgrave Macmillan 2014), ch. 9.

¹²⁵ Agreement Establishing an Association between the European Union and its Member States, on the One Hand, and Central America on the Other (EU-CAAA), OJ [2012] L346/3, 15.12.2012, at 3.

2012 EU- Colombia/Peru Agreement.¹²⁶ The 2013 EU-Singapore FTA (which is awaiting ratification) also contains such chapter.¹²⁷ The 2008 CARIFORUM-EU agreement is worthy of mention as it is the first EPA concluded with a regional group.¹²⁸ Since the conclusion of this agreement, the inclusion of a specific chapter setting out cooperation and commitments in relation to sustainable development has become systematic. It includes a reference to the ILO Decent Work Agenda (DWA) and CLS and the clauses are worded in such a manner suggesting that there is also reference to labour rights rather than merely standards or principles. For example, Article 72 provides that investors are required to act in accordance with ILO CLS and Article 73 provides that promotion of foreign direct investment (FDI) does not take place by lowering domestic environmental, labour or occupational health and safety legislation and standards.¹²⁹ It also has a separate chapter on social aspects of trade.¹³⁰ Another innovative feature of this EPA is, firstly, the setting up of the Joint Council, which has 'the power to take decisions in respect of all matters covered by the Agreement.'¹³¹ Secondly, the EPA provides for a consultation and monitoring process, under which each party may request consultations on the interpretation and application of the social clauses in the agreement, with an advisory role for the ILO.¹³² The agreement also envisages that in the event of continued disagreement a Committee of Experts may be convened.¹³³

In general terms, while there is some variation between the provisions contained in the different agreements, there seems to be some level of commonality as to the substantive standards and the institutional set-up envisaged. Indeed, we can identify a common core of the new generation of trade agreements, such as a reaffirmation by the parties of their general commitment to promote trade in a way that fosters sustainable development; a reaffirmation that coun-

¹²⁶ Trade Agreement between the European Union and its Member States, of the One Part, and Colombia and Peru, of the Other Part, *OJ* [2012] L354/3, 21.12.2012, at 3.

¹²⁷ It is the first bilateral agreement concluded by the EU with an Association of Southeast Asian Nations (ASEAN) country and it has provided the blueprint for future bilateral agreements with other ASEAN countries; Free Trade Agreement between the European Union and Singapore, 17.10.2014, Authentic text as of May 2015 available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>>. The Commission has submitted a request for an Opinion of the CJEU in relation to the competence of the EU and the Member States and ultimately concerning the legal status of the agreement as a mixed agreement, see Opinion 2/15 Request for an Opinion Submitted by the European Commission Pursuant to Article 218(11) TFEU, *OJ* [2015] C 363/22, 3.11.2015.

¹²⁸ The regional group comprises 15 Caribbean countries: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St Lucia, St Vincent and the Grenadines, St Kitts and Nevis, Suriname, Trinidad and Tobago; Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the European Community and its Member States, of the Other Part, *OJ* [2008] L289, 30.10.2008, at 3.

¹²⁹ For commentary on the investment provisions of the 2008 CARIFORUM-EU EPA, see P.J. Cardwell and D. French, 'The European Union as a Global Investment Partner: Law, Policy and Rhetoric in the Attainment of Development Assistance and Market Liberalisation?', in C. Brown and K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press 2011), 201-222.

¹³⁰ 2008 CARIFORUM-EU EPA, Arts. 191-196.

¹³¹ *Ibid.*, Art. 229(1).

¹³² *Ibid.*, Art. 195.

¹³³ *Ibid.*

tries have the freedom to define their own level of social and environmental protection, and that social and environmental standards should not be used for protectionist purposes; a commitment to “strive” towards high levels of social and environmental protection by: a) implementing the ILO Conventions and other multilateral instruments applicable to the parties and b) respecting, promoting and realising in their laws and practice the CLS and associated ILO Conventions proclaimed in the ILO Declaration of Fundamental Principles and Rights at Work of 1998; a commitment to cooperate to develop trade schemes and trade practices favouring sustainable development; and a commitment not to lower or fail to apply social and environmental standards with a view to encouraging trade or attracting investment.

The 2011 EU-Korea FTA and the 2012 Columbia and Peru TA include a reference to decent work and four CLS; in addition to the latter agreements, the 2012 EU-CAAA refers to the need to implement fundamental ILO Conventions, contained in the 1998 ILO Declaration of Fundamental Principles and Rights at Work. These three agreements all exemplify the EU predilection for soft conditionality. In particular, the Trade and Sustainable Development Chapter (Chapter 13) of the 2011 EU-Korea FTA has served as a model for other FTA negotiations,¹³⁴ following the adoption of the *Global Europe Strategy*.¹³⁵ It exemplifies a new trend in the EU's regulatory approach to the integration of trade and environmental/labour issues at the bilateral level according to which ‘trade-labour and trade-environmental linkages are no longer conceived as exception clauses that are permissive and conditional in nature, but are further elaborated through positive commitments, as well as cooperative measures.’¹³⁶ The 2014 EU-Canada Comprehensive Economic and Trade Agreement (CETA)¹³⁷ stands out for its detailed provisions on labour issues. This is to be expected given that it is the first comprehensive economic agreement with a highly industrialised developed country, which shares a similar set of values and principles as well similar political and legal traditions with EU Member States. In the 2014 EU-CETA there are separate chapters on Trade and Sustainable Development,¹³⁸ Trade and Labour,¹³⁹ and Trade and Environment.¹⁴⁰ The Chapter on Trade and Labour is far more detailed than the one of the 2011 EU-Korea FTA, and the degree of legal obligation is phrased in stronger terms. The focus is on the effective enforcement of labour provisions, as can be seen by the binding language used, such as “shall ensure”.¹⁴¹ In particular, it is stated that the parties

¹³⁴ See G.M. Durán, *supra* note 119, 124-145.

¹³⁵ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 4 October 2006, *Global Europe: Competing in the World*, COM (2006) 567 final, 4.10.2006.

¹³⁶ See G.M. Durán, *supra* note 119, at 135.

¹³⁷ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the One Part, and the European Union and its Member States of the Other Part, Consolidate Text published 26 September 2014, available at <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf>.

¹³⁸ 2014 EU-CETA, Chapter 22.

¹³⁹ *Ibid.*, Chapter 23.

¹⁴⁰ *Ibid.*, Chapter 24.

¹⁴¹ E.g. *Ibid.*, Arts. 23.3 and 23.5, para. 2.

'shall ensure' that their labour laws embody the eight ILO CLS fundamental Conventions.¹⁴² The 2014 EU-CETA also refers to specific labour law rights related to the ILO DWA, namely, health and safety at work and the prevention of occupational injuries; acceptable minimum employment standards for wage earners, and non-discrimination of working conditions, including for migrant workers.¹⁴³ In addition, a party is not allowed to waive or derogate from its labour law and standards in order to promote trade or investment and through a sustained or recurring course of action or inaction, fail to effectively enforce its labour law and standards for the same reasons.¹⁴⁴ Each party shall encourage public debate and promote public awareness of its labour standards and their enforcement.¹⁴⁵ The 2014 EU-CETA, therefore, contains a fairly robust labour-related chapter which combines promotional with more binding elements.

The 2016 EU-Vietnam FTA¹⁴⁶ is also noteworthy. The FTA makes an institutional and legally binding linkage to the 2012 EU-Vietnam Partnership and Cooperation Agreement (PCA).¹⁴⁷ Significantly, in the latter agreement, the commitment of both parties to the respect for human rights through the human rights clause and the promotion of sustainable development have been included in one article, which seems to suggest that sustainable development has gained further prominence.¹⁴⁸ The FTA contains a Trade and Sustainable Development Chapter, which includes obligations for both the EU and Vietnam with regard to a core set of multilateral standards and agreements on labour and environment, ensuring the respect by both parties of fundamental workers' rights as well as furthering environmental governance.¹⁴⁹ With regard to labour provisions, there is reference to specific commitments on the effective implementation of each of the four ILO CLS and of all the ratified ILO Conventions (not only the fundamental ones), as well as progress towards ratification

¹⁴² *Ibid.*, Art. 23.3, para. 1. This is particularly significant given that to date Canada has ratified six of the eight Fundamental Conventions (Conventions No. 29, No. 87, No. 100, No. 105, No. 111 and No. 182).

¹⁴³ *Ibid.*, Art. 23.3, para. 2.

¹⁴⁴ *Ibid.*, Art. 23.4, paras. 2 and 3.

¹⁴⁵ *Ibid.*, Art. 23.6, paras. 1 and 2.

¹⁴⁶ Free Trade Agreement between the European Union and the Socialist Republic of Vietnam, Agreed Text as of January 2016, available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>>; see also Commission Communication, Human Rights and Sustainable Development in the EU-Vietnam Relations with Specific Regard to the EU-Vietnam Free Trade Agreement, SWD(2016) 21 final, 26.1.2016; for academic commentary see T.M.H. Hoang et al., 'Labour Provisions in Preferential Trade Agreements: Potential Opportunities or Challenges to Vietnam?', World Trade Institute, University of Bern, *SECO Working Paper* No. 2 (27 May 2014), available at <http://www.wti.org/media/filer_public/32/31/3231e444-9a9b-4fe2-a24f-38acc5ae fa98/wti_seco_wp_02_2014.pdf>.

¹⁴⁷ E.g. Preamble, Arts. X. 17 and 21 of the Chapter on Institutional, General and Final Provisions (CIGF), ch. 17, 2016 EU-Vietnam FTA; Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the One Part, and the Socialist Republic of Viet Nam, of the Other Part, 27.6.2012, available at <http://eur-lex.europa.eu/resource.html?uri=cellar:e9d99d61-6897-11e3-a7e4-01aa75ed71a1.0011.01/DOC_2&format=PDF>.

¹⁴⁸ 2012 EU-Vietnam PCA, Arts. 1(1) and (3).

¹⁴⁹ *Ibid.*, ch. 15.

of non-ratified fundamental ILO Conventions.¹⁵⁰ Overall, these new provisions clearly indicate a stronger domestic political commitment to labour reforms that will ensure a more developed domestic labour legal framework, improvement of the enforcement of domestic labour law system. It is noticeable however that a legally binding language is absent and the more nuanced terms of “recognize”, “reaffirm its commitment” or “will make continued and sustained efforts” are used as opposed to the stronger term of “shall ensure”.¹⁵¹

With regard to the institutional provisions, ministerial contact points, specialised committees and/or boards of senior officials for the purpose of implementing the trade and sustainable development chapter have been set up at government level. Government officials meet annually with labour and environmental experts in the Committee on Trade and Sustainable Development, which has been established to oversee the implementation of the Trade and Sustainable Development chapter. As regards civil society and social partners, the 2011 EU-Korea agreement provides for Domestic Advisory Groups for each party made up of civil society, business, social partners and other experts from relevant stakeholder groups, which meet at an annual Civil Society Forum.¹⁵² Similarly, the 2012 EU-Colombia/Peru¹⁵³ and EU-CAAA¹⁵⁴ agreements mandate each party and the subcommittee/board to meet with existing national advisory groups (or to create new ones) and civil society on a regular basis.

The increased involvement and influence of the EU Parliament in the conclusion of trade treaties further to the changes introduced by the Treaty of Lisbon is pivotal to this development, and for a number of years it has been calling for the practice and policy developed in the context of cooperation and association agreements containing chapters on human rights to be extended to “pure” trade agreements.¹⁵⁵

While these are significant features of the “new generation” of trade agreements, which contribute to injecting a social dimension into the EU's external trade policy, it remains to be seen whether they entail an improvement of the implementation-capacity of developing countries to respect and protect labour standards and thus lead to an effective improvement of labour standards internationally. To date, whether or not the EU soft conditionality works, remains an open question. When countries adopt a clear resistant and/or obstructionist approach particularly towards full compliance with ILO Conventions, then this approach will be ineffective. The substantive norms that these new type of agreements introduce to achieve the sustainability objectives are “formulated in such manner that it often seems hard or even impossible to prove that a party

¹⁵⁰ *Ibid.*, Art. 3, ch. 15.

¹⁵¹ *Ibid.*

¹⁵² 2011 EU-Korea FTA, Art. 13.12(3)-(5) and Art. 13.13.

¹⁵³ 2012 EU-Colombia/Peru, Art. 282.

¹⁵⁴ 2012 EU-CAAA, Part III.

¹⁵⁵ EP Resolution of 25 November 2010 on Human Rights, Social and Environmental Standards in International Trade Agreements, Doc P7_TA(2010)0434, para. 12; EP Resolution of 27 September 2011 on a New Trade Policy for Europe under the EU 2020 Strategy, Doc P7_TA(2011)0412, para. 6.

is not meeting its obligations.¹⁵⁶ Enforcement remains weak as any dispute concerning the trade and sustainable development chapters should be resolved solely through the specific dispute settlement procedure provided therein, as recourse to the general dispute settlement procedures available under the FTAs is explicitly excluded for matters falling under the chapter. In most cases, there is a tendency to delegate disputes to a more neutral Panel of Experts. In some instances, there are no provisions in case of non-compliance and there is a lack of representation of the social partners, such as in the case of the EU-South Korea agreement, where some trade unions and organised civil society representatives have been excluded from the Korean Domestic Advisory Group.

In addition, there is a risk of overlap between the implementation of the Trade and Sustainable Development Chapter provisions and the obligations that arise from the human rights clauses. ILO's CLS are also human rights and the Commission itself considers that they are covered by the standard human rights clauses.¹⁵⁷ This is not a mere theoretical issue: whether a labour violation falls within the scope of the Trade and Sustainable Development Chapter or that of a human rights clause has significant implications in terms of enforceability.¹⁵⁸

In essence, there are two parallel co-existing systems: on the one hand, human rights and democratic principles with a strong monitoring and enforcement mechanism, which is seldom applied, and, on the other hand, the Trade and Sustainable Development chapter with a weak monitoring and enforcement mechanism, which impedes any form of effective enforceability of the labour provisions. These different approaches of the EU are problematic because they undermine the EU's obligation to respect the indivisibility of all human rights. Moreover, including labour provisions under the Trade and Sustainable Development Chapter weakens their human rights connotation.

Despite the limited enforceability of labour provisions in the "new generation" of trade agreements in the short term, their inclusion may have nevertheless important policy learning effects in the longer term, such as providing the ground for transnational advocacy building and, linked to this, a better understanding of the challenges faced by a given third country, thus reducing negative externalities on affected stakeholders and communities.

5. CONCLUSION: GLOBAL HUMAN DIGNITY THROUGH EU SOCIAL CONDITIONALITY

The interconnectedness between trade and labour in the context of new and more complex globalisation and transnational forces has not only become conspicuous, but arguably also stronger. The emergence and further develop-

¹⁵⁶ W. Douma, 'The Promotion of Sustainable Development through EU Trade Instruments', in L. Pantaleo and M. Andenas (eds.), and C. Reul (ass. ed.), *The European Union as a Global Model for Trade and Investment*, University of Oslo Faculty of Law, *Legal Studies Research Paper Series* No. 2 (2016), at 101; the analysis focuses specifically on the 2012 EU-Colombia/Peru Trade Agreement as an example of the new generation of EU trade agreements.

¹⁵⁷ L. Bartels, *supra* note 118, at 312.

¹⁵⁸ *Ibid.*

ment of a global human rights regulatory “network” for institutionalising global regulation of human rights at work confirms this interdependence. This regulatory network utilises both hard and soft law approaches to governance. Soft law instruments, such as positive commitments, political dialogue and cooperative measures, can ensure a better impact of hard law instruments. Both the EU and the ILO have developed soft law strategies to its toolkit of instruments deployed in their joint efforts to achieve “decent work”.¹⁵⁹

In spite of these EU-ILO joint efforts, problems concerning the enforceability (and thus credibility) of social conditionality in EU trade agreements remain. EU practice does not always reflect the objectives set out in EU discourse on social trade. In situating EU practice within the EU external relations’ normative context and mission post Lisbon,¹⁶⁰ it becomes clear that human rights clauses and the trade and sustainable development chapters are not mere EU foreign policy instruments but rather mechanisms that the EU should use to comply with its obligations under the EU Treaties.¹⁶¹ Indeed, Articles 3(5) and 21(1) TEU recognise economic and social rights as a matter of justice, which must be extended also to external trade relations. Moreover, Article 21(3) TEU refers to the external aspects of its other policies and thus extends the scope of application of the EU’s external human rights obligations. This provision is also normatively stronger than Article 21(1) TEU, because it employs the terms “respect”.¹⁶² This argument finds further confirmation in ATAA, where the CJEU held that Article 3(5) TEU establishes a positive duty for the EU to observe international law in its entirety.¹⁶³ However, the above provisions do not require the EU to pursue these objectives in any specific way, and the EU is not formally bound by any multilateral or regional human rights treaty.¹⁶⁴ In addition, the EU does not have a general competence in the field of human rights. This notwithstanding, Article 21(2)b and d TEU includes human rights, sustainable economic, social and environmental development of developing countries among the objectives of EU external action. Article 3(5) TEU refers to the Union upholding and promoting its values and, according to Article 2 TEU, the respect for human dignity and human rights features among the values of the EU.

¹⁵⁹ E.g. the Better Work Programme, which is a partnership between the ILO and the International Finance Corporation (IFC), more information is available at <www.betterwork.org>; Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 24 May 2006 – Promoting Decent Work for All – the EU Contribution to the Implementation of the Decent Work Agenda in the World, COM (2006) 249 final, 24.5.2006; ILO, ‘The ILO and the EU, Partners for Decent Work and Social Justice: Impact of Ten Years of Cooperation’ (5 December 2012), available at <http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/publication/wcms_195135.pdf>.

¹⁶⁰ Arts. 3(5), 21(3) TEU and 205 and 208(1) TFEU.

¹⁶¹ L. Bartels, *supra* note 118.

¹⁶² L. Bartels, *supra* note 39.

¹⁶³ CJEU, Case C-366/10, *Air Transport Association of America v. Secretary of State for Energy and Climate Change* [2011] ECR I-13755, at paras. 101 and 123.

¹⁶⁴ The only exception being the 2008 UN Convention on the Rights of Persons with Disabilities (CRPD), which the EU ratified in 2010.

With these important considerations in mind, what are the changes necessary for the EU to comply with these obligations? With regard to social conditionality in EU unilateral trade arrangements, and in particular the GSP+, the Commission should adopt a more comprehensive and cohesive approach in the way that it utilises the documents of ILO's supervisory bodies to ensure that it always intervenes in cases of blatant labour rights violations. In particular, this means that it should aim at reducing its selective conditionality by giving more weight to ILO reports and its supervisory bodies' findings and exercise more pressure on beneficiary countries in cases where there is strong evidence of labour rights abuses. With regard to the new generation of trade agreements, one solution could be the amendment of the provisions of the Trade and Sustainable Development Chapter so as to tailor them to the specificities of the third country that is party to the agreement. This could be along similar lines as those already proposed by Bartels in relation to the adoption of a new human rights clause¹⁶⁵ Other proposals for improving the effectiveness of social conditionality in bilateral and regional agreements are: the development of time-bound labour-related objectives to trade agreements, greater involvement and consultation of social partners and civil society in the negotiations and implementation of labour provisions, to ensure better coherence in the way that ILO instruments are included in the various trade agreements,¹⁶⁶ and to improve current mechanisms for reviewing the impact of international agreements such as *ex ante* 'trade sustainability impact assessments' (hereafter "trade SIAs"), which the EU has been conducting prior to the conclusion of each trade agreement as part of the EU's sustainable development policy (focusing in particular on economic development, social development and environmental protection).¹⁶⁷ These *ex ante* trade SIAs should be increasingly informed by human rights considerations and combined with *ex post* evaluations to assess the human rights impact and review the implementation of trade agreements¹⁶⁸ In this

¹⁶⁵ L. Bartels, 'A Model Human Rights Clause for the EU's International Trade Agreements', German Institute for Human Rights, Misereor (February 2014), available at <http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf>.

¹⁶⁶ ILO, Report: The Social Dimensions of Free Trade Agreements (6 November 2013), at 6-7, available at <http://www.ilo.org/global/research/publications/WCMS_228965/lang--en/index.htm>, ch. 4.

¹⁶⁷ European Commission, Handbook for Trade Sustainability Impact Assessment 2016, available at <http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154464.PDF>; a list of completed and ongoing assessments is available at <<http://ec.europa.eu/trade/policy/policy-making/analysis/sustainability-impact-assessments/assessments/>>; for further analysis, see K. Cote, 'European Union Trade Sustainability Impact Assessments: Developing Coherence between Trade Agreements and Labour Standards', in J. Wouters et al. (eds.), Special Issue on Protecting Labour Rights in a Multi-Polar Supply Chain and Mobile Global Economy, 89 *Bulletin of Comparative Labour Relations* 2014, ch. 6.

¹⁶⁸ With the Treaty of Lisbon there has been growing emphasis on the need to develop tailor-made approaches to human rights-relevant policies, including trade policy, the use of impact assessments to ensure human rights consistency and, linked to the former, the importance of inserting human rights in impact assessments. Since 2012, and in line with Art. 21 TEU, a new generation of EU trade SIAs has thus started to integrate, albeit partially, human rights considerations into their research methodologies; see EU Commission, High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council, Human Rights and Democracy at the Heart of EU External Action – Towards a

regard, the U.N. Special Rapporteur on the Right to Food has recommended that trade agreements be adopted provisionally with sunset clauses, namely a provision that it shall automatically cease to have effect after a specific date unless further action is taken to extend it, so as to allow for modifications in case their implementation is found by independent assessments to be generating human rights violations.¹⁶⁹

These proposals for improving social conditionality in EU trade agreements need to be taken a step further and evaluated also in light of the fact that the territorial reach of EU law is rapidly expanding. It is thus necessary to graft a “humaneness test” (here defined as “practical humanity”) onto external trade policies, which have development-related objectives. This would be in line with the EU’s global ethics of aspiration, and it would require the EU not to undertake trade obligations, which would undermine its ability to fulfil its human rights obligations. Equally, it would require the EU not to conclude trade agreements that, if implemented, would undermine a third country’s capacity to fulfil its human rights duties. The case of *Frente Polisario*¹⁷⁰ buttresses these claims. These extraterritorial duties are arguably necessary to give human rights meaning and, in particular, to ensure dignified standards of work and living conditions for the population of third countries that are parties to an international agreement concluded with the EU, thus giving effect in this manner to the obligations arising from the EU treaties.

More Effective Approach, COM(2011)886, 12.12.2011; see also Council of the European Union, EU Strategic Framework on Human Rights and Democracy, Doc 11855/12, 25.6.2012, at 2; for further analysis, see S. Velluti, ‘The Promotion and Integration of Human Rights in EU External Trade Relations’, *Utrecht Journal of International and European Law* forthcoming.

¹⁶⁹ Human Rights Council, ‘Report of the Special Rapporteur on the Right to Food, Olivier De Schutter: Mission to the World Trade Organisation’, United Nations, Doc A/HRC/10/5/Add.2, 25.6.2008, para. 37.

¹⁷⁰ See GC, Case T-512/12, *supra* note 66.

THE PROMOTION OF GOOD GOVERNANCE AS AN AUTONOMOUS OBJECTIVE OF THE EU'S EXTERNAL RELATIONS*

Sara Poli

I. INTRODUCTION

Exporting 'good governance' to third countries is one of the EU's aspirations. The High Representative, Federica Mogherini, recently, emphasised that: 'There is no stability without democracy. There is no security, without human rights. Stability and security cannot exist without a fair trial system, a serious commitment towards good governance, the rule of law and the fight against corruption [...]'.¹ The Council expressed itself along these lines in December 2015 in the specific context of the European Neighbourhood Policy, whose aim is to bring greater stability, security and prosperity to neighbouring countries.² These are just two recent examples in which the promotion of good governance was invoked as an autonomous objective of the EU's external relations, in addition to supporting democracy, respect for human rights and the rule of law. These goals are reflected in the normative framework that is the basis for the EU's multilateral (regional) and bilateral relations with developing countries and with other third countries. The EU's focus on strengthening good governance is as ubiquitous as promoting democracy. It can be found in many acts of soft law in the fields of development cooperation, the Common Commercial Policy, the Common Foreign and Security Policy,³ including the basic principles on restrictive measures,⁴ and the European Neighbourhood Policy.⁵

* The research leading to the publication of this article has been funded with support from the European Commission. This piece reflects the views of the authors only, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

¹ Speech by High Representative/Vice-President Federica Mogherini at the UN Security Council, 'Cooperation between the UN and Regional and Sub-Regional Organisations' (9 March 2015), available at <http://eeas.europa.eu/statements-eeas/2015/150309_01_en.htm>.

² The Council calls for the effective promotion of good governance, democracy, rule of law and human rights, which are important for long-term stability. See Council Press Release 961/15 (14 December 2015), point 6.

³ The European Security Strategy states: 'Spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law and protecting human rights are the best means of strengthening the international legal order,' A Secure European in a Better World – European Security Strategy (12 December 2003), at 10. The same document emphasises: 'Contributing to better governance through assistance programmes, conditionality and targeted trade measures remains an important feature in our policy that we should reinforce.'

⁴ Council of the EU, Basic Principles on EU Restrictive Measures, Doc 10198/1/04, REV 1, 7.6.2004.

⁵ Joint Communication HR/Commission, Review of the European Neighbourhood Policy, JOIN (2015) 50 final, 18.11.2015, at 3.

The aim of this piece is to define the scope of the principle of ‘good governance.’ Does a common understanding of ‘good governance’ exist in the EU’s external relations and what are the instruments used to promote it?⁶ In order to answer these questions an overview is provided of the most relevant EU agreements and unilateral measures, specifically referring to good governance; the way good governance practices are enforced will complement this part. In addition, an assessment will be made of whether or not good governance is uniformly used in the mentioned instruments. Finally, the reasons why the EU includes the principle of good governance as part of the cooperation in the context of its external relations will be explored. Is the EU trying to support state-building and to create the conditions for democracy and respect for the rule of law? Or are there other reasons for the EU’s insistence on having well-functioning public administrations in third countries? Having mapped out the different meanings that good governance assumes in the practice of the EU institutions, conclusions are drawn as to whether the EU should continue to export this principle as a self-standing objective of the EU’s external relations.

II. THE TREATY FRAMEWORK AND THE STATUS OF “GOOD GOVERNANCE”

The first issue to consider is the status of ‘good governance’ in the EU primary law. Article 21(2) (h) of the EU Treaty, inserted in the general provisions on the Union’s external action, under title V of the Treaty of the European Union (TEU) helps to clarify the matter. It states that one of the EU’s objectives is to promote ‘an international system based on stronger multilateral cooperation and *good global governance* [emphasis added].’ Here, the EU, in its role as a global actor, is given the task of contributing to a rule-based international order aimed at reducing poverty, tackling environmental concerns, and improving the respect for human rights by promoting free and fair trade and sustainable development within multilateral frameworks and organisations.⁷

It is clear that in the TEU the promotion of good governance in the EU’s bilateral relations with third countries is not envisaged as an objective of the EU’s external action. Yet, the promotion of good governance is a pre-condition for achieving various other objectives of the EU’s external action listed in the TEU. This is the case for the eradication of poverty, which can be qualified as a ‘milieu goal’, and support to the sustainable management of natural resources, a ‘possession goal’,⁸ as provided for by Article 21(2)d.

⁶ The assessment of the impact that the EU policies had on the improvement of good governance is outside the scope of the paper. For a reference study, see A. Mungiu-Pippidi, *The Quest for Good Governance* (Cambridge: Cambridge University Press 2015).

⁷ On the contribution of the EU within multilateral organisations, see European Parliament Resolution of 11 May 2011 on the EU as a Global Actor: Its Role in Multilateral Organisations, Doc 2010/2298(INI), OJ [2011] C 377/E 66, 11.5.2011; Communication from the Commission to the Council and the European Parliament, *The European Union and the United Nations: The Choice of Multilateralism*, COM (2003) 526 final, 10.10.2003.

⁸ G. De Burca, ‘EU International Relations: The Governance Mode of Foreign Policy’, in B. Van Vooren et al., *The Legal Dimension of Global Governance: What Role for the EU* (Oxford: Oxford University Press 2013).

It should be noted that the Lisbon Treaty refers to good governance as a principle that should inspire the EU's *internal* decision-making and the way the EU administration operates. Article 15 (1) of the Treaty on the Functioning of the European Union (TFEU) states:

'In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.'

This provision links good governance, the participation of civil society, and openness of the EU's decision-making and of all the EU administration. The concerned provision is related to the discussion opened by the Commission in 2001 with its White Paper on Governance.⁹ This document lists five principles of good governance: openness, participation, accountability, effectiveness, and coherence, and links these principles to a democratic governance. The Treaty of Lisbon turned the Commission's guidelines into a legally binding commitment for the EU institutions, bodies and organisms to be as open as possible.¹⁰ This thus means that the EU administration should comply with a number of standards of behavior. The principle of openness requires that, in addition to being transparent by providing access to documents, the EU administration is also impartial, guarantees independence of expertise, fairness of procedure, and appropriate stakeholder consultations. Only when the EU administration complies with these principles, will it be accountable to the citizens and will it give substance to the democratic principle.¹¹

It is clear that the meanings of 'good governance', as included in the text of Article 15 (1) TFEU and in the EU's external relations are different. Indeed, as we shall see in the next section, in the name of good governance, the EU supports the political leadership of third countries that manage the resources of their country to the benefit of their population and in full respect of democracy, human rights and the rule of law. The EU's efforts to promote good governance in third countries are part of its strategy to strengthen institution-building. The EU seeks to support the setting up of a well-functioning administration, which is free from corruption and is committed to use all the resources of a country for the public good. This is key to the establishment of EU values, such as democracy and the rule of law, and to the fostering of a third country's development. When good governance is mentioned within the context of the EU's internal action, it is to make sure that the EU administration functions properly, and in line with standards of good administration.¹² At the moment, in the EU's internal practice,

⁹ European Commission, *European Governance – A White Paper*, COM (2001) 428 final, 25.7.2001. For a more detailed analysis of this document, see P. Allott, 'European Governance and the Re-Branding of Democracy' 27(1), *European Law Review* 2002, 60-71.

¹⁰ Under Art. 11 (2) TFEU, the EU institutions are required to have 'an open, transparent and regular dialogue with representative associations and civil society.'

¹¹ For a discussion on these issues and for useful bibliographic references, see A. Alemanno, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy', 39(1) *European Law Review* 2014, 72-90.

¹² See Art. 41 of the EU Charter of Fundamental Rights.

there are no legally binding acts aimed at promoting the various components of good governance as described above.¹³

The most exhaustive description of the concept of good governance is provided in a Regulation on the conservation and sustainable exploitation of fisheries resources.¹⁴ Here, it is stated that the Common Fisheries Policy shall be guided by the following principles of good governance:

- (a) the clear definition of responsibilities at the Union, regional, national and local levels;
- (b) the taking into account of regional specificities, through a regionalised approach;
- (c) the establishment of measures in accordance with the best available scientific advice;
- (d) a long-term perspective;
- (e) administrative cost efficiency;
- (f) appropriate involvement of stakeholders, in particular Advisory Councils, at all stages from conception to implementation of the measures;
- (g) the primary responsibility of the flag State;
- (h) consistency with other Union policies;
- (i) the use of impact assessments as appropriate;
- (j) coherence between the internal and external dimensions of the CFP;
- (k) transparency of data handling in accordance with existing legal requirements, with due respect for private life, the protection of personal data and confidentiality rules; availability of data to the appropriate scientific bodies, other bodies with a scientific or management interest, and other defined end-users.¹⁵

This list can only be considered as an implementation of the principle of good governance as provided for by Article 15 (1) to the extent that it covers the participation of stakeholders in selected advisory bodies and transparency. In the light of the differences between the internal and external dimensions of good governance and considering the scarce internal practice, the EU does not have a model of good governance practices to follow and to be consistent with in its external relations.

Having clarified that improving good governance in third countries is linked with various other objectives of the EU's external action, it is necessary to see how the EU actually translates its ambition into concrete action. However, first we need to examine in more detail what promoting good governance implies for the EU.

¹³ However, it is possible to identify acts in which good governance is linked to the independence of an EU agency from stakeholders. See recital No. 18 of Regulation (EC) No. 713/2009 of the European Parliament and of the Council of 13 July 2009 Establishing an Agency for the Cooperation of Energy Regulators, *OJ* [2009] L 211/1, 14.8.2009.

¹⁴ Regulation No. 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, *OJ* [2013] L 354/22, 28.12.2013. It should be emphasised that in the area of 'the conservation of marine biological resources under the common fisheries policy', the EU has an explicit external competence (Art. 3 (1) d TFEU).

¹⁵ See Art. 2(2) of Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy, *OJ* [2002] L 358/59, 31.12.2002.

III. THE GENESIS AND THE DEFINITION OF 'GOOD GOVERNANCE' IN THE CONTEXT OF THE DEVELOPMENT COOPERATION POLICY

The term 'good governance' has its origins in a World Bank report on Sub-Saharan Africa in 1989. In this document, the development problems of this region were linked to the crisis of governance.¹⁶ The latter was defined as 'the exercise of political power to manage a nation's affairs.'¹⁷ The World Bank placed emphasis on the fact that the failure of public institutions and the ensuing lack of an efficient and accountable administration and of a reliable judicial system were at the root of the poor economic performance of Sub-Saharan Africa.¹⁸ In the EU context, it was not until 1995 – with the revision of the Fourth Lomé Convention¹⁹ concerning the ACP countries – that good governance was recognised as a particular aim of the cooperation arrangements (Article 5).²⁰ No definitions of this concept were provided for in the provisions of that treaty. In addition, cooperation in terms of governance was not an essential element of the agreement, whereas respect for democracy and human rights were.²¹

In 1998, the European Commission for the first time provided useful guidelines on the meaning of good governance in a Communication dedicated to the challenges of the partnership between the European Union and the ACP states.²² This was intended, amongst other things, to clarify the concepts cited in Article 5 of the revised Fourth Lomé Agreement.²³

The Commission Communication states that good governance

'implies managing public affairs in a transparent, accountable, participative and equitable manner showing due regard for human rights and the rule of law. It encompasses every aspect of a State's dealing with civil society, its role in establishing

¹⁶ The World Bank, 'Sub-Saharan Africa, from Crisis to Sustainable Growth, A Long Term Perspective Study' (November 1989), at 60. For more detailed comments, see C. Santiso, 'Good Governance and Aid Effectiveness: The World Bank and Conditionality', 7 *The Georgetown Public Policy Review* 2001, 1-22.

¹⁷ *Ibid.*

¹⁸ The World Bank, *supra* note 16, at XXII.

¹⁹ See Art. 5 of the Agreement amending the fourth ACP-EC Convention of Lomé, *OJ* [1998] L 156/3, 29.5.1998.

²⁰ 'In this context, development policy and cooperation shall be closely linked to respect for and enjoyment of fundamental human rights and to the recognition and application of democratic principles, the consolidation of the rule of law and good governance. The role and potential of initiatives taken by individuals and groups shall be recognised in order to achieve in practice real participation of the population in the development process in accordance with Article 13. In this context good governance shall be a particular aim of cooperation operations.'

²¹ Respect of democracy and human rights were considered essential elements of the Lomé IV convention since 1989. See N. Hachez, "'Essential Elements" Clauses in EU Trade Agreements: Making Trade Work in a Way That Helps Human Rights?', Leuven Centre for Global Governance Studies, *Working Paper* No. 158 (2015), at 7.

²² Commission Communication, *Democratisation, the Rule of Law, Respect for Human Rights and Good Governance: the Challenges of the Partnership between the European Union and the ACP States*, COM (1998) 146, 24.2.1998. In 1998, the Council mentioned 'good governance' for the first time in a Common Position concerning human rights, democratic principles, the rule of law and good governance in Africa, see Common Position on Human Rights, Democratic Principles, the Rule of Law and Good Governance in Africa, Decision 98/350/CFSP, 25.5.1998.

²³ Commission Communication, COM (1998) 146, *supra* note 22, at 3.

a climate conducive to economic and social development and its responsibility for equitable division of resources. [...] ²⁴ Good governance refers to the transparent and accountable management of all a country's resources for its sustainable economic and social development. The resources of a country include human resources [...], natural resources and internal and external economic and financial resources, including development aid. The concept of good governance remains implicit in a political and institutional environment respecting human rights, democratic principles and the rule of law. But it takes specific account of the role of the authorities in managing resources, promoting a favourable climate for economic and social initiatives and deciding how to allocate resources. Good governance therefore implies the existence of competent and effective institutions respecting democratic principles. The concept therefore extends the aims of democratisation into the sphere of resource management. ²⁵

This definition highlights two aspects. First, the EU links good governance with EU values such as respect for democracy, human rights and the rule of law. The essence of good governance seems to be represented by the possibility for civil society participating in public life and by the existence of a well-functioning public administration, which manages the resources of the country for the public good. The major obstacle to development and good governance is a corrupt administration. ²⁶

Secondly, there is an overlap between the concepts of 'good governance' and the 'rule of law', since an independent judiciary and the curbing of corruption are fundamental to both of them. ²⁷ Therefore, the borders between the two principles may be blurred. Perhaps, one of the distinctive elements with respect to the rule of law is that 'good governance' entails the sustainable management of natural resources.

The successor of the Fourth Lomé Convention, the Partnership Agreement concluded by the EU, its Member States and the ACP countries in 2000 (the 'Cotonou Agreement'), ²⁸ enshrines, in legally binding form, the constitutive elements of good governance. Article 9(3) transposes in an abridged form the definition of the 1998 Commission Communication. Thus, good governance is:

'The transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It

²⁴ *Ibid.*, at 7.

²⁵ *Ibid.*, at 8. After providing a detailed definition of 'good governance,' the Commission dwells on single aspects.

²⁶ The 1998 Communication identifies corruption as 'any abuse of power or impropriety in the decision-making process brought about by some undue inducement or benefit.' *Ibid.*, at 8.

²⁷ As Pech observes in commenting on the provisions of GSP+ Regulation (see *infra* section No. IV ii)a)), 'The concept of good governance implicitly includes the requirements to comply with the rule of law but is difficult to be affirmative considering the absence in reg. 232/2008 of any precision on what good governance entails', L. Pech, 'Rule of Law as a Guiding Principle of the European Union's External Action', *CLEER Working Paper* No. 13 (2012), at 17.

²⁸ Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States of the Other Part, OJ [2000] L 317/3, 15.12.2000. See also Resolution on Good Governance, Transparency and Accountability in Relation with the Exploitation of Natural Resources in ACP Countries, OJ [2007] C 254/17, 26.10.2007.

entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption.'

Here, the management of *all the resources of a country* is considered as an index of good governance. Yet, post-Cotonou, the focus of the EU in reality seems to be on how governments manage their *natural* resources. The EU gives special visibility to its efforts to promote good environmental governance. By contrast, in the EU official documents, there are no traces of the EU's efforts to improve the management of public finances or human resources. The use of natural resources attracts the EU's and international community's attention since the exploitation of these resources leads to an increase in corruption.²⁹ As a result, the population is deprived of a possible source of revenue, and greater poverty spreads throughout the country. In addition, natural mineral resources feed the instability of third countries. Improving governance and accountability in the management of public finances tends to reduce the risks of conflict in relation to the exploitation of natural resources.³⁰ The interconnection between increase in conflict, the low level of development, the trade in minerals and the way public power is managed has also recently been emphasised by the Council.³¹

Since the early 2000s, the EU has encouraged developing countries to manage their natural resources (over which all countries have full sovereignty) in a sustainable manner. For example, the EU has supported the Kimberly Process, a forum in which the participants have designed an international certification scheme for rough diamonds.³² The idea behind this system is to prevent the illicit trade in these goods as a means to finance internal conflicts by rebel movements³³ in highly unstable countries in Africa. The Member States and the Commission have supported this mechanism since 2001.³⁴ However, the EU's action in this context is aimed more at conflict prevention³⁵ rather than at strengthening good governance in third countries.

²⁹ See point H of the European Parliament Resolution of 27 February 2014 on the Conclusion of the Voluntary Partnership Agreement between the European Union and the Republic of Indonesia on Forest Law Enforcement, Governance and Trade in Timber Products into the European Union, Doc 2013/2990(RSP), 27.2.2014.

³⁰ See Resolution on Good Governance, Transparency and Accountability in Relation with the Exploitation of Natural Resources in ACP Countries', *supra* note 28.

³¹ Council Conclusions on the Union's Approach on Responsible Sourcing of Minerals, Foreign Affairs Council Meeting, Luxembourg (23 June 2014).

³² See Art. 2(a) of Council Regulation (EC) No. 2368/2002 of 20 December 2002 Implementing the Kimberly Process Certification Scheme for the International Trade in Rough Diamonds, OJ [2002] L 358/29, 31.12.2002.

³³ Trade in rough diamonds was at the origin of conflicts in Sierra Leone, Angola and the Democratic Republic of Congo.

³⁴ See the Programme for the Prevention of Violent Conflicts Endorsed by the Conclusions of the Göteborg, European Council Meeting (15-16 June 2001), point 52.

³⁵ For more information on the EU's involvement in this initiative, see G. Fernández Arriba, 'The European Union and the Kimberly Process', *CLEER Working Paper* No. 3. (2014).

Another more important initiative is the establishment of the FLEGT (Forest Law Enforcement, Governance and Trade) licensing scheme for imports of timber into the European Community. This is set up by a Regulation adopted in 2005³⁶ which authorises the EU to conclude Voluntary Partnership Agreements (VPAs) on forest law enforcement, governance and trade in timber products that are aimed at promoting good (environmental) governance. The purpose of the international cooperation is to fight illegal logging, which 'undermines many essential elements of the EC's development objectives: public sector financing for development targeted at the poor, peace, security, good governance, the fight against corruption, and sustainable environmental management.'³⁷ On the basis of these treaties, the third country concerned set up a system of licenses that certifies that these products are not harvested in violation of national law. Only legally harvested products may be imported into the EU. Although good governance is not mentioned in the texts of the agreements, it is clear from the Commission Communication on forest law enforcement, governance and trade³⁸ – which first launched the idea of the Partnerships – that their aim is to support the sustainable management of natural resources and therefore to contribute to the promotion of good governance.

Treaties of this kind were concluded between 2010 and 2014 with timber exporting countries in Africa (i.e. Liberia,³⁹ Central African Republic,⁴⁰ Republic of Congo,⁴¹ Ghana,⁴² Cameroon⁴³) and in Asia (Indonesia).⁴⁴ Other agreements are currently under negotiation with Côte d'Ivoire, Democratic Republic of the Congo, Gabon, Guyana, Honduras, Laos, Malaysia, Thailand and Vietnam.⁴⁵

Finally, sector-related agreements, which are framed within the Cotonou Agreement, are also worth mentioning. The EU has concluded a number of bilateral fisheries partnership agreements with ACP countries (but also with other categories of contracting parties), which refer to specific aspects of good governance, as principles underlying the cooperation with third countries. These agreements state that they should be implemented in accordance with the principles of 'good economic and social governance,' taking into consideration the state of the fishery resources.⁴⁶ Thus, the EU is probably invoking 'good

³⁶ Council Regulation (EC) 2173/2005 of 20 December 2005 on the Establishment of a FLEGT Licensing Scheme for Imports of Timber into the European Community on the Establishment of a FLEGT Licensing Scheme for Imports of Timber into the European Community, *OJ* [2005] L 347/1, 30.12.2005.

³⁷ Communication from the Commission to the Council and the European Parliament, Forest Law Enforcement, Governance and Trade (FLEGT), Proposal for an EU Action Plan, COM (2003), 251 final, 21.5.2003.

³⁸ *Ibid.*, at 8.

³⁹ *OJ* [2012] L 191/3, 19.7.2012.

⁴⁰ *OJ* [2012] L 191/103, 19.7.2012.

⁴¹ *OJ* [2011] L 92/127, 6.4.2011.

⁴² *OJ* [2010] L 70/3, 19.3.2010.

⁴³ *OJ* [2011] L 92/3, 6.4.2011.

⁴⁴ *OJ* [2014] L 150/252, 20.5.2014.

⁴⁵ See <https://ec.europa.eu/europeaid/sectors/environment/sustainable-forestry/flegt_en>.

⁴⁶ See Art. 3(4) of the Fisheries Partnership Agreement (FPA) attached to Council Regulation (EC) No. 764/2006 of 22 May 2006 on the Conclusion of the Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco, *OJ* [2006] L 141/1, 29.5.2006;

governance' to limit the impact of the EU fishing activities on the economy of the developing country concerned. Indeed, should the EU overfish, using stocks that are of interest to the local communities of the coastal states, this could have an unacceptable social and economic impact on the EU partner country.⁴⁷ This is a concern that affects not only developing countries but also high-income countries.⁴⁸

IV. MEANS TO PROMOTE GOOD GOVERNANCE

i) **Good governance in EU international agreements**

In this section, we see that good governance can qualify as a 'fundamental element' or as a mere 'principle of cooperation' in specific EU treaties, but also that in other association or partnership and cooperation agreements, good governance is not mentioned at all, despite the existence of governance problems in the contracting parties.

In the Cotonou Agreement, the principle of good governance is one of the subjects to be discussed within the political dialogue.⁴⁹ The mutual commitment toward this goal is presented as a major innovation of this agreement.⁵⁰ Good governance is considered as a fundamental element in the agreement, but not an essential one.⁵¹ Indeed, the ACP countries did not want to have further

Art. 3(3) of the same kind of agreement with the Republic of Mozambique attached to Council Decision of 22 November 2007 on the Conclusion of an Agreement in the Form of Exchange of Letters on the Provisional Application of the Fisheries Partnership Agreement between the European Community and the Republic of Mozambique, *OJ* [2007] L 331/31, 17.12.2007; Art. 3(4) of the Agreement on Sustainable Fisheries Partnership between the European Union and the Republic of Senegal, *OJ* [2014] L 304/3, 23.10.2014. The FPA with Mauritania imposes that the agreement is implemented in accordance with 'good environmental, economic and social governance.' See Art. 3(3) of the agreement attached to Council Regulation (EC) No. 1801/2006 of 3 November 2006 on the Conclusion of the Fisheries Partnership Agreement between the European Community and the Islamic Republic of Mauritania, *OJ* [2006] L 343/1, 8.12.2006.

⁴⁷ This interpretation is drawn from the Conclusions of the Council Meeting on Agriculture and Fisheries of 19 July 2004. In this meeting, the Council set out the rationale of the fisheries partnership agreements, which is to enable Community vessels to fish in the waters under the sovereignty of third countries to exploit the surplus of the coastal states' marine resources in a sustainable manner and without engaging in unfair competition with local fishermen. See Press Release 11234/04 REV (Press 221), available at: <http://www.minagric.gr/en/agro_pol/COUNCIL/81505.pdf>.

⁴⁸ See Art. 3(4) of the Fisheries Partnership Agreement between the European Community on the One Hand, and the Government of Denmark and the Home Rule Government of Greenland, on the Other Hand, *OJ* [2007] L 172/4, 30.6.2007.

⁴⁹ Art. 8 (4) provides that: 'The dialogue shall also encompass a regular assessment of the developments concerning the respect for human rights, democratic principles, the rule of law and good governance.'

⁵⁰ Communication from the Commission to the Council and the European Parliament, The European Union's Role in Promoting Human Rights and Democratisation in Third Countries, COM (2001) 0252 final, 8.5.2001.

⁵¹ 'Good governance shall underpin the domestic and international policies of the Parties and constitute a fundamental element of this Agreement.' Art. 9(3), para. 2.

conditions in addition to those of democracy and human rights.⁵² The parties agreed that serious cases of corruption, including acts of bribery leading to such corruption, as defined in Article 97, constitute a violation of that fundamental element of the agreement.⁵³ Thus, curbing corruption is a fundamental component in the promotion of good governance. However, only cases of *serious* corruption may affect the cooperation with the EU and give rise to the right of the party to invite the other to consultation, under Article 97. As to the consequences of violating an essential/fundamental element, there are small differences between the EU's ability to react to breaches of good governance standards and to violations of democracy and human rights (under Article 96).⁵⁴ In both procedures, the failure of the consultations may lead to the adoption of appropriate measures, including as a last resort, the suspension of the agreement.⁵⁵ Notoriously, the EU is not willing to use the non-execution clauses even in the case of flagrant violation of core EU values:

‘In the two decades since these clauses have existed, they have been applied in only a very small subset of these potential cases. The EU has taken “appropriate measures” on twenty-three occasions, typically by redirecting development aid from government projects to civil society. All of these cases involved ACP countries, as well as situations of major political instability. Fifteen of these cases involved coups d’état, seven involved flawed elections, and one involved a deteriorating political and security situation.’⁵⁶

It is thus not surprising that the EU has only rarely taken ‘appropriate measures’ under Article 97.⁵⁷ Note that the strength of the non-execution clause does not lie in the possibility to sanction a third country with the suspension of

⁵² E. Fierro, *European Union's Approach to Human Rights Conditionality in Practice* (The Hague, Martinus Nijhof 2003), at 314.

⁵³ Art. 9(3), para. 2.

⁵⁴ One of the differences is that in cases of serious corruption there is no possibility to take ‘urgent measures’ (i.e. the suspension of financial assistance) without previously consulting the party concerned with the case of corruption. This is in contrast with the violation of an essential element of the agreement.

⁵⁵ The breach of essential elements of the agreement may be considered a violation of a provision essential to the accomplishment of the object and the purpose of the Treaty by one of the parties, within the meaning of Art. 60 (3) b) of the Vienna Convention on the Law of the Treaties. On the non-execution clauses of EU agreements and their qualification in international law, see Martines’ piece.

⁵⁶ L. Bartels, ‘The European Parliament’s Role in Relation to Human Rights in Trade and Investment Agreements’, Directorate-General for External Policies: Policy Department, Doc EXPO/B/DROI/2012-09 (February 2014), available at: <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/dv/study_hr_tradeagreements_/study_hr_tradeagreements_en.pdf>, at 11.

⁵⁷ For an example of reliance on Art. 96-97 of the Cotonou Agreement, see the Council Decision of 25 March 2002 Concluding Consultations with Liberia under Articles 96 and 97 of the ACP-EC Partnership Agreement, OJ [2002] L 96/23, 13.4.2002. The preamble of the Decision states that Liberia has acted in violation of good governance requirements as serious cases of corruption can be identified.

the agreement, but in being able to engage in a dialogue with the third country concerned, so as to promote respect for universal values through diplomacy.⁵⁸

Good governance has a far less prominent position in all other international agreements. These can be divided into two groups: the first encompasses agreements including political clauses,⁵⁹ coupled with non-execution clauses,⁶⁰ in which good governance merely features as a principle underlying the co-operation⁶¹ or as the basis of the cooperation⁶² (while respect for democracy and respect for human rights appear as essential elements of these treaties). In these cases the violation of good governance principles does not lead to the suspension of the treaty. There are no sanctions associated with the breach of this principle.

There are several recent examples of these kinds of agreements. The EU's contracting parties belong to different geopolitical contexts. Examples include the regional agreement between the EU and Central America (2012)⁶³ and a

⁵⁸ For an in-depth assessment of the essential elements clauses, see Martines' contribution in this collection.

⁵⁹ On the common approach on the use of political clauses of 2009 of the Antici group, see Council of the European Union, Common Approaches on the Use of Political Clauses, Doc 10491/1/09, 2.6.2009, as quoted by N. Hachez, *supra* note 21.

⁶⁰ See *infra* for examples in which the parties commit themselves to respect for good governance. FTAs, as a general rule, do not mention good governance as a basis for cooperation, even if they contain human rights clauses. Their provisions often include the commitment to trade in full respect of sustainable development and ILO standards. See, for example, Art. 13.4 (labour standards) and Art. 13.6 (sustainable development) of the Free Trade Agreement with the Republic of Korea, Council Decision of 16 September 2010 on Signing, on Behalf of the European Union, and Provisional Application of the Free Trade Agreement between the European Union and its Member States, of the One Part, and the Republic of Korea, of the Other, *OJ* [2011] L 127/1, 14.5.2011; Art. 269 (labour standards) and Art. 270 (sustainable development) of Trade Agreement between the European Union and Colombia and Peru, Council Decision and its Member States of 31 May 2012 on the Signing, on Behalf of the European Union and its Member States, of the One Part, and Colombia and Peru, of the Other, *OJ* [2012] L 354/3, 21.12.2012. For an in-depth study on conditionality in the context of these agreements, see T. Takács, 'Human Rights in Trade: The EU's Experience with Labour Standards Conditionality and its Role in Promoting Labour Standards in the WTO', in J. Wetzel (ed.), *The EU as a 'Global Player' in the Field of Human Rights* (Abingdon: Routledge 2012), at 99.

⁶¹ By way of example, see the Agreement Establishing an Association between the European Community and its Member States, of the One Part, and the Republic of Chile, *OJ* [2002] L 252/3, 30.12.2002. Art. 1(3) of this agreement states: 'The parties reaffirm their commitment to the principle of good governance.' However, in this context no definitions of good governance are provided for. See along the same line, Art. 1(3) of the Political Dialogue and Cooperation Agreement with the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama (2003) of 15.12.2003 (entered into force in 2014). See Council Decision of 14 April 2014 on the Conclusion on Behalf of the European Union of the Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the One Part, and the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, of the Other Part, with the exception of Art. 49(3) thereof, *OJ* [2014] L 111/4, 15.4.2014. See also Art. 1(5) of the Comprehensive Partnership with Indonesia, *OJ* [2014] L 125/17, 26.4.2014.

⁶² Art. 1(4) of the Framework Agreement between the European Union and its Member States, on the One Part, and the Republic of Korea, on the Other Part, *OJ* [2013] L 20/2, 23.1.2013.

⁶³ See 13(3) of the Agreement between the European Union and its Member States on the One Hand, and Central America on the Other, *OJ* [2012] L 346/3, 15.12.2012 (not yet in force). In this context, good governance is also an objective of the cooperation (Art. 12).

few bilateral treaties (i.e. the PCA with Iraq (2012)⁶⁴ and the three association agreements with Georgia, Moldova and Ukraine (2014)).⁶⁵ In the association agreements with the EU's neighbouring countries, there are numerous references to good governance: the *aims of the political dialogue* [emphasis added] are strengthening respect for democratic principles, the rule of law and good governance.⁶⁶ Cooperation to enhance good governance is also envisaged in the areas of tax matters,⁶⁷ in the context of trade relations,⁶⁸ and as far as the fisheries and maritime policies are concerned.⁶⁹ In the previous forms of contractual relations with the three countries, there were no references to good governance.⁷⁰

However, the mere mention of good governance amongst the principles of cooperation or the subjects of the political dialogue does not mean much. The related provisions do not set out any concrete legally binding obligation for the parties. Despite this, reference to good governance enables the EU to exercise a political influence on the way these countries manage their resources, fight corruption and carry out political reforms.

The association agreements just described contrast with other EU treaties, including political clauses, which do not mention the principle of good governance. Examples of this second category of agreements are the Euro-Mediterranean agreements of the 1990s with southern neighbours,⁷¹ the PCAs with Russia⁷² and with Central Asian countries⁷³ of the 1990s and those with South Caucasian countries (Armenia, Azerbaijan and Georgia).⁷⁴ The lack

⁶⁴ Art. 3 of the Partnership and Cooperation Agreement between the European Union and its Member States, of the One Part, and the Republic of Iraq, of the Other Part, *OJ* [2012] L 240/20, 31.7.2012.

⁶⁵ Association Agreement ('AA') with Georgia, *OJ* [2014] L 261/4, 30.8.2014, Association Agreement with Moldova, *OJ* [2014] L 268/4, 30.9.2014; Association Agreement with Ukraine, *OJ* [2014] L 161/3, 29.5.2014.

⁶⁶ Art. 3 (2) e Moldova AA, Art. 3(2) h Georgia AA, Art. 4(2) 2 Ukraine AA.

⁶⁷ Art. 52-53 Moldova AA, Art. 280-281 Georgia AA, Art. 349-350 Ukraine AA. On the reasons for the inclusion of the principle of good governance in the context of the cooperation on tax, see section IV iii).

⁶⁸ Art. 370 Moldova AA, Art. 234 Georgia AA, Art. 295 Ukraine AA.

⁶⁹ Art. 72a Moldova AA, Art. 336a) and 339 Georgia AA, Art. 408 and 411 Ukraine AA.

⁷⁰ These countries concluded Partnership and Cooperation Agreements with Moldova (*OJ* [1998] L 181/1, 24.6.1998), Ukraine (*OJ* [1998] L 49/3, 19.2.1998) and Georgia (*OJ* [1999] L 205/3, 4.8.1999).

⁷¹ The partners that concluded association agreements (entered into force) with the EU are: Egypt, Morocco, Tunisia, Jordan, Israel, Palestine Authority and Lebanon. By way of example, see Art. 2 of the Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the One Part, and the Republic of Tunisia, of the Other Part, *OJ* [1998] L 97/2, 30.3.1998. The mentioned provision recognises as its essential elements only respect for democratic principles and human rights.

⁷² *OJ* [1997] L 327/1, 28.11.1997.

⁷³ Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan. In 1995, the Commission concluded that the 'EU's political conditionality for negotiating a PCA is unlikely to be met in the short term.' See Commission Communication, Towards a European Strategy for Independent States of Central Asia, COM (1995) 206 final, 10.10.1995, at 11-12.

⁷⁴ See Art. 2 of PCA with Georgia, *supra* note 70, Art. 2 of PCA with Armenia (*OJ* [1999] L 239/3, 9.9.1999), PCA Azerbaijan (*OJ* [1999] 246/3, 17.9.1999).

of reference to good governance is striking in these treaties, since the EU's contracting parties have governance gaps.

Therefore, there is a certain lack of uniformity in the texts of the EU agreements with respect to the promotion of good governance. This is possibly due to the refusal of certain countries to include any reference to this concept in the treaty. An alternative explanation is that these agreements, which were concluded in 1990s, do not include good governance, since the EU has only recently decided to include this principle in EU treaties with non-developing countries. It behoves EU institutions to provide an explanation of the reasons why good governance is sometimes included and in other cases excluded in the cooperation with third countries.

A *prima facie* striking absence of good governance also concerns the EU's contractual relations with candidate countries.⁷⁵ For example, this principle is neither included amongst the essential elements of the agreement, nor is it the subject of the political dialogue in the Stabilisation and Cooperation Agreements with the Western Balkans (Albania, Bosnia and Herzegovina, Montenegro, Serbia),⁷⁶ despite governance gaps in some of these countries. However, in the SAAs, the rule of law is an essential element of the cooperation. In addition, the provisions of the treaties, dealing with justice, freedom and security, state that:

'the Parties shall attach particular importance to the consolidation of the rule of law, and the reinforcement of institutions at all levels in the areas of administration in general and law enforcement and the administration of justice in particular. Cooperation shall notably aim at strengthening the independence of the judiciary and improving its efficiency, improving the functioning of the police and other law enforcement bodies, providing adequate training and fighting corruption and organised crime.'⁷⁷

Therefore, in the SAAs, the reinforcement of the institution and the rule of law replaces good governance.⁷⁸ As it was stated by the Commission in 2011, 'Public administration reform, aiming at enhancing transparency, accountability and effectiveness, essential for democracy and the rule of law, continues to be a key priority under the political criteria in most enlargement countries (sic).'⁷⁹ Thus, one would not have expected to find mention of good governance in the EU's

⁷⁵ In the enlargement process, 'good governance has neither been made an issue in decisions of the Council, nor in the strategic documents or monitoring reports of the European Commission,' with very few exceptions. T. Börzel, Y. Pamuk, and A. Stahn, 'Good Governance in the European Union', *Berlin Working Paper on European Integration* No. 7 (2008), at 22.

⁷⁶ SAA with Albania, OJ [2009] L107/166, 28.4.2009, with Bosnia and Herzegovina, OJ [2015] L 164/2, 30.6.2015, with former Yugoslav Republic of Macedonia, OJ [2004] L 84/13, 20.3.2004, with Montenegro, OJ [2010] L 108/3, 29.4.2010, with Serbia, OJ [2013] L 278/14, 18.10.2013.

⁷⁷ Art. 80 of all SAAs, except Albania (Art. 78) and Former Yugoslav Republic of Macedonia (Art. 74).

⁷⁸ Admittedly, the principle of good governance has a broader scope since it covers the sustainable management of natural resources.

⁷⁹ See Commission Communication, *Enlargement Strategy and Main Challenges 2011-2012*, COM (2011) 666 final, 12.10.2011, at 6.

external financial instrument for acceding countries (the IPA II Regulation).⁸⁰ Instead, this unilateral instrument, which is intended to prepare the candidate countries to the accession to the EU, confusingly, includes the strengthening of the public administration and good governance at all levels amongst its objectives.⁸¹ Here, good governance has a very specific meaning: it entails the strengthening of the administration to enable it to properly perform its role in adapting the domestic legal order to the future obligations stemming from the EU membership.⁸² Therefore, reference to good governance in addition to ‘the reinforcement of the public administration’ is not superfluous. However, the meaning of good governance is different in this context from that of the Cotonou Agreement.

ii) **Good governance in unilateral measures**

a) *The special incentive arrangement for sustainable development and good governance (GSP+)*

The Lisbon Treaty states that: ‘The Common Commercial Policy shall be conducted in the context of the principles and objectives of the Union’s external action.’⁸³ Therefore, trade measures can be used to achieve the objective of promoting good governance outside the EU.⁸⁴ This was stated in a Commission Communication of 2010:

‘Trade and trade policy reinforce the EU’s international influence and concerted action at EU level should pursue and support EU economic interests in third countries. So the Union’s trade and foreign policies can and should be mutually reinforcing. This applies to areas such as development policy and the application of UN sanctions, but also to creating the right incentives within, inter alia, our trade and political relations with third countries or through specific trade instruments such as the General System of Preferences or FTAs, to encourage our partners to promote the respect of (sic) human rights, labour standards, the environment, and good governance, including in tax matters.’⁸⁵

The EU has a generalised system of preferences (GSPs), which has sought to encourage developing countries to respect non-trade values (labour rights,⁸⁶

⁸⁰ Regulation No. 231/2014 of the European Parliament and of the Council of 11 March 2014 Establishing an Instrument for Pre-Accession Assistance, IPA II, OJ [2014] L 77/1, 15.3.2014.

⁸¹ Art. 2(1)vi.

⁸² This is shown by the same wording of the IPA II Regulation, which subjects the financial assistance to ‘progress in building up and strengthening good governance and the administrative, institutional and absorption capacity at all levels, including adequate human resources, needed to *adopt and enforce the acquis* [emphasis added] related legislation’ (Art. 2 (2)d).

⁸³ Art. 207 (1) TFEU.

⁸⁴ On this issue, see the recent study by J. Larik, ‘Good Global Governance through Trade: Constitutional Moorings’ in J. Wouters et al., *Global Governance through Trade* (Cheltenham: Edward Elgar forthcoming).

⁸⁵ Commission Communication, Trade, Growth and World Affairs, COM (2010) 612, 9.11.2010, at 15.

⁸⁶ See Velluti’s paper in this collection.

protection of the environment) through trade measures (tariff reductions) since 1994.⁸⁷ The special incentive arrangement for sustainable development and good governance is part of a system, which was created in 2005 (and subsequently revised in 2008⁸⁸ and 2012⁸⁹) to help vulnerable countries⁹⁰ to assume the special burdens and responsibilities resulting from the ratification of core international conventions on human and labour rights, environmental protection and good governance.

The target countries are required to ratify and effectively implement a group of 12 conventions covering environmental protection and good governance (and which are additional to the 15 basic human rights treaties that all countries qualifying for the GSP scheme should ratify).⁹¹ The Commission verifies the condition of 'effective implementation' by relying on the conclusions of the monitoring bodies set up by the mentioned conventions.⁹² In exchange, vulnerable countries receive tariff preferences in addition to those applicable to other developing countries. The EU's expectation is that this incentive will trigger the interest of the beneficiaries in the effective implementation of the treaties. As the Commission stresses:

'Preferences are used as a lever to ensure that implementation [of the Conventions] (i) does not deteriorate and (ii) improves over time. A regular dialogue with beneficiaries provides the necessary follow-up, which includes temporary withdrawal mechanisms. This approach of progressive improvement is considered the most appropriate given that the changes that need to take place to fully implement the conventions are of a complex, structural nature and involve high economic costs.'⁹³

Beneficiaries are subject to an EU monitoring system: they have to provide information to the Commission on the status of ratification and implementa-

⁸⁷ Council Regulation (EC) No. 3281/94 of 19 December 1994 Applying a Four-Year Scheme of Generalised Tariff Preferences (1995 to 1998) in Respect of Certain Industrial Products Originating in Developing Countries, OJ [1994] L 348/1, 31.12.1994.

⁸⁸ 'Council Regulation (EC) No. 732/2008 of 22 July 2008 Applying a Scheme of Generalised Tariff Preferences for the Period from 1 January 2009 to 31 December and Amending Regulations (EC) 552/97, (EC) No. 1933/2006 and Commission Regulations (EC) No. 1100/2006 and (EC) No. 964/2007, OJ [2008] L 211/1, 22.7.2008.

⁸⁹ Regulation (EU) No. 978/2012 of the European Parliament and of the Council of 25 October 2012 Applying a Scheme of Generalised Tariff Preferences and Repealing Council Regulation, (EC) No. 732/2008, OJ [2012] L 303/1, 25.10.2012.

⁹⁰ Developing countries which, due to a lack of diversification and insufficient integration within the international trading system, are vulnerable. See recital No. 11 of Regulation No. 978/2012, *supra* note 89. For a definition of vulnerability, see Art. 9 (1) a,b,c of the mentioned Regulation. Currently, 13 States (Armenia, Bolivia, Cape Verde, Costa Rica, El Salvador, Georgia, Guatemala, Mongolia, Pakistan, Panama, Paraguay, Peru, and the Philippines) are eligible to apply for the GSP+.

⁹¹ The list of this Convention is included in Annex VIII of Regulation No. 978/2012, *supra* note 89.

⁹² See art. 9(1) b. The monitoring bodies of the Conventions listed by Regulation No. 978/2012, *cit.* should not identify serious failure to the effective implementation of these conventions in the beneficiaries of the GSP+ scheme.

⁹³ See <http://trade.ec.europa.eu/doclib/docs/2015/august/tradoc_153732.pdf>, at 3.

tion of the Conventions⁹⁴ and more broadly, they have to cooperate with this institution.⁹⁵ If the target countries seriously and systematically violate one of the mentioned treaties, the Commission can temporarily withdraw the GSP+.⁹⁶ Notoriously, the EU has only withdrawn the tariff preferences on three occasions in more than 20 years. Tariff preferences were withdrawn in the case of Myanmar (1997) due to the practice of forced labour⁹⁷ (later reintegrated in the GSP+ system⁹⁸), before the GSP+ was created. The violation of the ILO Conventions also justified the withdrawal of benefits in the case of Belarus in 2006,⁹⁹ while Sri Lanka was found to breach basic human rights conventions in 2010.¹⁰⁰ In addition, Myanmar and Belarusian political leadership were imposed restrictive measures on account respectively, serious violation of human rights (including the failure to take action to eradicate the use of forced labour) and other breaches of international rules¹⁰¹ and the violation of international electoral standards and the crackdown on civil society and the democratic opposition.¹⁰²

The poor enforcement record of this scheme certainly affects the achievement of its objectives. However, it is perhaps even more striking that amongst the treaties that vulnerable countries should observe, the 2004 UN Convention against corruption is the only one which was designed to improve good governance. The other treaties concern the protection of the environment. Finally, the breach of the UN Convention on corruption has never been the

⁹⁴ Every two years, the Commission should present to the European Parliament and the Council a report on the status of ratification of the respective conventions, the compliance of the beneficiary countries with any reporting obligations under those conventions, and the status of the implementation of the conventions in practice (Art. 14).

⁹⁵ Art. 12.

⁹⁶ Art. 15. For an in-depth study, see C. Portela and J. Orbie, 'Sanctions under the EU Generalised System of Preferences and Foreign Policy: Coherence by Accident?', 20(1) *Contemporary Politics* 2014, 63-76.

⁹⁷ See Council Regulation (EC) No. 552/97 of 24th March 1997 Temporarily Withdrawing Access to Generalised Tariff Preferences from the Union of Myanmar, *OJ* [1997] L 85/8, 27.3.1997.

⁹⁸ See Regulation (EU) No. 607/2013 of the European Parliament and of the Council of 12 June 2013, *OJ* [2013] L 181/13, 29.6.2013.

⁹⁹ See Council Regulation (EC) No. 1933/2006 of 21 December 2006 Temporarily Withdrawing Access to the Generalised Tariff Preferences from the Republic of Belarus, *OJ* [2007] L 29/14, 3.2.2007.

¹⁰⁰ In 2008, the Commission opened an investigation on Sri Lanka due to its failure to respect basic human rights conventions. The Commission's detailed report concluding the investigation found that the legal and institutional framework of the country concerned was not in line with three human rights conventions and, in addition, human rights violations were committed by state agents (the Karuna group). During the investigation, the tariff preferences were not suspended. In 2010, the tariff reductions were temporarily withdrawn. It should be noted that consultations were also requested by the EU in 2011, in the framework of Art. 96 of the Cotonou Agreement. Appropriate measures were taken against Sri Lanka, including the suspension of certain projects, and the disbursement of the EDF was made subject to a number of conditions. For more details, see L. Beke and N. Hachez, 'The EU GSP: a Preference for Human Rights and Good Governance? The Case of Myanmar', Leuven Centre for Global Governance Studies, *Working Paper* No. 155 (March 2015), at 6.

¹⁰¹ Common Position 2006/318/CFSP, *OJ* [2006] L 116/77, 29.4.2006. However, the first restrictive measures were adopted in 1996.

¹⁰² Common Position 2006/276/CFSP provides that the funds and economic resources of President Lukashenko and certain officials of Belarus that have been identified for this purpose should be frozen, *OJ* [2006] L 101/5, 11.4.2006.

subject of an investigation by the Commission. As a result, it is doubtful that the GSP+ scheme genuinely promotes good governance in developing (vulnerable) countries.

b) *External financial instruments*

The development of good governance practices is supported through many of the EU's external financial instruments on the basis of positive conditionality. The focus is here on the following ones: the Development Cooperation Instrument (DCI),¹⁰³ whose primary aim is to eradicate poverty in developing countries, the European Neighbourhood Instrument (ENI II),¹⁰⁴ which is aimed at 'advancing further towards an area of shared prosperity and good neighbourliness involving the Union' and its neighbours; and the Instrument for Pre-accession Assistance (IPA II).¹⁰⁵ The latter is intended to support the candidate countries in adopting and implementing the reforms needed to comply with the Union's values and to progressively align to the Union's rules, standards, policies and practices before acceding to the EU. The promotion of good governance is included as a specific objective of the three mentioned instruments both under the current regime (applicable as of 2014) and in the previous one.¹⁰⁶ Finally, the European Instrument for Democracy and Human Rights (EIDHR), which supports democracy by reinforcing the active role of civil society, should be mentioned.¹⁰⁷

The DCI considers the consolidation of democracy, the rule of law, good governance, human rights and the relevant principles of international law as necessary to achieve the overall objective of eradicating poverty.¹⁰⁸ The ENI II is aimed at 'establishing deep and sustainable democracy, promoting good governance, fighting corruption, strengthening institutional capacity at all levels

¹⁰³ Regulation (EU) No. 233/2014 of the European Parliament and of the Council of 11 March 2014 Establishing a Financing Instrument for Development Cooperation for the Period 2014-2020, *OJ* [2014] L 77, 15.3.2014. It should be noted that EU Member States also contribute to 'consolidating and supporting democracy, the rule of law, good governance, human rights and the relevant principles of international law' through the European Development Fund. See Council Regulation (EU) 2015/322 of 2 March 2015 on the Implementation of the 11th European Development Fund, *OJ* [2015] L 58, 3.3.2015.

¹⁰⁴ Regulation (EU) No. 232/2014 of the European Parliament and of the Council of 11 March 2014 Establishing a European Neighbourhood Instrument, *OJ* [2014] L 77/27, 15.3.2014.

¹⁰⁵ Reg. No. 231/2014, *supra* note 80.

¹⁰⁶ Council Regulation (EC) No. 1085/2006 of 17 July 2006 Establishing an Instrument for Pre-Accession Assistance (IPA), *OJ* [2006] L 210/82, 31.7.2006; Regulation (EC) No. 1638/2006 of the European Parliament and of the Council of 24 October 2006 Laying Down General Provisions Establishing a European Neighbourhood and Partnership Instrument, *OJ* [2006] L 310/1, 9.11.2006; Regulation (EC) No. 1905/2006 of the European Parliament and of the Council of 18 December 2006 Establishing Financing Instrument for Development Cooperation, *OJ* [2006] L 379/41, 27.12.2006.

¹⁰⁷ Regulation (EU) No. 235/2014 of the European Parliament and of the Council of 11 March 2014 Establishing a Financing Instrument for Democracy and Human Rights Worldwide, *OJ* [2014] L 77, 15.3.2014.

¹⁰⁸ Compare Art. 2(1)a and 2(1)b ii, Reg. No. 233/2014, *supra* note 101.

and developing a thriving civil society including social partners.¹⁰⁹ One of the objectives of the IPA II is to support political reforms in order to strengthen the public administration and good governance at all levels.¹¹⁰ As mentioned,¹¹¹ the promotion of good governance in the context of the enlargement policy implies the strengthening of the administration in order for it to be ready to assume all the obligations deriving from the EU membership. Finally, the EIDHR mentions good governance in the Preamble¹¹² and envisages the funding of projects intended to support the rule of law, to consolidate democratic institutions, and to fight against corruption.¹¹³

A common feature of all the regulations that institute the financial instruments is that they do not clearly state what 'good governance' stands for. In addition, it is not clear by what parameters progress (or lack of progress) in respecting good governance is assessed. Measurement tools are important, especially in the context of the DCI and the IPA II, where the commitment to progress in good governance is conditional on having differentiated relations with the EU.¹¹⁴ Any meaningful promotion of good governance¹¹⁵ must rely on indicators to assess the partners' performance. It is submitted that the EU uses the World Bank indicators on governance.¹¹⁶ However, this should be clearly stated somewhere. A further issue, which does not fit into the scope of this paper, is whether the EU should develop different indicators of governance from those of the World Bank. The EU institutions should pay greater attention to ensure transparency, in the way the EU external financial instruments support good governance.

¹⁰⁹ Art. 2(2)a of Reg. No. 232/2014, *supra* note 104.

¹¹⁰ Art. 2(1) a vi.

¹¹¹ Section IV i).

¹¹² See para. 5.

¹¹³ The Union's assistance focuses, *inter alia*, on: 'Strengthening the rule of law, promoting the independence of the judiciary, encouraging and evaluating legal and institutional reforms, and promoting access to justice; supporting reforms to achieve effective and transparent democratic accountability and oversight, including that of the security and justice sectors, and encouraging measures against corruption.' See Art. 1(1) ii and iv of Regulation No. 235/2014, *supra* note 107.

¹¹⁴ Differentiated approach amongst partner countries depending on a number of factors, criteria, and indicators: 'political, economic, and social progress, gender equality, progress in good governance and human rights, and the effective use of aid, in particular the way a country uses scarce resources for development beginning with its own resources', Art. 3 (2) of Reg. No. 233/2014. By contrast in the ENI, progress in good governance does not count in order to receive greater financial support. Rather, the incentive-based approach of the European Neighbourhood Policy considers progress in building a deep and sustainable democracy and respect for human rights more important. See Art. 4 of Reg. No. 232/2014, *supra* note 102, for a list of other factors that count in having greater financial assistance from the EU. Amongst these factors there is 'progress in building deep and sustainable democracy.' It should be noted that there are there are deep democracy and human rights indicators. See SWD (2015) 77, 25.3.2015.

¹¹⁵ The case of a lack of benchmarks to assess whether the principle of good governance is respected is not the only one. There is also a lack of measurement tools for the assessment of progress or regress with respect to the 'rule of law.' L. Pech, 'The EU as a Global Rule of Law Promoter: The Consistency and Effectiveness Challenges', 14 *Asia Europe Journal* 2016.

¹¹⁶ World Bank, 'Worldwide Governance Indicators Project' (2014), available at: <<http://info.worldbank.org/governance/wgi/index.aspx#home>>. For criticism to this tool and other ones to measure the rule of law, see L. Pech, *supra* n. 27.

iii) **Soft law instruments**

Good governance is often quoted in soft law measures adopted in the context of EU's external relations. It is one of the items for discussion with third countries in human rights dialogues.¹¹⁷ It also features in the European Consensus on development,¹¹⁸ where it is mentioned together with the respect for human rights as shared values underpinning the EU and as a complementary objective to that of fighting poverty. Good governance is often (though not always) included in the action plans between the EU and the third countries of the European Neighbourhood Policy.¹¹⁹ We have seen that after the launch of the ENP, only the association agreements concluded with Georgia, Moldova and Ukraine incorporated references to good governance. As to the Southern neighbours, at the moment the applicable association agreements are the Euro-Mediterranean agreements that omit any reference to good governance.

While it is difficult to find a common approach to good governance in the mentioned soft law measures, by contrast, it is possible for the cooperation in the area of tax matters. Good governance in this area has been the subject of various soft law acts originating from both the Commission and the Council. The Ecofin Council of May 2008 recognised:

'the need to promote, on as broad geographical basis as possible, the principles of good governance in the tax area. As a result, it requested that a provision on good governance in the tax area be added to relevant agreements that are concluded by

¹¹⁷ See EU Guidelines on Human Rights Dialogues with Third Countries, available at: <eeas.europa.eu/human_rights/guidelines/dialogues/docs/16526_08_en.pdf>, at 6.

¹¹⁸ Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting within the Council, the European Parliament and the Commission on the European Union Development Policy: The European Consensus, *OJ* [2006] C46/1, 24.2.2006.

¹¹⁹ These soft law measures lay the ground for the development of new legally binding treaties between the parties. Special emphasis is placed on good governance in the EU-Palestine Authority (PA) Action Plan. In the name of good governance the PA agrees to: '(18) Take all necessary legislative and administrative measures to establish and implement a clear division of powers between the different branches of government. (19) Reinforce national efforts to fully implement the National Development Plan (2011-2013) and its successors in liaison with the international donor community. (20) Support the PA's efforts to implement the national strategic objective to reform its public administration in order to deliver high quality and efficient public services all over the OPT. (21) Develop a functioning legislative framework through formulating a legislative plan, establishing rules to review qualification of legislative initiatives under emergency rule and making full use of the TAIEX instrument for the future preparation of future legislation.' Good governance had also a special position in the EU Action Plan on Justice and Home Affairs in Ukraine, *OJ* [2003] C 77/1, 29.3.2003. This act has a very detailed list of actions that the implementation of the principle of good governance requires. The scope of this principle is very broad. In addition to the strengthening of the institutions and fighting corruption, the alignment of the domestic legislation to European standards and access to legislation and decisions of the higher courts are included. See point 4. In the case of Ukraine, implementing good governance has a similar meaning to that applicable to candidate countries (i.e. strengthening the capacity of the State to align with EU law). Finally, references to good (environmental) governance can be found in selected action plans both with Southern and Eastern neighbours. See Action Plan EU-Egypt, at 26, Action Plan EU-Tunisia, point 67 and Action Plan EU-Morocco, point 72, EU-Azerbaijan Action Plan and EU-Armenia Action Plan, point 60 of EU-Ukraine Action Plan.

the Community and its Member States with third countries or third-country groupings.¹²⁰

Between 2009 and 2012, the Commission issued several communications and a recommendation targeting third countries, including developing countries.¹²¹ These initiatives were supported by the Parliament, which asked the Commission ‘to give good governance in tax matters, and fair, well-balanced, efficient and transparent tax collection, a high place on the agenda in its policy dialogue (political, development and trade), and in all development cooperation agreements [...]’.¹²² In a recommendation in 2012, the Commission spelled out minimum standards of good governance that third countries should respect and indicated what Member States should do if these standards are not met.¹²³ For example, transparency and exchange of information are at the basis of good governance in tax matters. If these and other ‘good governance’ requirements are not met, the Commission invites Member States to publish black lists of these countries. These soft law documents are interesting for several reasons. There is no doubt that:

‘transparency in taxation and fiscal policies have a direct positive effect on good governance and state-building by strengthening democratic institutions, the rule of law, and the social contract between government and citizens, in order to create a reciprocal link between taxes, public and social services, and efforts to promote the stability of government budgets, thereby promoting long-term independence from foreign assistance [...]’.¹²⁴

However, this is the first time that good governance has been invoked to defend ‘the EU’s interests,’ that is to say to reduce the phenomenon of unfair tax competition from third countries. Second, in recent bilateral agreements, the implementation of the principles of good governance in the tax area has become a legally binding commitment.¹²⁵

¹²⁰ Commission Communication, Promoting Good Governance in Tax Matters, COM (2009) 201 final, 28.4.2009.

¹²¹ See, for example, Commission Communication, Cooperating with Developing Countries on Promoting Good Governance in Tax Matters, COM (2010) 163, 21.4.2010, and Commission Recommendation of 6 December 2012 Regarding Measures Intended to Encourage Third Countries to Apply Minimum Standards of Good Governance in Tax Matters, COM (2012) 8805 final, 6.12.2012.

¹²² European Parliament Resolution of 10 February 2010 on Promoting Good Governance in Tax Matters, 2009/2174(INI), 10.2.2010, and European Parliament Resolution of 8 July 2015 on Tax Avoidance and Tax Evasion as Challenges for Governance, Social Protection and Development in Developing Countries, 2015/2058(INI), 8.7.2015.

¹²³ Commission Recommendation of 6 December 2012 *supra* note 121.

¹²⁴ Committee on Development (European Parliament), Report on Tax Evasion as Challenges for Governance, Social Protection and Development in Developing Countries, 2015/2058(INI), 9.6.2015, point J.

¹²⁵ Art. 96(2) PCA with Iraq (2012), *supra* note 64; Art. 22 of the EU-Central America Association Agreement, *supra* note 63. In the Framework Agreement with Korea (2013), *supra* note 62, good governance is not mentioned in the provision dedicated to tax cooperation. However, this principle is embedded in Art. 12: ‘The Parties recognise and commit themselves to implement in the tax area the principles of transparency, exchange of information and fair tax competition.’ See

V. CONCLUSIONS

This paper has attempted to define the scope of the principle of good governance. The TFEU links it to the principle of openness which applies to the EU's (internal) decision making and to the activity of the EU administration. Article 21 TEU does not refer to good governance as an autonomous objective of the EU external action. However, in the practice, good governance seems to be an autonomous goal pursued by the EU in its bilateral relations with third countries. In EU-ACP relations, the EU basically seeks to consolidate the state apparatus and more specifically the administration so as to enable the country to appropriately manage its resources, including its natural resources, in an effort to alleviate poverty. Concrete actions to promote good governance seem quite limited and confined to the environmental dimension of good governance. The EU has sought to encourage developing countries of the ACP group, but also lower-middle income countries such as Indonesia, to manage natural resources in a sustainable manner.

However, this definition of good governance is not uniformly used in the context of the EU relations with other countries. International agreements other than Cotonou Agreement do not offer definitions. Within the framework of the Enlargement Policy, where strengthening of good governance is mentioned in the IPA II (but not in the EU association agreements with acceding countries), good governance entails the improvement of the third country's capacity to adapt its legal order to the new EU obligations. On the one hand, this is understandable: it is clear that developing countries have more governance problems than upper-middle income countries such as those seeking to join the EU. However, if this is the case, the EU should not refer at all to good governance in the context of the IPA instrument II. It would be more logical to establish a parallel between the text of the SAA agreement and that of the enlargement financial instrument by not referring to good governance in the context of the Regulation setting up the IPA II. It would be sufficient to state that the EU's financial efforts are aimed at strengthening the third country's capacity to meet the obligations stemming from the future EU membership.

In reviewing the instruments deployed by the EU to promote good governance, we have found that firstly, the EU bilateral agreements refer to good governance as a common basis for cooperation more frequently than in the early 2000s. Good governance is merely qualified as a 'principle underlying the cooperation' and/or it is a topic in the political dialogue between the EU and the partner country. It is never a fundamental element of the agreement (except in

also the association agreements with Moldova, Georgia and Ukraine (*supra* note 66). A further interesting aspect of these treaties is that Member States are reluctant to be bound by the EU common approach on good governance in tax matters. This is evident from the unilateral declarations by the European Union in the above-mentioned agreements concerning the cooperation in tax matters. The text of the mentioned agreements make clear that Member States are committed under the provision on tax matters of those agreements 'only to the extent that they have subscribed to these principles of good governance in the tax area at the level of the European Union.' See for an example on Art. 96 (customs and tax cooperation in the PCA with Iraq), *supra* note 64.

the Cotonou Agreement). In these cases, the parties do not have any concrete legally binding obligation to strengthen governance; however, reference to good governance in the treaty could be useful for the EU to exercise its influence on the partner's domestic affairs. Secondly, more recently, the EU has used cooperation on good governance in tax matters in several agreements. In these cases, good governance entails an expectation by the Union that a certain third country will ensure that its administration will conduct a fiscal policy according to specific international standards. Thus, good governance is used not only to assist third countries in state building, to fight poverty and promote respect for the rule of law, but also to protect the EU's self-interest.

Consequently, there does not seem to be a common understanding of good governance neither in the EU contractual arrangements nor in the EU financial instruments.¹²⁶ Rather, there are different angles of good governance that the EU seeks to promote in its external relations and these depend on the specific partner country.

Turning to the techniques used by the EU to promote good governance, we have seen that the EU uses negative and positive conditionality. Reliance on the non-execution clauses of the agreements and the suspension of tariff preferences are examples of negative conditionality,¹²⁷ whereas financial support for projects designed to improve governance is an example of positive conditionality. However, we found that the enforcement of breaches of good governance is weak. Only rarely have instances of bad governance led to a consultation between the parties of the Cotonou Agreement. The GSP+ only has slight impact on fostering good governance in the beneficiary countries. Thus, the promotion of good governance may be perceived by third countries as merely a slogan rather than a concrete objective to achieve.

The EU should thus refrain from invoking this principle as a self-standing objective of the cooperation with third countries and it should seek to focus on a narrower number of conditions as a basis for cooperation with its partners (respect for democracy and human rights). The EU should also stress that partner countries have to seriously tackle problems of corruption. This does not mean that the EU merely assists third countries without requiring respect for certain standards of behaviour. In its relations with third countries, the EU should continue to give its support to the strengthening of the institutions, the public administration, the independence of the judiciary, the fight of corruption, ensuring the primacy of law and promoting the sustainable use of natural resources. However, it is problematic to promote all these different objectives by referring to a single principle. It would be more appropriate and ultimately more effective if the EU referred to the objective of providing comprehensive

¹²⁶ In the EU's external financial instruments, there are no definitions of good governance and it is not clear what the benchmarks are to appreciate progress/regress in good governance practises.

¹²⁷ For an in-depth study of conditionality, see L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press 2005). For critical comments on the EU's promotion of human rights, see A. Williams, *EU Human Rights Policies: A Study in Irony* (Oxford: Oxford University Press 2004).

support for public institutions,¹²⁸ and support the country's management of natural resources in a sustainable manner. Alternatively, if the EU wishes to pursue good governance as a self-standing objective in its external relations, it should reserve the promotion of good governance to the area of development cooperation,¹²⁹ and should refrain from using good governance in other external policies. The proposed solutions may possibly be considered the first implementation of the EU 'principled pragmatism'¹³⁰ that is likely to replace the pure 'principled approach' in the future external action of the EU.

¹²⁸ This is a phrase that was recently used in the Action Plan on Human Rights and Democracy. Joint Communication to the European Parliament and the Council Action Plan on Human Rights and Democracy (2015-2019), Keeping Human Rights at the Heart of the EU Agenda, JOIN (2015) 16, 28.4.2105, at 9.

¹²⁹ At the end of day, good governance was coined by the World Bank in this context.

¹³⁰ See the EU's Global Strategy on Common Foreign and Security Policy, presented on 28 June 2016 to the European Council (available at <<http://www.iss.europa.eu/publications/detail/article/a-global-strategy-for-the-european-unions-foreign-and-security-policy/>>), at 8.

EUNAVFOR MED OPERATION SOPHIA: FIGHTING SMUGGLING OF MIGRANTS OR PROTECTING HUMAN RIGHTS?

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I. INTRODUCTION

On 22 June 2015, the second naval operation of the European Union (EU)¹ was launched in the Southern Central Mediterranean (EUNAVFOR MED, later renamed as EUNAVFOR MED Operation Sophia²) with the aim of disrupting the business model of human smuggling and trafficking networks in the Southern Central Mediterranean. This Operation has been part of the so-called EU's Comprehensive Approach towards the current EU refugee crisis that was firstly conceived on 23 April 2015 by the European Council³ in the aftermath of the death of approximately 800 'boat people' in the Mediterranean Sea.⁴

EUNAVFOR MED Operation Sophia is one the missions that the EU has carried out in the framework of the Common Security and Defence Policy (CSDP).⁵ The number of CSDP missions has been steadily increasing. At the

* The author would like to thank Professor Sara Poli for having read and offered comments on a previous draft of this paper. The usual disclaimer applies.

¹ The first naval operation has been EUNAVFOR Operation Atalanta. See Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Coast of Somalia, *OJ* [2008] L 301/31, 10.11.2008. For comments see E. Papastavridis, 'EUNAVFOR Operation Atalanta off Somalia: The EU in Unchartered Legal Waters?', 64 *International & Comparative Law Quarterly* 2015, 533-568, and R. Gosalbo-Bono and S. Boelaert, 'The European Union's Comprehensive Approach to Combating Piracy at Sea: Legal Aspects', in P. Koutrakos and A. Skordas (eds.), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Oxford: Hart Publishing 2014), 87-134.

² The Operation was renamed to EUNAVFOR MED Operation Sophia after the name given to a baby born on-board of a ship participating in the Operation, which rescued her mother off the coast of Libya. See at <<http://www.consilium.europa.eu/en/press/press-releases/2015/09/28-eunavfor/>>.

³ On 23 April 2015, the European Council expressed its indignation about the situation in the Mediterranean and underlined that the Union will mobilise all efforts at its disposal to prevent further loss of life at sea and to tackle the root causes of this human emergency, in cooperation with the countries of origin and transit, and that the immediate priority is to prevent more people from dying at sea. See Special Meeting of the European Council (23 April 2015); available at <<http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/>>.

⁴ On 19 April 2015, more than 800 people drowned after their 20 mt boat capsized in the Mediterranean. The migrants reportedly fell overboard when they rushed to draw the attention of a passing merchant vessel, causing their ship to capsize. See, *inter alia*, P. Kingsley, A. Bonomolo, and S. Kirchgaessner, '700 Migrants Feared Dead in Mediterranean Shipwreck', *The Guardian*, 19 April 2015, available at <<http://www.theguardian.com/world/2015/apr/19/700-migrants-feared-dead-mediterranean-shipwreck-worst-yet>>.

⁵ For a comprehensive review of CSDP missions, see F. Naert, *International Law Aspects of the EU's Security and Defence Policy* (Antwerp: Intersentia 2010), and P. Koutrakos, *The EU Common Security and Defence Policy* (Oxford: Oxford University Press 2013).

time of writing (15 June 2016), there have been 19 ongoing CSDP missions in third states, covering aspects of both military and civilian crisis management.⁶

The basic legal instrument governing each CSDP operation is a Council Decision, based on Articles 43 and 28 of the Treaty of the European Union (TEU), adopted in accordance with the voting rules laid down in Articles 31 and 42 (4) of the TEU. Under Article 28, these decisions 'shall lay down their objectives, scope, the means to be available to the Union, if necessary their duration, and the conditions for their implementation' and 'shall commit the Member States in the positions they adopt and in the conduct of their activity'.⁷ Council Decision (CFSP) 2015/778, dated 18 May 2015, is the legal basis of EUNAVFOR MED Operation Sophia. In accordance with Article 2,

'EUNAVFOR MED [Operation Sophia] shall be conducted in sequential phases, and in accordance with the requirements of international law.

EUNAVFOR MED [Operation Sophia] shall: (a) in a first phase, support the detection and monitoring of migration networks through information gathering and patrolling on the high seas in accordance with international law;

(b) in a second phase, (i) conduct boarding, search, seizure and diversion on the high seas of vessels suspected of being used for human smuggling or trafficking, under the conditions provided for by applicable international law, including UNCLOS and the Protocol against the Smuggling of Migrants;...'⁸

Since 7 October 2015, as agreed by the EU Ambassadors within the Security Committee on 28 September, the mission moved to its second phase as set out in the Council Decision. As reported by the EU External Action Service in May 2016, there are currently 24 contributing Member States, while the Operation Commander is of Italian nationality.⁹ On 23 May 2016, the EU Council of Foreign Affairs decided

'to extend the mandate of EUNAVFOR MED Operation Sophia by one year and, while retaining the focus on its core mandate, to add two further supporting tasks: capacity building and training of, and information sharing with, the Libyan Coastguard and Navy, based on a request by the legitimate Libyan authorities taking into account the need for Libyan ownership; contributing to information sharing, as well as implementation of the UN arms embargo on the High Seas off the coast of Libya on the basis of a new UNSC Resolution.'¹⁰

⁶ Further information is available at <http://www.eeas.europa.eu/csdp/index_en.htm>.

⁷ Art. 28 of the TEU.

⁸ See Art. 2 of Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ [2015] L 122/31, 18.5.2015 [hereinafter: Council Decision].

⁹ See European Union Naval Force – Mediterranean Operation Sophia (update: 22 August 2016), available at <http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/factsheet_eunavfor_med_en.pdf>.

¹⁰ See European Council Conclusions on EUNAVFOR MED Operation Sophia (23 May 2016); available at <<http://www.consilium.europa.eu/en/press/press-releases/2016/05/23-fac-eunavfor-sophia/>>.

As the above Council Decision mentioned, the operation is to be conducted 'in accordance with the requirements of international law,' which in the present case includes, *inter alia*, requirements of the law of the sea, international human rights law, and international refugee law. This legal framework was supplemented by a long-anticipated Security Council Resolution under Chapter VII of the UN Charter.¹¹ Since May 2015, the EU has tried to secure a Resolution that would authorise the interdiction of smuggling vessels either on the high seas or, more importantly, within the territorial waters of Libya.¹² These efforts were intensified during the following months in view of the reticence of the Libyan side to grant its consent to such operations within its waters.¹³ Finally, the Council adopted Resolution 2240 two days after the commencement of the second phase of the Operation on the high seas, on 9 October 2015, and authorised under certain conditions the inspection of foreign-flagged vessels on the high seas and their subsequent seizure.¹⁴

At the time of the writing of this article (June 2016), the phase 2 of EUNAVFOR MED Operation Sophia has been operative for about 9 months.¹⁵ According to the EU External Action Service, 'as of 27 May 2016, the Operation has contributed to save more than 14800 people while 71 people have been reported to the Italian Authorities as possible smugglers and 127 vessels have been removed from illegal organizations' availability'.¹⁶ Notwithstanding this *prima facie* success, EUNAVFOR MED Operation Sophia is susceptible to criticism on many grounds: for example, it could be contended that it is the wrong tool, i.e. a military operation, to tackle a predominantly humanitarian problem, or that its geographical scope is restricted off the coast of Libya, while migratory flows also come from Turkey, Egypt and Algeria.¹⁷

The purpose of this paper, however, is not to address this criticism or assess the efficacy of the Operation; rather, it is to explore its consistency with human rights law, i.e. assess its legality against the background of the applicable rules of international human rights law. It will conclude that although the Operation seems to be conducted in accordance with international human rights law, there are some operational as well as jurisdictional 'grey areas' that invite discussion. The analysis will focus on the interdictions¹⁸ taking place in the course of the

¹¹ See S/RES/2240 (2015), 9.10.2015.

¹² See 'EU Seeks UN Support to Tackle Migrant Smuggling', *BBC*, 11 May 2015, available at <<http://www.bbc.com/news/world-europe-32695483>>.

¹³ See in this regard G. Ziccardi Capaldo, 'The EUNAVFOR MED Operation and the Use of Force', 19 *ASIL Insights*, 2015, available at <<https://www.asil.org/insights/volume/19/issue/27/eunavfor-med-operation-and-use-force>>.

¹⁴ See S/RES/2240 (2015); paras. 7 and 8. For the negotiations leading to the adoption of the Resolution, see at <<http://www.whatsinblue.org/2015/10/vote-on-a-resolution-on-human-trafficking-and-migrant-smuggling-in-the-mediterranean.php>>.

¹⁵ For further information about the Operation, see at <http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/index_en.htm>.

¹⁶ See at <http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/news/20160527_01_en.htm>.

¹⁷ For the relevant data, see at <<http://data.unhcr.org/mediterranean/regional.php>>.

¹⁸ The terms interdiction and interception are used interchangeably in the present paper to denote the practice of warships and other duly authorised governmental ships to stop, board, search, and divert foreign-flagged vessels on the high seas. On maritime interception or interdic-

Operation and not on the conduct of Member States insofar as the reception of asylum-seekers and their further treatment is concerned, or on questions regarding the law of the sea,¹⁹ including search and rescue services.²⁰

II. THE INTERDICTION OPERATIONS IN THE CONTEXT OF EUNAVFOR MED OPERATION SOPHIA AND HUMAN RIGHTS LAW

By virtue of Article 2 (b) (i) of the Council Decision, the purpose of the Operation in the present Phase II-High Seas is 'to board, search, divert and seize vessels on the high seas of vessels suspected of being used for human smuggling or trafficking'. The legal framework of these acts is not only the law of the sea, as reflected in the UN Convention on the Law of the Sea (UNCLOS),²¹ but also international human rights law. As the Council Decision itself expressly stated, the Operation is to be conducted in accordance with the requirements of international law, and it is submitted that these requirements include requirements not only under the law of the sea, but, very importantly, also under international human rights law.

Accordingly, this paper will argue that maritime interdiction operations are also subject to international human rights law, which informs both their planning and their implementation, and will address whether EUNAVFOR MED Operation Sophia, at least in its planning, is in compliance with this body of international law. In this regard, it will first discuss under which conditions human rights law applies to the EUNAVFOR MED Operation Sophia and binds both the EU and its Member States, and then it will shift its focus to the individual human rights that may be violated in the context of this Operation.

1. The application of human rights law in the context of the EUNAVFOR MED Operation Sophia

The first preliminary, yet most significant, question is whether human rights obligations bind states and international organisations when they engage in

tion see, *inter alia*, D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press 2009), and E. Papastavridis, *Interception of Vessels on the High Seas* (Oxford: Hart Publishing 2013).

¹⁹ On the legality of the EUNAVFOR MED Operation Sophia under the law of the sea, see E. Papastavridis, 'EUNAVFOR Operation Sophia and the International Law of the Sea', 2 *Maritime Security and Safety Law Journal* 2016, 57-72.

²⁰ On this topic of paramount importance see, *inter alia*, E. Papastavridis, 'Rescuing Migrants at Sea: The Responsibility of States under International Law', in G.S. Goodwin-Gill and Ph. Weckel (eds.), *Migration and Refugee Protection in the 21st Century. International Aspects*, Hague Academy of International Law (Leiden: Martinus Nijhoff 2015), 269-308; J. Coppens, 'The Lampedusa Disaster: How to Prevent Further Loss of Life at Sea?', 7 *The International Journal on Marine Navigation and Safety of Sea Transportation* 2013, 589-598.

²¹ United Nations Convention on the Law of the Sea, Montego Bay, 10.12.1982, in force 16.11.1994, 1833 UNTS 397. The EU is party to the LOSC since 1998; see Council Decision 98/392, OJ [1998] L 179, 129 (EC). See also E. Paasivirta, 'The European Union and the United Nations Convention on the Law of the Sea', 38 *Fordham International Law Journal* 2015, at 1045.

interception operations extraterritorially, *in casu* on the high seas. Under international law, the protection of human rights extends to persons under the jurisdiction of the contracting parties to the pertinent treaties. It is, however, this concept of 'jurisdiction' that has aroused considerable controversy in international legal discourse. The main international human rights treaties on civil and political rights conceive state responsibility for securing the rights they contain essentially in terms of the state's 'jurisdiction'. Thus, it is necessary to establish whether a situation falls within the state's 'jurisdiction' before the obligations in these instruments come into play.²²

Human rights bodies conceive jurisdiction as a question of fact, of actual authority and control that a state has over a given territory or person.²³ 'Factivity' in this regard 'creates normativity',²⁴ or in the words of the European Court of Human Rights, '*de facto* control gives rise to *de jure* responsibilities.'²⁵ In the maritime context and in particular on the high seas, the situation is rather unambiguous, particularly in light of the jurisprudence of the Strasbourg Court: the Convention applies on the high seas, in so far as control, and therefore jurisdiction is exerted by organs of the states' parties, usually warships or other duly authorised vessels. This assertion is supported by the *Xhavara and others v. Albania and Italy* case,²⁶ involving the sinking of an Albanian vessel by an Italian warship on the high seas and by the *Rigopoulos v. Spain* case (1999)²⁷ and *Medvedyev v. France* case (2010),²⁸ involving the arrest of a drug-trafficking vessel on the high seas, and the list goes on. In all these interception cases, the jurisdiction *ratione loci* of the Court was never contested.

In the *Hirsi* case (2012), which resembles the present enquiry, since it concerned Somali and Eritrean migrants who had been intercepted on the high seas by the Italian authorities and sent back to Libya, the Grand Chamber held that:

"the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. In the Court's opinion, in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities [...]. Accord-

²² See R. Wilde, 'Triggering State Responsibility Extraterritorially: The Spatial Test in Certain Human Rights Treaties', 40 *Israel Law Review* 2007, at 506.

²³ For more detailed insights, see, *inter alia*, M. Gondek, *The Reach of Human Rights Treaties in a Globalizing World: Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia 2009), and M. Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford: Oxford University Press 2011).

²⁴ M. Sheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in F. Coomans et al. (eds.), *Extraterritorial Application of Human Rights* (Antwerp: Intersentia 2004), at 81.

²⁵ ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, Appl. No. 61498/08, 30 June 2009, para. 88.

²⁶ ECtHR, *Xhavara and Others v. Italy and Albania*, Appl. No. 39473/98, January 2001.

²⁷ ECtHR, *Rigopoulos v. Spain*, Appl. No. 37388/97, 12 January 1999.

²⁸ ECtHR, *Medvedyev v. France*, Appl. No. 3394/03, 29 March 2010, para. 67.

ingly, the events giving rise to the alleged violations had fallen within Italy's jurisdiction within the meaning of Article 1".²⁹

Hence, the *Hirsi* case comes to complement the above decisions and provides potency to the argument that the Convention applies on the high seas.

The application of the Convention on the high seas presupposes a certain degree of factual control on the vessel or on the persons that are to come under the jurisdiction of the boarding state. Such degree of control would be satisfied in cases of boarding and search of the vessel, let alone when the suspects are detained and transferred to the judicial authorities of the state party to the Convention, such as in the *Medvedyev* case, or when they are transferred to a third state on the intercepting vessels, such as in the *Hirsi* case. It may also be satisfied in cases when there is a ship-to-ship operation prior to boarding, which involves limited use of force to bring the 'delinquent' vessel to a halt. For example, in the *Andreou v. Turkey* case, the ECtHR stated that 'the opening of fire on the crowd from close range ... was such that the applicant must be regarded as within the jurisdiction of Turkey'.³⁰ In a similar vein, in *Women on Waves v. Portugal*, the Court regarded the Convention applicable simply on the basis that the Portuguese warship intercepted *Borndiep*, seemingly without even boarding the vessel.³¹

The next question is whether the full gamut of human rights comes into play in the case of the exercise of jurisdiction on the high seas. In the *Bankovic* case, the applicants proposed the idea of 'sliding scale' or 'cause and effect' jurisdiction: obligations apply insofar as control is exercised; their nature and scope is set in direct proportional relation to the level of control.³² The European Court rejected this argument; for it, the concept of jurisdiction could not be 'divided and tailored in accordance with the particular circumstances of the extraterritorial act in question'.³³ This proposition was refuted later in the *Al-Skeini* case, in which the European Court held, in stark contrast to its previous *dictum* in *Banković* case, that 'it is clear that whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore the Convention rights can be "divided and tailored"'.³⁴

Having ascertained that human rights obligations do bind states and in particular EU Member States engaged in interdiction operations on the high seas, it is questioned whether the EU itself is bound by human rights obligations.

Indeed, the TEU provides explicitly in Article 6 (3) that:

²⁹ ECtHR, *Hirsi Jamaa a.o. v. Italy*, Appl. No. 27765/09, 23 February 2012, paras. 81 and 82.

³⁰ ECtHR, *Andreou v. Turkey*, Appl. No. 45653/99, 3 June 2008, para. A.3.c.

³¹ ECtHR, *Women on Waves v. Portugal*, Appl. No. 31276/05, 3 May 2009, para. 23.

³² ECtHR, *Bankovic and Others v. Belgium and Others*, Appl. No. 52207/1999, 12 December 2001, para. 75.

³³ *Ibid.*, para. 76.

³⁴ ECtHR, *Al-Skeini v. UK*, Appl. No. 55721/07, 7 July 2011, para. 137.

'fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law',

while Article 6 (2) sets forth that:

'the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'.³⁵

Accordingly, the EU is bound by human rights law, including the provisions of ECtHR, as 'general principles of EU' law, until the EU itself accedes to the Convention.³⁶

Secondly, there is another instrument, the EU Charter of Fundamental Rights (EUCFR),³⁷ which pursuant to Article 6 (1) of the TEU, has the same legal value as the Treaties, i.e. it is now primary EU law. Since the entry into force of the Lisbon Treaty in 2009, the Charter is binding on both the EU institutions and the Member States when they are implementing EU law. Indeed, Article 51 (1) provides that

'the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when *they are implementing Union law*'.³⁸

It follows that the trigger for the application of the Charter is the 'implementation of EU law'. There is considerable academic debate as to what is meant by 'implementing', but recently the question was put to rest when the Court of Justice of the European Union, in the *Akerberg Fransson* case, equated 'implementation' of EU law to 'falling within the scope of' EU law.³⁹ Hence EU human rights obligations are applicable in all areas governed by EU law or, as the Court in the above case puts it, '[t]he applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter'.⁴⁰

³⁵ See Arts. 6 (2) and (3) of TEU.

³⁶ On 5 April 2013, in negotiations of the 47 Council of Europe, Member States and the EU have finalised the draft accession agreement of the EU to the ECtHR. However, on 18 December 2014, the Court of Justice of the EU postponed, for the time being, any progression towards the EU acceding to the ECtHR; see Court of Justice of the EU (Full Court) Opinion 2/2013, 18.12.2014, available at <<http://curia.europa.eu/>>. For the text of the draft agreement, see <[http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1\(2013\)008rev2_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf)>. A short commentary is furnished in 'A New Framework for Allocating International Responsibility: The EU Accession to the European Convention on Human Rights', *SHARES Briefing Paper* (2014), available at <www.sharesproject.nl>.

³⁷ Council of the European Union, Charter of Fundamental Rights of the European Union, Doc 2007/C 303/01, 14.12.2007 [hereinafter: EUCFR]. For commentary, see S. Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart Publishing 2014).

³⁸ [emphasis added].

³⁹ CJEU, Case C-617/10, *Åklagaren v. Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 21.

⁴⁰ *Ibid.*

The only threshold requirement, therefore, is whether EU law applies to the particular circumstances.

In addition, the majority of human rights law binds the EU as a matter of customary law. As the Court of Justice of the European Union has repeatedly confirmed, the EU, including the Communities, must, as subject of international law, respect international law- both treaty and customary- in the exercise of its powers.⁴¹ Thus, the EU is also under the customary obligation to respect fundamental human rights, as those applicable in the context of the present enquiry.

Finally, it is submitted that human rights law may also bind the EU extraterritorially. It is true that Article 52(1) of the TEU may appear to set a territorial limitation to the law of the Union. The clause provides that the EU treaties 'shall apply to the [EU Member States]', while Article 52 (2) refers, in turn, to Article 355 of the Treaty on the Functioning of the European Union (TFEU) which concerns overseas territories.⁴² However, as rightly pointed out by Moreno-Lax and Costello,

'the ultimate function of Articles 52 TEU and 355 TFEU is not to demarcate the field of application of EU law, but to enumerate the High Contracting Parties that are bound by it. Like Article 51 for the purposes of the Charter, Articles 52 TEU and 355 TFEU list the addressees of the obligations flowing from the Union Treaties'.⁴³

Thus, 'once the European Union is found competent to act—a conclusion which is informed by PIL [Public International Law] jurisdiction, EU law may apply extraterritorially'.⁴⁴

In any case, it can be argued that since, for the purposes of EUNAVFOR MED Operation Sophia, EU Member States and the EU itself, as acknowledged by Security Council Resolution 2240/2015, operate on the high seas, they are all under the obligation to respect international human rights law and international refugee law. This is evident from the above Resolution, which

'*emphasises* that all migrants, including asylum-seekers and regardless of their migration status, should be treated with humanity and dignity and that their rights should be fully respected, and urges all States in this regard to comply with their obligations under international law, including international human rights law and international refugee law, as applicable'⁴⁵

and

⁴¹ See e.g. CJEU, Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change* [2011] ECR I-13755, para. 101. See also A. Giannelli, 'Customary International Law in the European Union' in E. Cannizzaro, P. Palchetti and R. Wessels (eds.), *International Law as Law of the European Union* (Leiden: Martinus Nijhoff 2012), at 93.

⁴² See Treaty on the Functioning of the European Union OJ [2012] C 326/47 [hereinafter: TFEU].

⁴³ V. Moreno-Lax and C. Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity – the Effectiveness Model', in S. Peers et al. (eds.), *supra* note 37, at 1663.

⁴⁴ *Ibid.*

⁴⁵ S/RES/2240 (2015), para. 13.

'urges Member States and regional organisations acting under the authority of this resolution to have due regard for the livelihoods of those engaged in fishing or other legitimate activities'.⁴⁶

Thus, the obligation to respect human rights of migrants applies, in principle, equally to Member States and the EU.

In conclusion, there is no doubt that the EU itself and the Member States participating in the EUNAVFOR MED Operation Sophia are bound by human rights law insofar as they exert jurisdiction over the persons in question. Should a violation of these human rights obligations occur in the context of the Operation, issues of international responsibility would eventually arise. International responsibility arises whenever a state or an international organisation commits an internationally wrongful act, which is defined as a conduct attributable to the state or international organisation in question that amounts to a breach of the latter's obligation.⁴⁷ Obviously, the question of attribution attains extreme prominence in the context of such operations, since it must be ascertained whether the conduct in question is attributed to the EU or to the Member States.⁴⁸ In either case, it is contended that there is room for the indirect responsibility of the EU or the Member States according to the ILC Articles on the Responsibility of International Organizations (ARIO).⁴⁹

It is beyond the ambit of the present enquiry to address the aforesaid questions; it suffices to say that pursuant to Article 7 of ARIO, it would be a matter of who exerts 'effective control', or in our understanding 'operational control' over the conduct in question.⁵⁰ Thus each and every potential incidence that may involve a human rights violation would have to be assessed on an *ad hoc* basis in order to ascertain the directly responsible entity; albeit, as mentioned above, this does not mean that the other would not incur indirect responsibility.

That said, the question remains: what human rights obligations may be breached in the context of the Operation? Additionally, is the Operation, and in particular its Rules of Engagement⁵¹ drafted in such a manner so as to ensure the protection of human rights law?

⁴⁶ Ibid, para. 14.

⁴⁷ See Arts. 1 and 2 of ILC Articles on Responsibility of States for Internationally Wrongful Acts, UN General Assembly Official Records, 56th Session, Supp. No. 10 at UN Doc A/56/10, at 31 [hereinafter: ARSIWA]; and Arts. 3 and 4 of the Draft Articles on the Responsibility of International Organizations, ILC Report, Sixty-Third Session, UN Doc A/66/10 (2011), 50-170 [hereinafter: ARIO].

⁴⁸ On this question concerning the EU see, *inter alia*, F. Naert, 'The International Responsibility of the Union in the Context of its CSDP Operations' in M. Evans and P. Koutrakos (eds.), *The International Responsibility of the European Union* (Oxford: Hart Publishing 2013), 313, and A. Sari and R. Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in B. Van Vooren, S. Blockmans and J. Wouters (eds.), *The Legal Dimension of Global Governance: What Role for the EU?* (Oxford: Oxford University Press 2013), 126-141.

⁴⁹ See Ch. IV and Part V of ARIO and accompanying commentary.

⁵⁰ See Art. 7 of ARIO and relevant comments of the present author in relation to EUNAVFOR Operation Atalanta, *supra* note 1, at 21.

⁵¹ The Rules of Engagement set out the operational procedures according to which each operation should be conducted. On RoEs, see C. Cooper, 'Rules of Engagement Demystified: A

2. The human rights in need of protection in the context of EUNAVFOR MED Operation Sophia

i) *the right to life*

The first right that is in need of protection in the course of maritime interception operations, such as, in which force may be used in order to interdict a vessel and arrest the suspects on board the vessel, is undoubtedly the right to life. All universal and regional human rights treaties provide for the protection of the right to life, which is considered as customary international law; for example, Article 6 para. 1 of the International Covenant on Civil and Political Rights declares that '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'⁵²

The right to life forbids states to intentionally deprive someone of his or her life unless it is 'no more than absolutely necessary', amongst others, 'in defence of any person from unlawful violence' or 'in order to effect a lawful arrest'. Therefore, when States engage in law enforcement operations at sea should do 'no more than absolute necessary ... to effect a lawful arrest'. The fundamental tenets of necessity and proportionality are the cornerstones on which each and every case of lethal force would be assessed. As held in the landmark case of *McCann and others v. United Kingdom* (1995),⁵³ deprivations of life must be subject to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the state who actually administer the force, but also all the surrounding circumstances.

In the case-law of the Strasbourg Court, there has been only one case in which a violation of Article 2 of ECHR was invoked, and which was relevant to the present enquiry, namely the *Xhavara and others v. Albania and Italy* case. In this case, 16 Albanian refugees, who had survived the *Katar I Rades* incident, but had lost several family members, claimed that the Italian vessel had deliberately hit their boat and brought a complaint against both Italy and Albania, primarily for a violation of the right to life. The substance of the applicant's complaint under Article 2 was that they had been deprived of a proper investigation of the Italian state's actions that led to the death of their parents. Even though the Strasbourg Court held that Italy did not act contrary to the right of a person to leave one's country (Article 2(2) Protocol No. 4), it did rule that the interception activities which extended to international waters and to the territorial waters of Albania fell under Italian jurisdiction, and that Italy therefore had to take 'all the necessary measures to avoid, in particular, drowning'. Nonetheless, complaints under Articles 2 and 3 (which involved largely the same complaint) were rejected as inadmissible *ratione temporis*.⁵⁴

Study of History, Development and Use of RoEs', 53 *Revue de Droit Militaire et Droit de Guerre* 2014, 189-245.

⁵² See Art. 6 of the International Covenant on Civil and Political Rights 1966, 999 *UNTS* 171 (hereinafter: ICCPR). See also Art. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 *UNTS* 221 [hereinafter: ECHR].

⁵³ ECtHR, *McCann and others v. United Kingdom*, Appl. No. 18984/91, 27 September 1995.

⁵⁴ See *Xhavara* case, *supra* note 26.

Of relevance is also the Decision of the UN Committee against Torture (CAT) in the *Sonko v. Spain* case (2012),⁵⁵ which concerned a Senegalese national that had died after being apprehended by guards in Spanish waters and forced to remain in the water without a flotation device despite his inability to swim.

In view of the above-mentioned case law, it is submitted that the boarding authorities should be extremely cautious in counter-immigration interdiction operations. While the use of force in the course of interdiction operations may, in general, be allowed as inherently necessary to any law-enforcement at sea,⁵⁶ in this particular context it should, in principle, be prohibited and only in very exceptional circumstances allowed. In other words, the rebuttable presumption should shift from permitting the use of force in strictly controlled circumstances to opposing it. This argument rests upon the consideration that the purpose of the enforcement operations and consequently the target of the use of force *in casu* are human beings, usually victims of trafficking or smuggling of migrants and not terrorists, drug smugglers or illegal anglers, as in other interdiction operations. Elementary considerations of humanity, to which reference is made also by the *Saiga II* case,⁵⁷ as well as the proper application of the principles of necessity and proportionality buttress the thesis that the operations against the trafficking of human beings in all its forms should abstain from the use of force, save in self-defence cases, in contemplation of the human 'cargo' on board the intercepted vessels and the danger present for innocent persons being injured or even losing their life. Especially the proportionality principle requires the enforcing state to weigh the gravity of the offence against the value of human life, which in all cases falls short of justifying the intentional sinking of vessels and the loss of human beings.⁵⁸ This was exemplified by the *Xhavara* case.⁵⁹

It follows that the permissibility of the use of force in the context of Operation Sophia should be not be taken as granted. This also flows from the authorisation provided by the SC Resolution 2240/2015 itself: in authorising the EU and its Member States to use all measures commensurate to the specific circumstances in confronting migrant smugglers or human traffickers, it makes

⁵⁵ UN Committee against Torture, *Sonko v. Spain*, Comm. No. 368/2010, 20 February 2012.

⁵⁶ The *locus classicus* in this regard has been the judgment of the International Tribunal for the Law of the Sea (ITLOS) in the *M/V Saiga (No. 2)* case [1999]. The Tribunal expressed the view that 'international law requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law'; para. 155. See also A.V. Lowe, 'National Security and the Law of the Sea', 17 *Thesaurus Acroasium* 1991, at 133, 162, and E. Papastavridis, 'The Use of Force at Sea in the 21st Century: Some Reflections on the Proper Legal Framework(s)', 2 *Journal of Territorial and Maritime Studies* 2015, 119-138.

⁵⁷ See *ibid.*

⁵⁸ In accord seems to be Ivan Shearer, who claims that 'a deliberate sinking will in no circumstances be warranted if the offence involved is a customs (i.e. purely regulatory) offence ... It is suggested that fisheries, revenue, immigration and other regulatory offences would fall into the same category'; see *ibid.*, 'The Development of International Law and Respect to the Law Enforcement Role of Navies and Coast Guards in Peacetime', in M.N. Schmitt and L.C. Green (eds.), *The Law of Armed Conflict: Into the Next Millennium* (Newport: Naval War College 1998), at 441.

⁵⁹ See *Xhavara* case, *supra* note 26.

explicit reference to the fact that these measures should be in full compliance with international human rights law, as applicable, as well as that they should provide *for the safety of persons on board as an utmost priority* and to avoid causing harm to the marine environment or to the safety of navigation.⁶⁰

In light of the foregoing, doubts may, arguably, arise as to whether the standing Rules of Engagement of the *Operation Sophia* (Operation RoEs) are in full consistency with the right to life. Indeed, there is reference to the possibility of the use of force in the General Text of the Operation RoEs as follows: '[t]he use of force is governed by the principles of proportionality, necessity and minimum force that includes, by definition, the authority to use deadly force on conditions in which it is necessary and proportionate',⁶¹ as well as 'nothing in the present ROE should be construed as limiting the inherent right of self-defence as provided for under national and international law'.⁶² Particularly, use of minimum force, excluding deadly force, is authorised to compel compliance with the order to divert or to stop vessels,⁶³ while the use of minimum use of force, including use of deadly force, is authorised in cases of 'non-cooperative boardings', i.e. when the master of the suspect vessel does not cooperate with the boarding authorities,⁶⁴ or in cases of 'opposed boardings', namely when there is certainty that the suspect vessel would oppose boarding with various means, including use of force.⁶⁵

Very importantly, however, in all the above cases, there is the caveat that 'the possible use of minimum force should be duly evaluated as not to cause any danger direct, or induced to persons others than human smugglers/traffickers'.⁶⁶ Additionally, it is acknowledged that when the firing of warning shots or the use of 'electronic warfare'⁶⁷ is authorised, 'due precautions shall be applied not to induce panic that will compromise maritime safety or is likely to put lives at risk'.⁶⁸

As an extensive analysis of all the above RoEs and procedures of the boarding operations is beyond the ambit of the present paper, it is submitted that even though 'due regard precautions' have been included therein, the idea that electronic warfare or even the minimum use of force is permitted against a boat full of migrants is at least alarming. In any case, the assessment of the legality of the boarding operation and whether it was conducted in full compliance with international human rights law, namely the right to life, can only be made on an *ad hoc* basis and not *ex ante*. From the vantage point of having read the applicable RoEs, the conclusion may be drawn that the latter have, indeed, taken

⁶⁰ S/RES/2240 (2015), para. 10 [emphasis added].

⁶¹ See EUNAVFOR MED Operation Sophia-Revised Draft 3-ROEAUTH-004, EEAS (2015) 10394 REV3, GENTEXT/04 (on file with the author) [hereinafter: Operation RoEs].

⁶² *Ibid.*, GENTEXT/05.

⁶³ *Ibid.*, ROEAUTH/162.

⁶⁴ *Ibid.*, ROEAUTH/172.

⁶⁵ *Ibid.*, ROEAUTH/173.

⁶⁶ *Ibid.*, ROEAUTH/173.AMPN 3.

⁶⁷ Electronic warfare is defined as 'the employment of electro-magnetic energy, including directed energy to reduce or prevent hostile of EM spectrum and action to ensure its effective use by friendly forces'; ROEAUT/361, AMPN.2.

⁶⁸ *Ibid.*, AMPN.3

into account the applicable legal framework and have incorporated the principles of necessity and proportionality; yet there are certain operational 'grey zones' within these RoEs, which give rise to concerns about their implementation.

ii) *The principle of non-refoulement*

The principle of *non-refoulement*, i.e. the prohibition of returning people to territories where they may face persecution, torture or other degrading and inhumane treatment, is one of the fundamental tenets of international human rights law.⁶⁹ No surprise thus that it has found its way in numerous international human rights treaties binding upon states in the context of counter-immigration operations.⁷⁰ Equally, it is included in the EUCFR⁷¹ and thus governs also the operations of EU in the Mediterranean Sea.

In addition, the prohibition of *refoulement* under human rights law has application on the high seas, provided that the persons concerned are within the jurisdiction of the intercepting States. This has been unequivocally affirmed in the famous *Hirsi v. Italy* case. The application was filed on 26 May 2009 by 11 Somalis and 13 Eritreans, who were among the first group of about 200 migrants interdicted by Italian authorities and summarily returned to Libya pursuant to Italy's push-back practice.⁷² As per Article 3 and the prohibition of *refoulement*, the Grand Chamber noted that 'the numerous reports by international bodies and non-governmental organisations painted a disturbing picture of the treatment meted out to clandestine immigrants in Libya at the material time'⁷³ and showed that clandestine migrants, disembarked in Libya following their interception by Italy on the high seas, such as the applicants, were exposed to those risks.⁷⁴ It concluded that 'in the present case substantial grounds have been shown for believing that there was a real risk that the applicants would be subjected to treatment in Libya contrary to Article 3'⁷⁵ and that 'by transferring the applicants to Libya, the Italian authorities, in full knowledge of the facts, exposed them to treatment proscribed by the Convention.'⁷⁶

In the context of the present enquiry, it appears that it is unlikely that *non-refoulement* would occur, since all the intercepted and rescued persons are

⁶⁹ On this principle, see the excellent treatise on the issue by Sir E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in E. Feller et al. (eds.), *Refugee Protection in International Law* (2001), at 87, and C. Wooters, *International Legal Standards for the Protection from Refoulement* (Antwerp: Intersentia 2009).

⁷⁰ See, *inter alia*, Arts. 6 and 7 of ICCPR and Art. 3 of ECHR. See also *Ahmed v. Austria* [1997] 24 EHHR 278, paras. 39-40, *Saadi v. Italy*, Appl. No. 37201/06, 28 February 2008, and *MSS v. Belgium and Greece*, Appl. No. 30696/09 21 January 2011, para. 344 et seq.

⁷¹ See Arts. 18 and 19 of the EUCFR.

⁷² According to the Italian authorities, from 6 May to 6 November 2009, a total of nine operations were carried out, returning a total of 834 persons to Libya; see further information at <<http://migrantsatsea.wordpress.com/2010/03/18/unhcr-files-ecthr-third-party-intervention-in-hirsi-v-italy/>>.

⁷³ *Ibid.*, para. 123.

⁷⁴ *Ibid.*, para. 126.

⁷⁵ *Ibid.*, para. 136.

⁷⁶ *Ibid.*, para. 137.

transferred to Italy.⁷⁷ Be that as it may, it is not certain whether this would go on forever, in the sense that especially for search and rescue services, which are not within the remit of the Operation *per se*, the decision-making authority for the disembarkation of rescued persons rests with the Rescue Coordination Centre (RCC).⁷⁸ This RCC might be of a state that does not meet all the safeguards of the ECtHR; for instance, according to the Operational Plan of the EUNAVFOR MED, the Piraeus RCC would be responsible for rescue operations within its Search and Rescue Area (SAR zone).⁷⁹ Greece, due to the systematic deficiencies of its asylum system as well as due to the dire reception conditions, may fall short of guarantying all the requirements of the principle of *non-refoulement*.⁸⁰

iii) *The right to liberty and security*

Another right that may be breached in the context of the *Operation Sophia* is the right to liberty and security. It is true that in many cases involving maritime interception operations, there are several issues regarding the quality of legal standards surrounding the detention of the suspects both on-board the vessel and in the territory of the state of disembarkation.

As the ECtHR has consistently upheld,

‘where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application (...), a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness...’⁸¹

In the *Medvedyev v. France* case, the Court was of the opinion that these safeguards also apply to interception and detention activities at sea.⁸²

With regard to the right to liberty and security, a decisive consideration for determining whether coercive measures taken in respect of suspect persons at sea amount to a deprivation of their liberty concerns, not only the degree of physical constraint asserted over them, but also to the duration of restriction on

⁷⁷ See *supra* note 16.

⁷⁸ Coastal states are obliged to provide search and rescue services in the area under their responsibility and are invited to regulate and coordinate operations and rescue services in the maritime zone designated in accordance with international agreements, such as the IMO Convention on Maritime Search and Rescue. See International Convention on Maritime Search and Rescue, adopted 27 April 1979, entered into force 22 June 1985, 1405 UNTS No. 23489. See also S. Trevisanut, ‘Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?’, 25 *International Journal of Marine and Coastal Law* 2010, at 524.

⁷⁹ EEAS, Final Draft Operation Plan for EUNAVFOR MED, EEAS (2015) 10185 REV 2, at 12/45 (on file with the author).

⁸⁰ See *M.S.S. v. Belgium and Greece*, *supra* note 76.

⁸¹ See *Medvedyev v. France*, *supra* note 28, para. 80, and *Malone v. UK*, Series A No. 82, 2 August 1984, at para. 67.

⁸² *Ibid.*

their liberty.⁸³ The duration of the restriction on the liberty was discussed in the *Rigopoulos v. Spain* case, in which the Panamanian flagged vessel *Archangelos* was boarded on 23 January 1995 on the high seas by a Spanish coastguard vessel. The Spanish authorities, after discovering more than 2 tons of cocaine on board the vessel, detained the crew and brought the vessel to Las Palmas after 16 days. The applicant, Mr. Rigopoulos, filed a complaint based on the violation of Article 5(3) of ECtHR. Nevertheless, the Court considered that even though 'a period of sixteen days does not at first sight appear to be compatible with the concept of 'brought promptly' laid down in Article 5(3) of the Convention', 'having regard to the wholly exceptional circumstances of the instant case, the time which elapsed between placing the applicant in detention and bringing him before the investigating judge cannot be said to have breached the requirement of promptness in paragraph 3 of Article 5'.⁸⁴

In the present context, the Operation RoEs are very clear that the detention of suspect smugglers is authorised under the following circumstances:

'[a]ny detention will have to comply with the domestic law of the TCN [Troops Contributing Nation] concerned. Measures to temporarily restrict freedom on-board may be taken by EUNAVFOR MED when applying appropriate measures against human smugglers/traffickers. Detention is a measure which is temporary and does not necessarily constitute a criminal arrest (which normally involves criminal jurisdiction). Detention aims at safety and security on board until disembarkation, where the person may be arrested or subjected to other judicial processed by the competent receiving state authorities'.⁸⁵

Notwithstanding how the physical internment of any person is designated, it must in all cases be in compliance with the requirements of Article 5 of ECHR so as not to be arbitrary. The reason for this is merely that there is no need for the formal detainment of the persons concerned to be considered as subject to the protection of the Convention, since the cornerstone criterion is the existence of sufficient control of these persons by the organs of a state party to the Convention. Thus the Member States concerned would be held responsible for any human rights violations during this phase, which would involve, *inter alia*, the lack of precise and foreseeable legislation providing for this detention, as well as unreasonable delay in bringing the suspected smugglers to a competent judicial authority. With respect to the latter requirement, the Member States concerned could not avail themselves of the justification of the 'wholly exceptional circumstances', put forward by the Strasbourg Court in the *Rigopoulos* case,⁸⁶ as the size of the Mediterranean Sea cannot be compared with that of the Atlantic Ocean.

⁸³ See K. Wouters and M. den Heijer, 'The *Marine I* Case: A Comment', 22 *International Journal of Refugee Law* 2010, at 14-15.

⁸⁴ See *Rigopoulos*, *supra* note 27, at 9, translation available at <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-5625#{"itemid":\["001-5625"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-5625#{)>. Cf. ECtHR, *Vassiss and Others v. France*, Appl. No. 62736/09, 27 June 2013.

⁸⁵ Operation RoEs, GENTEXT/11.

⁸⁶ See *supra* note 90.

Finally, there is always the possibility that the prohibition of degrading and inhumane treatment enshrined in Article 3 of ECHR and Article 4 of EUCFR would be breached during this detention phase, as the Operation RoEs explicitly mention that minimum use of force, excluding deadly force, is authorised in order to detain suspected smugglers.⁸⁷

III. CONCLUDING REMARKS

EUNAVFOR Med Operation Sophia was launched in Summer 2015 in order to fight the smuggling of migrants at the South Mediterranean Sea, as part of a more comprehensive response of the Union to the continuing and increasing refugee crisis in Europe. Its mandate includes the interdiction of vessels suspected of being engaged in the smuggling of migrants from Libya, the seizure of those vessels, and even their disposal, in certain cases. In May 2016, the European Council renewed its mandate for one more year and amended it in order to include also the fighting against illicit trafficking in arms to Libya, but at the time of writing (June 2016), the latter amendment has not yet been operationalised.

The paper discussed the legality of these interdiction operations against the background of human rights law. It was asserted that human rights law binds states when acting extraterritorially, i.e. on the high seas and in particular when they engage in interception operations. In addition, the EU, as a subject to international law, is also bound by these rules, be it treaty or customary ones, in the exercise of its powers under EU law, including within the Common Defence and Security Policy. On the other hand, it was posited that the human rights in need of protection in this particular context are mainly the right to life, the prohibition of *refoulement*, and the right to liberty and security.

The assessment of the legality of the Operation in this regard was based mainly on the analysis of the applicable RoEs and the relevant Security Council Resolution 2240/2015, and not on the knowledge of the everyday conduct of the Operation. As regards the RoEs and whether they have taken into account the relevant rules of human rights law, it was contended that in principle they have done so. In any event, it must be seen in the everyday conduct of the Operation whether the EU and its Member States abide by these rules.

Having said that, concerns may arise regarding the adherence to the strict requirements of the right to life insofar as the RoEs permit the use of deadly force, albeit restrictively, in the present context. In any case, prior to invoking the responsibility of either the EU or the Member States taking part in the Operation for any violation, the question of attribution must be ascertained in accordance with ARIIO. Also, as was argued in respect of EUNAVFOR Operation Atalanta,⁸⁸ judicial remedies for these violations should inevitably be sought before national courts, since the Court of Justice of the EU lacks jurisdiction over the activities in the context of CDSP operations.⁸⁹

⁸⁷ Operation RoEs, ROEAUTH/182.

⁸⁸ See E. Papastavridis, *supra* note 1, at 8-9.

⁸⁹ See Art. 275 of TFEU and F. Naert, *supra* note 48, at 331.

ATTRIBUTION OF CONDUCT IN THE FRAMEWORK OF CSDP MISSIONS: REFLECTIONS ON A RECENT JUDGMENT BY THE HIGHER ADMINISTRATIVE COURT OF NORDRHEIN-WESTFALEN

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1. INTRODUCTION

One of the main objectives of the Treaty of Lisbon¹ (ToL) was to turn the European Union (EU) into a more effective global actor. In contrast to its predecessors, the Treaty contains many novelties with respect to the EU Common Foreign and Security Policy (CFSP), the most important being the expansion of the so-called 'Petersberg Tasks' to cover a wider range of possible military options, including post-conflict stabilisation, joint disarmament operations, and the fight against terrorism, in addition to the humanitarian, peacekeeping, and peace-making roles already foreseen.² Yet, even before the entry into force of the ToL, the EU had started deploying its own missions abroad, and playing an important role as a crisis management actor through its Common Security and Defence Policy (CSDP).

Thirteen years after the first EU mission in Bosnia and Herzegovina, the CSDP has become a solid reality. As of July 2016, sixteen CSDP missions and operations are ongoing, most of them using civilian (ten) rather than military (six) means. Another seventeen missions were conducted between 2003 and 2016 (eleven civilian, five military, and one mixed).³ The EU currently deploys several thousand military personnel around the world, and the reach of its peace missions extends well beyond the EU's immediate neighbourhood.

The increase in the EU's activities in this sector gives rise to several legal questions, in particular with respect to the possible consequences attached to the conduct of EU-sponsored troops in their area of deployment. Some of

* The author wishes to thank Sara Poli and the two anonymous reviewers for their useful comments and suggestions. Any mistakes are, of course, the author's own. All the links were last accessed on 20 July 2016.

¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ 2007/C 306/01, 17.12.2007. The ToL amends the two main international legal instruments setting out the EU's constitutional basis, i.e. the Treaty on European Union (TEU), and the Treaty on the Functioning of the European Union (TFEU).

² See TEU, Art. 43.

³ Data retrieved from the EU's External Action Service website, available at <<http://www.eeas.europa.eu/csdp/missions-and-operations/>>. For more information on CSDP missions, see J. Rehl, 'Development of CFSP/CSDP', in J. Rehl and G. Glume (eds.), *Handbook on CSDP Missions and Operations – The Common Security and Defence Policy of the European Union* (Vienna: Federal Ministry of Defence and Sports of the Republic of Austria 2015), at 12-17, available at <http://eeas.europa.eu/csdp/structures-instruments-agencies/european-security-defence-college/pdf/handbook/final_-_handbook_on_csdp_missions_and_operations.pdf>.

these questions concern the legal responsibility under international law for the conduct of military contingents put at the disposal of an international organisation (IO), an issue that has already been the object of much academic debate.⁴ Significantly, both international and national courts have had to engage with the task of determining which legal entity should bear international responsibility for possible violations of international law. Answers have varied considerably, and responsibility has been found to lie at times with the organisation authorising the mission (typically the United Nations),⁵ and at times with the individual Troop Contributing State (TCS).⁶ This variety of outcomes must be traced back to the relatively recent development of the rules pertaining to the responsibility of IOs. In contrast to the field of state responsibility, there still is a scarcity of practice in this area, which has made the distillation of general norms and principles a difficult task.

Yet, the lack of a clear legal framework is also due to the complex interaction among many legal aspects, which include the general mandate the mission is given, the institutional setting of the organisation under whose direction the operation is launched, and the specific agreements through which states put their troops at the disposal of the organisation itself. These remain soldiers in the service of the respective states, while at the same time acquiring an international standing, as they act in pursuance of UN Security Council (UNSC) resolutions and/or of the enabling acts of regional organisations.

It is crucial to shed some light on the attribution of conduct to the TCS or to the IO, since the consequences attached to the troops' behaviour can be extremely dire, as the soldiers' conduct might constitute violations of human rights law or international humanitarian law. Despite the fact that international

⁴ See, for instance, N. Tsagourias, 'The Responsibility of International Organizations for Military Missions', in M. Odello and R. Piotrowicz (eds.), *International Military Missions and International Law* (Leiden: Martinus Nijhoff 2011), 245-266; B. Kondoch, 'The Responsibility of Peacekeepers, Their Sending States, and International Organizations', in T. Gill and D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford: Oxford University Press 2010), 515-534; R. Buchan, 'UN Peacekeeping Operations: When Can Unlawful Acts Committed by Peacekeeping Forces be Attributed to the UN?', 32 *Legal Studies* 2012, 282-301; E. Sommario, 'Responsibility under International Law for Human Rights Violations Committed by UN Peacekeepers: Reconsidering Issues of Attribution', in A. de Guttry, E. Sommario, and L. Zhu (eds.), *China's and Italy's Participation in Peacekeeping Operations: Existing Models, Emerging Challenges* (Lanham: Lexington Books 2014), 369-397, and M. Zwanenburg, *Accountability of Peace Support Operations* (Leiden: Martinus Nijhoff 2005), in particular ch. 2.

⁵ See ECtHR (Grand Chamber), *Behrami and Behrami v. France*, and *Saramati v. France, Germany and Norway*, Joint Admissibility Decision, Appl. Nos. 7412/01 and 78166/01, 31 May 2007, para. 144 (hereinafter *Behrami and Saramati*).

⁶ See House of Lords, *R (on the Appl. of Al Jedda) (FC) v. Secretary of State for Defence* [2007] UKHL 58, 12 December 2007, 1 AC 332 (HL Al Jedda); or *Gerechthof 's-Gravenhage* (Court of Appeal of the Hague), *Mustafić-Mujić et al v. The Netherlands*, BR5386, Judgment, and *Nuhanović v. The Netherlands*, BR5388, Judgment, both issued on 5 July 2011. For a thorough analysis of the *Al Jedda* case, see F. Messineo, 'The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights', 56 *Netherlands International Law Review* 2009, 35-62. For commentary on the Dutch cases, see A. Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica', 9 *Journal of International Criminal Justice* 2011, 1143-1157.

forces are often expressly mandated to protect human rights in their area of deployment, media reports often describe them as violators of the rights of the very people they are meant to defend,⁷ or as passive bystanders when those same rights are violated by other actors.⁸ It is therefore essential to understand to whom the conduct (and the responsibility that might come with it) is to be imputed, in order to clarify who is responsible for making reparation for the injury caused.

The EU, although a relatively new actor in the area of peacekeeping, is no stranger to such legal puzzles. In a recent judgment, the High Administrative Court of Nordrhein-Westfalen (NRW) had to rule on the alleged responsibility of Germany for the transfer of suspected Somali pirates to Kenya, carried out within the framework of the EUNAVFOR Atalanta mission.⁹ Germany's line of defence, pointing to the fact that it was the EU and not Germany that had launched the operation and exercised control over the naval forces offered by participating states, did not convince the judges. The Court instead found that the handing over was (at least in part) attributable to Germany, and that it constituted a violation of its obligations under the European Convention of Human Rights (ECHR).

The purpose of the present contribution is to assess the reasoning of the German Court, and to evaluate the extent to which it has followed the prevalent legal rules on attribution of conduct in the framework of multilateral military operations. In order to do so, we will first briefly describe the relevant rules and principles, in light of the work of the International Law Commission (ILC), which has recently adopted a set of Draft Articles on the Responsibility of International Organisations (DARIO).¹⁰ After having determined that *effective control* over the conduct should be considered the decisive factor in determining attribution, we will have a brief look at how this notion developed in national and international jurisprudence, in order to understand what the exercise of such control actually entails. Next, the facts put before the Higher Administrative Court of NRW will be presented, and the arguments of the Court will be discussed against the background of the relevant legal framework. Some concluding remarks will follow.

The scope of the contribution is, however, limited in certain respects. First, it does not delve into the primary rules that the EU and its Member States are supposed to comply with while conducting military operations outside EU territory. In particular, it is assumed that the main obligations pertaining to human rights

⁷ Among the most widespread offences committed by peacekeepers are sexual abuses and exploitation perpetrated against the local population, see R. Murphy, 'An Assessment of UN Efforts to Address Sexual Misconduct by Peacekeeping Personnel', 13 *International Peacekeeping* 2006, 531-546.

⁸ See F. Grünfeld and W. Vermeulen, 'Failures to Prevent Genocide in Rwanda (1994), Srebrenica (1995), and Darfur (since 2003)', 4 *Genocide Studies and Prevention: An International Journal* 2009, 221-238.

⁹ Oberverwaltungsgericht NRW, 4 A 2948/11, 18 September 2014, available at <http://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2014/4_A_2948_11_Urteil_20140918.html> (hereinafter Case 4 A 2948/11). Note that the numbering of the paragraphs in the remainder of this work refers to the judgment as it is published on the court's website and might not correspond to other versions available online.

¹⁰ ILC, Draft Articles on the Responsibility of International Organizations, reproduced as an Annex to General Assembly Resolution 66/100, of 12 January 2012.

law are binding on both the EU and its Member States,¹¹ and that the principles extending the application of human rights treaties extraterritorially also apply to the conduct at stake.¹² Second, while the analysis concerning the rules on attribution is mainly based on practice related to UN peacekeeping operations, it is submitted that the legal arguments advanced could be considered valid also in respect of other IOs undertaking joint military activities, including the EU.¹³

2. THE RULES ON ATTRIBUTION OF CONDUCT IN THE FRAMEWORK OF MULTINATIONAL MILITARY MISSIONS

It is a settled tenet that, when a violation of international law occurs, the legal entity to whom the violation can be attributed, is legally responsible for the breach. As early as 1949, the International Court of Justice (ICJ) made it clear that legal personality under international law is not only bestowed on states. Instead, an IO may possess a legal personality that is distinct from the personality of the organisation's Member States.¹⁴ As a discrete legal subject, the IO thus has the capacity to bear international rights and obligations and may, through its

¹¹ See F. Naert, 'Accountability for Violations of Human Rights Law by EU Forces', and M. Zwanenburg, 'Towards a More Mature ESDP: Responsibility for Violations of International Humanitarian Law by EU Crisis Management Operations', in S. Blockmans (ed.), *The European Union and Crisis Management: Policy and Legal Aspects* (The Hague: T.M.C. Asser Press 2008), 375-393 and 395-415 respectively. See also Papastavridis' contribution in this volume.

¹² This would certainly be the case in instances – such as the one at hand – where individuals are under the physical control of foreign state agents. From the time of their capture by German soldiers, the alleged pirates were effectively under the authority, and therefore the jurisdiction, of Germany, even if that authority was being exercised abroad. For the purposes of the ECHR, this means that Germany has an obligation to secure the rights enshrined in the Convention. See, for instance, ECtHR, *Hasan v. United Kingdom*, Appl. No. 29750/09, 16 September 2014, paras. 74-80. The UN Human Rights Committee (HRC) also endorses this position when it states that extraterritorial human rights obligations cover "those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, *such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation*", General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 29.3.2004, para. 10 [emphasis added]. For an overview on the topic, see M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press 2011), and K. da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Leiden: Martinus Nijhoff Publishers 2012).

¹³ A similar perspective is taken by a number of authors. See, for instance, N. Tsagourias, *supra* note 4, where attribution of conduct and responsibility in the framework of EU Crisis Management Operations is discussed using the same legal parameters that are valid for UN PKOs. See also E. Myjer and N. White, 'Peace Operations Conducted by Regional Organizations and Arrangements', in T. Gill and D. Fleck (eds.), *supra* note 4, at 177, finding that attribution of conduct to either the IO or the TCS in the framework of peace operations run by a regional organisation must be determined on the basis of the same principles applied in UN PKOs.

¹⁴ ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of April 11, 1949, ICJ Reports 1949, at 178-181. While the advisory opinion exclusively focused on the UN, the Court's assertion is now considered to also cover other IOs possessing similar features. See T. Gazzini, 'Personality of International Organizations', in J. Klabbers and A. Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (Cheltenham: Edward Elgar 2011), at 34.

acts or omissions, breach the latter, thus committing an internationally wrongful act that entails its responsibility.¹⁵ This rule obviously also holds true with respect to the EU, at least since the entry into force of the TEU, whose Article 47 explicitly recognises the legal personality of the European Union, making it an independent legal entity in its own right.¹⁶

An attempt at codifying the rules and principles of international law pertaining to the responsibility of international organisations was recently made by the ILC. The topic was included in the Commission's Programme of Work in 2002, and in 2011 the DARIO were adopted and then taken note of by the UN General Assembly. While tackling the subject, one of the most difficult issues proved to be the question of the attribution to IOs of the conduct performed by organs of their Member States that were put at the organisation's disposal, and the ensuing repercussions on findings of international responsibility. The complexity of the matter was, indeed, compounded by a rather scarce and inconsistent international practice, and by the often contradicting stances taken by scholars.¹⁷ However, the DARIO were the result of years of painstaking reflection within the ILC, and can be considered the most useful and authoritative guidelines to understand the law on attribution.

According to Draft Article 4, an internationally wrongful act materialises 'when conduct consisting of an action or omission: (a) Is attributed to the international organization under international law; and (b) Constitutes a breach of an international obligation of that international organization.' The criteria for attribution are then detailed in Draft Articles 6-9. Draft Article 6 establishes that '[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law'. Draft Article 7, on the other hand, is concerned with the conduct of organs or agents of states or IOs that are *placed at the disposal* of an IO. It stipulates that the conduct of such organs or agents shall be attributed to the receiving organisation 'if the organization exercises *effective control* over that conduct' [emphasis added]. As the ILC's commentary to the Article states, the test for attribution of conduct to either the

¹⁵ In its Advisory Opinion on Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (adopted on 20 December 1980), the ICJ confirmed that '[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law', ICJ Reports 1980, at 89-90, para. 37. See also C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge: Cambridge University Press, 2nd edition 2005), at 399.

¹⁶ The adoption of Art. 47 terminates the academic discussions about whether the EU, as opposed to the European Community, has international legal personality. For a brief overview of the debate, see P. Koutrakos, *EU International Relations Law* (Oxford: Hart Publishing, 2nd edition 2015), at 14-15. Yet, as we will see below, the EU's status before the entry into force of the ToL was of some importance in the case at hand, see *infra*, at 170.

¹⁷ See the Second Report of the ILC's Special Rapporteur Giorgio Gaja, UN Doc A/CN.4/541, 2.4.2004, and the many scholarly works cited at 2-3. The lack of practice with regard to the subject matter covered by the DARIO was also confirmed by the comments of international organisations submitted to the ILC after completion of the DARIO on first reading, see UN Doc A/CN.4/637 and Add. 1 (2011), 14.2.2011. Indeed, it would probably be too early to consider all of the draft articles as mirroring rules of customary international law.

contributing or the receiving legal entity is based 'on the *factual control* that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal'¹⁸ [emphasis added]. It flows from the above that, in order to determine attribution for the conduct of national contingents deployed in a CSDP mission, two possible solutions must be considered. The first one is to regard such troops as organs or agents of the EU. The second is to consider them as organs of the TCSs put at the disposal of the EU. In the latter case, it must be assessed whether the EU exercised *effective control* over the specific unlawful conduct at issue.

Can the troops put at the EU's disposal to carry out CSDP operations be considered as organs of the organisation? While in theory the Council of the EU would have the legal prerogatives necessary to transform seconded troops into *de jure* organs of the EU, such status cannot be simply presumed, but requires some sort of formal recognition.¹⁹ Neither the Council decisions establishing EU military operations nor any related instruments describe these operations as organs of the Council or otherwise reveal the Council's intention to incorporate such troops in its institutional structure. Therefore, in the absence of a clear expression of will on part of the Council, it is difficult to maintain that EU military operations constitute *de jure* organs of the EU.²⁰

Some authors take the position that CSDP missions could nonetheless be considered as *de facto* organs of the EU, by virtue of the particularly high degree of dependence between the EU and national contingents.²¹ This would, in turn, prompt the application of Draft Article 6 for the purpose of determining attribution. Yet, in this author's opinion, this position fails to give appropriate weight to the fact that national troops maintain a strong institutional link with the sending states, which is in no way severed by the fact that they have been lent to an IO, even if operational command passes into the hands of the organisation. Indeed, the ILC has pointed to these residual powers as a decisive factor in determin-

¹⁸ The ILC's commentary to the Articles is available in the Report of the International Law Commission, Adopted at its Sixty-Third Session (26 April–3 June and 4 July–12 August 2011), General Assembly Official Records Sixty-Sixth Session, Supplement No. 10, UN Doc A/66/10 (hereinafter, *ILC 2011 Report*), at 87-88.

¹⁹ See A. Sari and R.A. Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in B. Van Vooren et al. (eds.), *The EU's Role in Global Governance: The Legal Dimension* (Oxford: Oxford University Press 2013), at 136. Wessel maintains that, in the area of the CSDP, the definition of 'organ' should be conferred to the Council of the EU, the High Representative of the Union for Foreign and Security Policy, the Political and Security Committee, the EU External Action Service and its representations abroad, and to agencies such as the European Defence Agency and the EU Institute for Security Studies. EU civil and military missions could be considered as organs only if they 'can be regarded as extensions of Union bodies.' R.A. Wessel, 'Division of International Responsibility between the EU and its Member States in the Area of Foreign, Security and Defence Policy', 3 *Amsterdam Law Forum* 2011, at 36.

²⁰ See A. Sari and R.A. Wessel, *supra* note 19, at 137. This stance seems to be supported by the decision of the President of the General Court to reject the assumption that the EU Police Mission (EUPM) in Bosnia and Herzegovina could be classified as a body, office or agency of the EU, see GC, Case T-271/10 R, *H. v. Council and Commission*, ECLI:EU:T:2010:315, Order of the President of the General Court of 22 July 2010, para. 19.

²¹ See A. Sari and R.A. Wessel, *supra* note 19, at 137-140.

ing attribution of conduct.²² Does the EU deserve different treatment when it comes to issues of attribution in the framework of CSDP missions? The ILC did not consider it appropriate to make any distinction between UN-run operations and those conducted by regional organisations, which would suggest that the same rules on attribution should apply to all IOs.²³ This approach is even more convincing if one shares the view of those who consider that – in the area of CSDP – the EU still acts according to an intergovernmental paradigm,²⁴ and that – when it comes to the creation and running of peace-support operations – there are few appreciable differences with other IOs active in the area. Yet, as we shall see, even more persuasive is the fact that the choice not to base attribution of conduct for national contingents on Draft Article 6, but rather on Draft Article 7, was upheld by the national courts of many states.²⁵

This is why it appears more accurate to base attribution of conduct of troops deployed in CSDP missions on the criteria of ‘effective control over the contested conduct’, rather than on their alleged status as (either *de jure* or *de facto*) organs of the organisation. According to the ILC, only the conduct of state organs that are ‘fully seconded’ to an IO can be attributed on the basis of Draft Article 6. Yet, as noted above, when they place their troops at the disposal of the EU, states do not divest them of their status as state organs, and only transfer to the organisation limited powers of operational control over their forces, while they retain full command for themselves.²⁶

This is exactly the state of affairs that Draft Article 7 is intended to address, as it:

‘deals with the different situation in which the seconded organ or agent still acts to a certain extent as organ of the seconding State or as an organ or agent of the seconding organization. This occurs for instance in the case of military contingents that a State places at the disposal of the UN for a peacekeeping operation, since

²² See *infra* note 27.

²³ According to P.J. Kuijper and E. Paasivirta, ‘[t]here would seem to be no reason why the EU in the context of military operations would necessarily require a radically different approach from the UN peacekeeping as both operate on the basis of troops that states have made available to them’, ‘EU International Responsibility and its Attribution: From the Inside Looking out’, in M. Evans and P. Koutrakos (eds.), *The International Responsibility of the European Union* (Oxford: Hart Publishing 2013), at 54. See also the authorities mentioned in *supra* note 13.

²⁴ See, for instance, P.J. Kuijper, ‘Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?’, 7 *International Organizations Law Review* 2010, at 21; F. Terpan, ‘Article 23 [Fundamentals of CFSP]’, in H.-J. Blanke and S. Mangiameli (eds.), *The Treaty on European Union – A Commentary* (Heidelberg: Springer 2013), at 902-903.

²⁵ Some even suggest that the rule codified in Draft Art. 7 ‘may in due course start to reflect customary international law’, see C. Ryngaert, ‘Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the ‘Effective Control’ Standard after *Behrami*’, 45 *Israel Law Review* 2012, at 178.

²⁶ See B. Cathcart, ‘Command and Control in Military Operations’, in T. Gill and D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford: Oxford University Press 2010), at 235.

the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent.²⁷

In other words, the ILC did not subscribe to the view that secondment to an IO could turn national troops into organs of the receiving organisation.²⁸ By virtue of the organic link that the military contingent still maintains with its sending state, it cannot be said that it is *fully seconded* to the organisation. Therefore, 'the decisive question in relation to attribution of a given conduct appears to be who had effective control over the conduct in question.'²⁹ The test appears to establish a fitting legal regime that places responsibility with the actor who can exercise control over the wrongful conduct and can therefore take effective measures to prevent its commission. Ultimately, such a regime discourages the commission of wrongful acts and thus fosters compliance with the law. Conversely, deterrence and compliance would not be promoted if the legal entity that exercises effective control over the operations of the troops were not exposed to responsibility.

2.1. The European Court of Human Rights' view on attribution of conduct

The validity of the 'effective control' test for determining attribution of conduct in the context of military operations has gained a significant degree of acceptance.³⁰ However, judicial practice has not always interpreted the notion as one would have expected. In particular, when asked to decide which international legal person was to be held responsible for alleged violations of human rights committed by the international presence in Kosovo, the European Court of Human Rights (ECtHR) apparently developed its own understanding of how attribution needs to be determined. The NATO-led Kosovo Force (KFOR) was established by the UNSC in June 1999, in the wake of the NATO air strikes against the then Federal Republic of Yugoslavia.³¹ The Chapter VII Resolution also authorised the UNSG to establish the United Nations Interim Administra-

²⁷ ILC 2011 Report, at 87. It should be noted, however, that the UN strongly advocated that the peacekeeping missions conducted under the direction of the UN should be considered subsidiary organs of the organisation, and openly acknowledged the intention of assuming international responsibility for their conduct. For an analysis, see E. Sommario, *supra* note 4, at 372-374.

²⁸ The ILC reached this conclusion despite the contrary view of the United Nations themselves; see the Letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division, UN Doc CN.4/545, 25.6.2004, S II.

²⁹ See G. Gaja, *supra* note 17, at 19, and specifically note 64, which references many scholarly writings that support this view.

³⁰ See, for instance, T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers', 51 *Harvard International Law Journal* 2010, at 140; Ö.F. Direk, 'Responsibility in Peace Support Operations: Revisiting the Proper Test for Attribution Conduct and the Meaning of the 'Effective Control' Standard', 61 *Netherlands International Law Review* 2014, at 7; and C. Rynjaert, *supra* note 25, at 154.

³¹ UNSC Resolution 1244, 10.6.1999.

tion Mission in Kosovo (UNMIK), to ‘provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.’³² The *Behrami* decision concerned the alleged failure of French KFOR troops to mark or defuse undetonated cluster bombs that they knew were present in their area of responsibility. The explosion of one of these ordnances cost the life of one of the applicant’s sons, and severely injured another. The ECtHR, however, found that it was UNMIK, as opposed to KFOR or France, that had the mandate to de-mine the area in which the incident occurred. Having determined that UNMIK was a subsidiary organ of the UN created under Chapter VII of the UN Charter, the Court ruled that ‘the impugned action was, in principle, attributable to the UN’.³³ Hence, with respect to this prong of the decision, the ECtHR appears to have applied Draft Article 6, as it simply acknowledged that UNMIK was a UN organ, whose conduct was attributable to the organisation under international law. This is somewhat surprising, as it appears to run counter to the determinations of the ILC, and the ECtHR had not included Draft Article 6 in its review of the relevant law.

However, even more perplexing was the Court’s handling of the *Saramati* case. The applicant was an individual suspected of murder and other crimes. He had been placed under arrest twice by KFOR troops and complained of a violation of his right to personal liberty. Having found that the mandate to issue detention orders rested with KFOR – a military presence which was merely authorised by the UN, but could not be considered a UN organ – the ECtHR was expected to apply the ‘effective control’ test developed by the ILC.³⁴ Indeed, the Court included in its review of the relevant law the text of what would later become Draft Article 7, as well as extensive sections of the ILC’s commentary on it.³⁵ However, the Court rephrased the key question and deemed that the relevant factor was whether the UNSC retained ‘ultimate authority and control’ over KFOR.³⁶ This was, in the Court’s view, the decisive element to determine attribution, and not who had operational (i.e. effective) control over the troops with respect to the acts under review. Operational control, the judgment finds, had been lawfully delegated by the UNSC to NATO by means of Resolution 1244 and – for the purpose of attribution – this explicit delegation was what really mattered.³⁷ Having found that both UNMIK’s inaction (failure to de-mine) and KFOR’s action (the detention of Mr. Saramati) were attributable to the UN,

³² *Ibid.*, para. 10.

³³ *Behrami and Saramati*, para. 141.

³⁴ Draft Art. 5 (the current Art. 7) and the commentary to it were provisionally adopted by the ILC in 2004, three years before *Behrami and Saramati* was decided. See Report of the International Law Commission, Adopted at its Fifty-Sixth Session (3 May–4 June and 5 July–6 August 2004), General Assembly Official Records Fifty-Ninth Session, Supplement No. 10, UN Doc A/59/10.

³⁵ *Behrami and Saramati*, paras. 30-32.

³⁶ *Ibid.*, para. 133.

³⁷ *Ibid.*, para. 141.

the Court found the applications to be inadmissible *ratione personae*, the UN not being a party to the ECHR.³⁸

The decision was greeted by a chorus of academic criticism.³⁹ This came to no surprise, as the way in which the ECtHR decided the issue of attribution was clearly at odds with the ILC's work. The Court conferred decisive importance to elements of a more formal and institutional nature, to the detriment of the predominantly empirical and context-oriented criteria adopted by the ILC. The latter rely mainly on an assessment of the reality in the field, in line with the principle of effectiveness that permeates the law of international responsibility.⁴⁰ Even the ILC felt the need to distance itself from the *Behrami and Saramati* ruling. In its commentary to the DARIO, after highlighting that the ECtHR seemed initially ready to apply the 'effective control' test, the Commission observed that the latter is more closely related to the notion of 'operational control' than to the 'ultimate authority and control' criterion employed by the Strasbourg Court to determine attribution. Indeed, according to the ILC, ultimate control 'hardly implies a role in the act in question.'⁴¹

Without doubt, the *Behrami and Saramati* decision was shaped by policy considerations regarding the effectiveness of the UN's collective security system. Indeed, the Court explicitly recognised the paramount importance of the UN's mission to preserve international peace and security, and its need to rely on effective support from its Member States to achieve this aim. Therefore, the Court argued, 'the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court.'⁴²

However, the conclusions reached by the ECtHR are worrying in several respects. In the first place, the Strasbourg Court completely abdicated to its monitoring role with respect to all UN-mandated missions, be they classical PKOs or operations authorised by the Security Council but run by regional IOs (such as the EU) or ad hoc coalitions.⁴³ Yet even more disquieting is its vision of the relationship between human rights protection and the UN collective security system, as the judgment gives precedence to the latter over the legitimate interest of local populations to have their human rights protected and upheld.

³⁸ *Ibid.*, para. 152.

³⁹ See, amongst many, P. Klein, 'Responsabilité pour les Faits Commis dans le Cadre d'Opérations de Paix et Étendue du Pouvoir de Contrôle de la Cour Européenne des Droits de l'Homme: Quelques Considérations Critiques sur l'Arrêt *Behrami et Saramati*', 52 *Annuaire Français de Droit International* 2007, 43-64; P. Palchetti, 'Azioni di Forza Istituite o Autorizzate dalle Nazioni Unite davanti alla Corte Europea dei Diritti dell'Uomo: I Casi *Behrami e Saramati*', 90 *Rivista di Diritto Internazionale* 2007, 681-704; T. Dannenbaum, *supra* note 30; and M. Milanovic and T. Papic, 'As Bad As It Gets: The European Court of Human Rights's *Behrami and Saramati* Decision and General International Law', 58 *International and Comparative Law Quarterly* 2009, 267-96.

⁴⁰ See P. Klein, *supra* note 39, at 50.

⁴¹ ILC 2011 Report, at 91, para. 10.

⁴² *Behrami and Saramati*, para. 149.

⁴³ A. Breitegger, 'Sacrificing the Effectiveness of the European Convention on Human Rights on the Altar of the Effective Functioning of Peace Support Operations: A Critique of *Behrami & Saramati* and *Al Jedda*', 11 *International Community Law Review* 2009, at 173-74.

Finally, by implying that the weight of international responsibility is to be borne by the UN alone, the approach taken by the ECtHR might lead TCSs to pay less regard to the conduct and discipline of their troops.

It must be noted, however, that in a more recent case the ECtHR appears to have – at least partially – backtracked and is now adhering to a reading more in line with the ILC's work. In the *Al Jedda* case, where the Court had to decide whether a specific act carried out by British troops in Iraq had to be imputed to the UK or the UN, the judges determined that the UN had '*neither effective control nor ultimate authority and control* over the acts and omissions of foreign troops within the multinational force and that the applicant's detention was not, therefore, attributable to the United Nations'⁴⁴ [emphasis added]. Hence, the ECtHR seemingly recognised that the criterion of 'effective control' has some bearing in deciding on attribution. Also notable is the fact that the Strasbourg judges eventually acknowledged the possibility of multiple attribution, i.e., that the same conduct might be imputed to more than one international legal person. In particular, the judgment highlights that, even if a given conduct could be imputed to the UN, this does not mean that it 'ceased to be attributable to the troop-contributing nations'.⁴⁵

2.2. What does 'effective control' actually mean?

As has become apparent in the preceding pages, the notion of 'effective control' is not as straightforward as it may appear at first glance. It can be difficult to determine under what factual circumstances an IO is able to exercise the required degree of control over military forces put at its disposal by a state. As Tomuschat argues, '[c]ontrol over a troop contingent is never full and complete [as there] will always be some degree of autonomous action, even though an attempt may have been made to establish a tight system of supervision.'⁴⁶ As recalled above, the assessment must be grounded on the factual situation, and yet it might be arduous to understand how far the receiving organisation must go in imposing its will on troops that operate in discharging the IO's mandate.⁴⁷ However, it appears safe to say that – in such contexts – 'effective

⁴⁴ ECtHR, *Al Jedda v. UK*, Appl. No. 27021/08, 7 July 2011, para. 84.

⁴⁵ *Ibid.*, para. 80. On the issue of attribution in the *Al Jedda* case and, more generally, on the role the ECHR could play in the framework of CSDP missions, see H. Krieger, 'EU Missions and the European Convention: Recent Cases', in A. Sari and R.A. Wessel (eds.), *Human Rights in EU Crisis Management Operation: A Duty to Respect and to Protect*, CLEER Working Paper No. 6 (2012), at 51-62.

⁴⁶ C. Tomuschat, 'Attribution of International Responsibility: Direction and Control', in M. Evans and P. Koutrakos (eds.), *supra* note 23, at 14.

⁴⁷ Certainly, 'effective control' in the sense of Draft Art. 7 cannot be equated to the test developed by the ICJ in the *Nicaragua* Case, where it had to decide whether the acts of armed rebels could be attributed to the United States, see *Nicaragua v. United States of America*, Merits, Judgment of June 27, 1986, ICJ Reports 1986, para. 115. In that case, the ICJ intended to link the conduct of non-state actors to a state, whereas – in the context of international military operations – the conduct at stake is carried out by *de jure* organs of the TCS, which maintain a legal dependency with both their sending state and the receiving IO. The ILC itself has remarked the difference between the two tests (see ILC 2011 Report, at 88, para. 5), as have important authors; see, for

control' requires an assessment of the factual, but also of the legal control that the organisation and the TCS have (or should have) exercised over the contested conduct.⁴⁸

An attempt at disentangling the complexity of the matter was recently made by the Court of Appeal of The Hague, which was requested to rule on whether the Netherlands had acted unlawfully (and were liable) for allowing the eviction of four Bosnian nationals from the compound of its contingent, which was serving within the UNPROFOR mission in Bosnia and Herzegovina.⁴⁹ The events at stake occurred shortly after the fall of Srebrenica, on 11 July 1995. In the *Nuhanovic* and *Mustafic*⁵⁰ cases, the Court determined that the correct criterion for attribution was 'effective control',⁵¹ and also distinguished the case from the *Behrami and Saramati* decision, emphasising that the near collapse of the UN chain of command and the extremely volatile situation in the Bosnian scenario differed significantly from 'the situation in which troops placed under the command of the UN normally operate'.⁵² The judgment then stressed that the exercise of 'effective control' is not only dependent on the issuance and execution of specific instructions by the state or the receiving organisation, but can materialise even in the absence of any instruction, when either entity 'had the *power to prevent* the conduct concerned'⁵³ [emphasis added]. In essence, if evidence showed that the Netherlands were in a position to prevent the eviction of Nuhanovic's relatives from the camp, their removal (viz. the unlawful conduct) should be imputed to the state.

The question therefore becomes: what does the 'power to prevent' entail? Nollkaemper conceptualises the notion by linking it to the concepts of *normative control* and *factual control*, which, taken together, generate 'effective control'.⁵⁴ Normative control is based on the *legal authority* to prevent the commission of a certain act. In the *Nuhanovic* case, such authority derived, inter alia, a) from the formal power the Netherlands retained over its troops concerning disciplinary and personal matters; b) from the existence of a legal duty to prevent the unlawful conduct; and c) from the particular phase UNPROFOR was undergoing, as the mission was about to withdraw and the Dutch authorities

instance, N.D. White, 'Institutional Responsibility for Private Military and Security Companies', in F. Francioni and N. Ronzitti (eds.), *War by Contract: Human Rights, Humanitarian Law and Private Contractors* (Oxford: Oxford University Press 2011), at 383.

⁴⁸ See T. Dannenbaum, 'Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct', 61 *International and Comparative Law Quarterly* 2012, at 722 and 724.

⁴⁹ Note that the validity of the Court's reasoning was later confirmed by the Dutch Supreme Court, which dismissed the state's appeal in cassation. See Supreme Court of the Netherlands, First Division, *The State of the Netherlands v. Hasan Nuhanović*, Judgment, 12/03324, LZ/TT, 6 September 2013. On the *Nuhanović* case more generally, see K.E. Boon, 'Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines', 15 *Melbourne Journal of International Law* 2014, 331-376.

⁵⁰ As the reasoning of the Court in the two cases was virtually identical, we will henceforth only refer to the *Nuhanović* decision.

⁵¹ Court of Appeal *Nuhanović*, para. 5.7.

⁵² *Ibid.* para. 5.8.

⁵³ *Ibid.* para. 5.9.

⁵⁴ A. Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica', 9 *Journal of International Criminal Justice* 2011, 1143-1157.

‘participated in that decision-making at the highest level’.⁵⁵ Factual control, on the other hand, concerns the *ability* to influence the commission of the contested conduct. The Appeals Court noted that the eviction of Nuhanovic’s relatives was directly linked to the decisions and instruction of the Dutch authorities. It was the Netherlands that decided to evacuate its contingent and the Bosnian civilians, and Dutch commanders played a decisive role in the process.⁵⁶ The judgment observes that, in the circumstances at the time, the Dutch authorities were so involved in the evacuation process that their orders would have surely been obeyed by the Dutch troops.⁵⁷ Having appraised all these elements, the Court concluded that ‘the State possessed ‘effective control’ over the alleged conduct’ and the conduct could therefore be attributed to the Netherlands.⁵⁸

Also of importance is the fact that the judgment fully embraces the possibility of multiple attribution, in that it considers ‘that the possibility that more than one party has ‘effective control’ is generally accepted, which means that it cannot be ruled out that the application of this criterion results in the possibility of attribution to more than one party.’⁵⁹ Therefore, the Court only examined whether the Netherlands exercised ‘effective control’ over the alleged conduct, while not ruling out that the UN could also have had ‘effective control’. Even the ILC acknowledges that Draft Articles 6-9 do not necessarily entail that conduct must be exclusively attributed to an IO – thereby resulting in exclusive responsibility of the organisation itself –, but instead leaves open the possibility of conduct being attributed to an IO and a State, thus resulting in dual attribution to the two legal persons concerned.⁶⁰

3. THE JUDGMENTS OF THE GERMAN ADMINISTRATIVE AND HIGHER ADMINISTRATIVE COURTS

After having identified the relevant legal framework, it must now be examined how it has been applied by respectively the Administrative Court of Köln and the Higher Administrative Court of NRW with respect to acts committed within EU Operation Atalanta. In particular, the Courts had to decide whether the responsibility for the handover to Kenya of nine alleged Somali pirates – an act which entailed the possibility that they would be subject to treatment contrary to human rights – lay with the UN, with the EU, and/or with Germany, whose military units actually performed the arrest and the transfer of the alleged pirates.

⁵⁵ Court of Appeal *Nuhanović*, para. 5.12.

⁵⁶ *Ibid.*, para. 5.19.

⁵⁷ *Ibid.*, para. 5.18.

⁵⁸ *Ibid.*, para. 5.20.

⁵⁹ *Ibid.*, para. 5.9.

⁶⁰ ILC 2011 Report, at 83, para. 4. It should also be borne in mind that Art. 48 DARIO explicitly foresees that an IO and one or more states can be responsible for the same internationally wrongful act.

3.1. The facts at issue

Operation Atalanta was launched in December 2008, mainly to offer protection to merchant vessels sailing off the coasts of Somalia. In 2008, the Somali government asked the UNSC for support in combatting piracy. The Council reacted to the request by passing a number of resolutions,⁶¹ which encouraged UN Member States to undertake anti-piracy measures, including in Somali waters.⁶² The resulting international efforts were led by the EU's Operation Atalanta, which the Council of the EU established by means of EU Council Joint Action 2008/851⁶³ and EU Council Decision 2008/918.⁶⁴ The frigate *Rheinland Pfalz* was seconded to the Operation by Germany.

Regarding the mission's organisation, it must be recalled the EU has no standing military command structures. The EU Military Committee (EUMC) is indeed a permanent body, but it does not belong to the chain of command of CSDP military operations. Its role is confined to monitoring the proper execution of CSDP missions.⁶⁵ The Political and Security Committee (PSC),⁶⁶ in turn, only exercises political control and strategic direction over crisis management operations, while the arrangements for the military command of the mission are concluded on an *ad hoc* basis.⁶⁷ At an operational level, the responsibility for military command rests with the Operation Commander, who sits in the Operational Headquarters (OHQ), which are usually located in EU territory. He or she will receive operational control over the troops seconded by the participating states through a transfer of authority. The highest level of command in the area of operation is the Force Commander, who exercises command and control of all military forces in the field.⁶⁸

On 3 March 2009, the *Rheinland Pfalz* successfully fended off a pirate attack carried out on the high seas against the German owned merchant vessel *MV Courier*, which was sailing through the Gulf of Aden. On receiving the alarm

⁶¹ Resolution 1814 of 15 May 2008, Resolution 1816 of 2 June 2008, and Resolution 1838 of 7 October 2008.

⁶² It has been noted that the power to carry out anti-piracy operations did not derive from SC authorisation, but rather from the combined effects of the United Nations Convention on the Law of the Sea (1833 UNTS 397; entered into force 16 November 1994) and the consent expressed by the Somali authorities, see E. Papastavridis, 'EUNAVFOR Operation Atalanta off Somalia: The EU in Unchartered Legal Waters?', 64 *International and Comparative Law Quarterly* 2015, at 542-544.

⁶³ Council Joint Action 2008/851/CFSP of 10 November 2008, on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Somali Coast, *OJ* [2008] L 301/33, 12.11.2008.

⁶⁴ Council Decision 2008/918/CFSP of 8 December 2008, on the Launch of a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Somali Coast (Atalanta), *OJ* [2008] L 330/19, 9.12.2008.

⁶⁵ See Council Decision 2001/79/CFSP of 22 January 2001 Setting up the Military Committee of the European Union, *OJ* [2001] L27/4, 30.1.2001.

⁶⁶ For more details on the PSC, see <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Ar00005>>.

⁶⁷ See F. Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict* (Antwerp: Intersentia 2010), at 61-62.

⁶⁸ For the command and control arrangements in military operations, see Council Doc 11096/03 EXT I, 26.7.2006, at 6-7 and 15-16.

call, the German warship launched helicopters to assist the besieged vessel. The pirates immediately abandoned their attack, but were pursued for several miles by one of the helicopters. In the end, the *Rheinland Pfalz* boarded and searched the skiff used by the pirates, arresting nine. On 4 March, a cross-departmental decision-making body composed of members of the German Ministries of Defence, Internal Affairs, Justice, and Foreign Affairs was formed, and it determined that the preliminary investigations that had been started by a criminal court in Hamburg should be halted, and that the alleged pirates should be handed over to the Kenyan authorities.⁶⁹ In order to allow the transfer, an exchange of notes was concluded between the EU and Kenya on 6 March 2009, defining the modalities for the transfer of persons detained for prosecution in the course of the operation.⁷⁰ The terms of the agreement included an undertaking by Kenya to treat transferred individuals 'humanely and in accordance with international human rights obligations, including the prohibition against torture and cruel, inhumane and degrading treatment or punishment'.⁷¹ On 9 March, the German embassy in Mombasa addressed a diplomatic note to the Kenyan authorities, asking their consent to proceed with the transfer. With the assent of the receiving party, on 10 March 2009, German officers brought the applicants to Mombasa and – in a ceremony only involving German diplomats – placed them in the custody of the Kenyan police. On 29 May 2009, one of the alleged pirates brought a case before the Administrative Court in Cologne, claiming that both the arrest and the transfer to Kenya were unlawful. On 11 November 2011, the Administrative Court issued its judgment, in which it determined that international responsibility for the handing over of the men lay with the German state, and that the conduct constituted a violation of Germany's obligations under Article 3 of the ECHR.⁷² This latter provision not only outlaws torture and inhuman or degrading treatment, but also prohibits states from exposing individuals under their jurisdiction to a real risk of being subjected to violations of Article 3 if transferred to another country.⁷³ The Higher Administrative Court had to decide on an appeal filed by the German Government against this decision.

⁶⁹ This conduct clearly represents the general attitude of states participating in the anti-piracy effort, all of which were somewhat reluctant to arrest suspected pirates on the high seas, possibly anticipating the legal difficulties related to their treatment at home. For instance, the German navy had repeatedly released suspected pirates, see 'German Navy Foils Somali Pirates', *BBC News*, 25 December 2008, available at <<http://news.bbc.co.uk/2/hi/africa/7799796.stm>>.

⁷⁰ Exchange of Letters between the European Union and the Government of Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy and Detained by the European Union-Led Naval Force (EUNAVFOR), and Seized Property in the Possession of EUNAVFOR, from EUNAVFOR to Kenya and for their Treatment after such Transfer, *OJ* [2009] L 79/49, 25.3.2009.

⁷¹ *Ibid.*

⁷² Verwaltungsgericht Köln, Judgment of 11 November 2011, 25 K 4280/09, available at <<https://openjur.de/u/451905.html>>.

⁷³ The principle was first spelled out by the ECtHR in the case of *Soering v. United Kingdom*, Judgment of 7 July 1989, paras. 90-91.

3.2. The judgment of the Higher Administrative Court on matters of attribution

In front of the Higher Administrative Court, Germany argued that both the capture and the transfer of the alleged pirates were to be attributed to the EU.⁷⁴ Both acts were carried out within the limits of specifications contained in binding Joint Action 2008/851/CSFP, and were thus to be imputed to the organisation running the mission. German forces did not act as state organs, but rather within the framework of Operation Atalanta, as their orders came from the EU Operation Commander in Northwood (UK). EU responsibility is still present even in cases where national contingents have some scope in taking autonomous decisions, as these have to be confirmed by the Force Commander and the Operation Commander. This shows that command and control (*Befehlsgewalt und Kontrolle*) of the mission effectively lay with the EU.⁷⁵

The Higher Administrative Court, like the Cologne Court before it, decided otherwise. According to the judgment, the transfer of the Somali men to Kenya was a sovereign act of the German state, and, as such, needed to be attributed to it.⁷⁶ As a preliminary point, the Court noted that the capacity of the EU to bear responsibility at the relevant time was far from clear, given that Article 47 of the ToL – providing the EU with full legal personality – only entered into force on 1 December 2009.⁷⁷ Yet even assuming that the EU had the capacity to bear international responsibility, the transfer should still be considered an act of Germany, as all legal procedures leading up to it were solely started and implemented by German authorities.⁷⁸ Significantly, the Court did not attribute decisive weight to whether the *Rheinland Pfalz* was acting under the command of the EUNAVFOR headquarters.⁷⁹ The decision to proceed with the handover was taken by the cross-departmental decision-making body *before* the relevant agreement between the EU and Kenya had been concluded. Even the implementation of this decision was the exclusive work of German bodies. The messages that the German authorities sent to the *Rheinland Pfalz* were not

⁷⁴ For a concise analysis of the case, see I. Ley, 'Neuere Entwicklungen im Recht der Verantwortungsverteilung zwischen Truppenentsendenden Staaten und Internationalen Organisationen im Rahmen Internationaler Einsätze – Überlegungen Anlässlich des Berufungsurteils des OVG Münster v. 18.9.2014, 4 A 2948/11', 130 *Deutsches Verwaltungsblatt* 2015, 874-882; and T. Groh, 'Arrest of Somali Pirate Suspects Case (Higher Administrative Court for North Rhine-Westphalia, 18 September 2014, 4 A 2948/11)', ILDC 2391 (DE2014).

⁷⁵ Case 4 A 2948/11, para. 65.

⁷⁶ *Ibid.*, para. 78.

⁷⁷ The Court noted that, while the legal personality of the EC was well acknowledged, the same could not be said about the EU. In this sense, even the agreement between the EU and Kenya for the transfer of the Somali captives could also be seen as an agreement between the African state on one hand and all EU Member States on the other, see *Case 4 A 2948/11*, paras. 88 and 90. However, the Court's assertion is not fully convincing, as there are good reasons to believe that the EU possessed international legal personality even before the entry into force of the ToL, *inter alia*, because it had the capacity of concluding binding international agreements. See P. Gautier, 'The Reparation of Injuries Case Revisited: The Personality of the European Union', 4 *Max Plank Yearbook of United Nations Law* 2000, 331-361.

⁷⁸ Case 4 A 2948/11, para. 91.

⁷⁹ *Ibid.*

'communications', as the appellant argued, but rather orders. Such orders, the judgment claimed, should not have been issued by Germany, but by the OHQ.⁸⁰

Yet the EU was also absent in other phases of the affair, as EU diplomats did not participate in the transfer event, nor did the Czech Republic (that at the relevant time held the Presidency of the EU Council) get involved in the matter, even though it had indicated that it was ready to.⁸¹ In addition, the Court noted that – assuming that the competence to order the transfer lay with the EU – no steps comparable to those completed at the national level by Germany had been taken at the relevant time.⁸² As a matter of fact, it would appear that the OHQ had invited the German authorities to proceed with caution, as the details of the transfer had not yet been agreed.⁸³ In other words, the Court found that Germany had unduly accelerated the procedures, hence assuming a decisive role in the process. Furthermore, even assuming that the EU did play a role in the transfer of the pirates, this would not exonerate Germany of co-responsibility, as EU Member States remain liable in the implementation of EU legislation. This is even more the case in the field of the CFSP, where EU law is decisively influenced by the conduct of Member States, and where national courts represent the only judicial avenue to obtain redress for potential wrongdoings.⁸⁴ The Court then considered the debate on the issue of attribution more closely, finding further support for its conclusions. It began by mentioning the rule enshrined in Draft Article 7, then recalling the case law of the ECtHR, and specifically the *Behrami and Saramati* decision. Yet, without deciding which was the correct criterion for attribution, the judgment excluded the possibility that either of the two standards would lead to a finding of (exclusive) responsibility of the UN or the EU. With respect to the *Behrami* doctrine, which would see the UN responsible if it had lawfully delegated its power to an IO, the Court simply indicated that the UN had no powers to delegate, in the instant case, as the prerogatives to carry out antipiracy operations and act within Somali territorial waters were based on pre-existing legal premises, i.e. the Law of the Sea Convention and an authorisation from Somali authorities.⁸⁵ In addition, while Joint Action 2008/851/CSDP endeavoured to create a unified chain of command, this does not prevent participating states from exercising their own decisive decision-making capacities. The command and control structure of Operation Atalanta – the Court found – heavily relied on national decision-making, while the OHQ was factually involved in the process only occasionally.⁸⁶ Lastly, the Court applied the 'effective control' test developed by the ILC, and found – on the basis of its initial analysis of the facts – that the control over the transfer of the men to Kenya lay continuously with the German authorities.⁸⁷ Thus, Germany

⁸⁰ *Ibid.*, para. 97.

⁸¹ *Ibid.*, para. 100.

⁸² *Ibid.*, para. 105.

⁸³ *Ibid.*, para. 107.

⁸⁴ *Ibid.*, para. 115.

⁸⁵ See *supra* note 62.

⁸⁶ Case 4 A 2948/11, para. 135.

⁸⁷ *Ibid.*, para. 137.

had decisive influence over the decision to hand over the suspects and on its implementation, and its responsibility was therefore involved.

3.3. Appraising the judgment of the German Higher Administrative Court

This was the first final judgment of a German Administrative Court regarding the fight against piracy. The ruling basically confirmed the conclusions reached by the Lower Court, reiterating that the transfer of the pirates to Kenya had to be attributed to Germany, and that it was in breach of international human rights norms.

A few points can be made regarding the reasoning of the German judges. First of all, the Court did not initially signal whether it was going to proceed with its assessment on the basis of national, EU, or international law. Yet, the extremely detailed description of the decision-making process and of the given orders suggests that the criterion the Higher Administrative Court had in mind is indeed the fact-oriented 'effective control' test. The decision not to make an explicit choice regarding the legal framework to be applied can potentially also be traced back to the extreme complexity of this legally multi-layered case.⁸⁸ Second, the Court confirmed the jurisprudential trend according to which responsibility must not necessarily be attributed to one single actor, but can be shared between two or more actors, on the basis of their role in the concrete circumstances of the case. Such tendency seems to be on the rise, as has been confirmed by several international and national judgments.⁸⁹ Indeed, the effective control test allows for a differentiated and gradual attribution of conduct. This is particularly appropriate in the context of multinational peace-support operations, where the exercise of control is usually rather dynamic.

Third, the judgment appears to go beyond the pre-existing case law in assessing the condition for an attribution of responsibility to TCSs. As will be remembered, in the *Nuhanović* case, the Dutch Court conferred a certain weight to the fact that the PKO was going to be withdrawn rather abruptly, and that this warranted a more active role by the Dutch authorities in providing orders to their troops. The same cannot be said with respect to the German case, as at no moment was the chain of command of Operation Atalanta unable to perform its role. It would therefore appear that – according to the German ruling – it is not necessary that an exceptional event occurs to undermine the IO's control of the military contingent, and reinstate control by the TCS and thus shift attribution from the organisation to the state. In other words, effective control over the troops can be exercised (or lost) even in 'ordinary' circumstances.

⁸⁸ See I. Ley, *supra* note 74, at 879.

⁸⁹ See the ECtHR's *Al Jedda* judgment, *supra* note 44, the Dutch Court of Appeal *Nuhanović* judgment, *supra* note 6, and the judgment of a Belgian court of First Instance in the case *Muke-shimana-Ngulinzira and Others v. Belgium and Others*, RG No. 04/4807/A, 07/15547/A, ILDC 1604 (BE 2010), 8 December 2010, concerning attribution of the conduct of Belgian blue helmets deployed in the United Nations Assistance Mission for Rwanda (UNAMIR), who failed to intervene to prevent the killing of Tutsi civilians in 1994.

4. CONCLUSIONS

Attribution of conduct (and, hence, of responsibility) within CSDP operations is a delicate task, which might be expected to be performed more often in the coming years, due to the EU's rising activism in international affairs. Allocation of responsibility ultimately reflects the delicate issue of the balance of power between Member States and the EU, as well as the recognition of the 'emanipation' of the Union from its own Member States. So far, indications are that national courts will find that a certain degree of participation in a specific conduct by the state authorities, linked to a lack of coordination with EU bodies, will necessarily entail at least a partial responsibility for the TCS involved. In this respect, the German judgment has the merit of highlighting the lack of clarity with respect to the division of work between the OHQ and national contingents.⁹⁰

Obviously, one additional reason that may militate in favour of a finding of state responsibility is the fact that the Court of Justice of the EU (CJEU) does not have jurisdiction with respect to the EU treaties' provisions relating to the CFSP and acts adopted on the basis of these provisions.⁹¹ It is not clear whether the Court would find itself competent in the context of a preliminary ruling concerning the EU-Kenya agreement.⁹² Indeed, as a general rule, the Court lacks jurisdiction to rule on the interpretation or the validity of an agreement that falls within the CFSP in the context of a preliminary ruling procedure.⁹³ On the other hand, there are exceptions to the Court's lack of jurisdiction in the area of CFSP, which are laid down in Article 40 of the TEU and Article 275 (2) of the TFEU.⁹⁴ The latter provision is interesting, as it authorises the Court to review 'the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council'. The CJEU could perhaps establish its jurisdiction and rule on the interpretation of the EU-Kenya agreement if the arrest and handing over of the alleged pirates were to be regarded as 'restrictive measures against a natural person' within the meaning of Article 275 (2) of

⁹⁰ Case 4 A 2948/11, para. 108.

⁹¹ See Art. 24 (1) of the TEU, para. 2. The CJEU's lack of jurisdiction is also highlighted by Papastavridis, *supra* note 62, at 566.

⁹² The Court did not clarify this issue in its opinion on the accession of the EU to the ECHR, see CJEU, Opinion 2/2013, ECLI:EU:C:2014:2454, paras. 175-176.

⁹³ The CJEU determined that it had jurisdiction to rule on Council Decision 2011/640/CFSP of 12 July 2011, which authorised the signing of the Agreement between the European Union and the Republic of Mauritius on the Conditions of Transfer of Suspected Pirates and Associated Seized Property from the European Union-Led Naval Force to the Republic of Mauritius and on the Conditions of Suspected Pirates after Transfer. However, this was an annulment action and it concerned the legal basis of the Council Decision at stake. See CJEU, Case C-658/11, *Parliament v. Council*, ECLI:EU:C:2014:2025, paras. 73-74.

⁹⁴ The derogations to the Court's competence under Art. 19 TEU should be interpreted restrictively. See CJEU, Case C-439/13 P, *Elitaliana SpA v. Eulex Kosovo*, ECLI:EU:C:2015:753, paras. 41-42. In addition, the CJEU has recently considered itself competent in the context of an annulment action concerning a decision 'set in the context of the CFSP', see CJEU, Case C-455/14 P, *H v. Council of the European Union and European Commission*, ECLI:EU:C:2016:569, para. 42.

the TFEU.⁹⁵ The Luxembourg Court will probably soon settle this issue in the framework of a preliminary ruling procedure concerning a number of Council decisions adopted under the CFSP umbrella.⁹⁶

Until then, however, possible claims connected to EU operations will probably continue to be submitted to national courts which, as has been shown, tend to be rather rigorous vis-à-vis their respective governments. On the other hand, resort to the ECtHR does not appear to be a likely prospect in the foreseeable future. As is well known, the CJEU was asked to express an opinion on the Draft Accession Agreement that should implement Article 6(2) of the TEU, paving the way for the EU to join the ECHR.⁹⁷ However, the CJEU maintained that the agreement was incompatible with EU primary law.⁹⁸ It should be noted that one of the reasons at the basis of the Court's negative opinion was that the draft accession treaty would empower a non-EU body (the Strasbourg Court) to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP. As a consequence of the Court's position, the process of accession has been stalled. Therefore, the possibility of a joint application to the ECtHR (against the Member State and the EU) coming from the victims of a violation committed by troops deployed in an EU operation is, for the time being, excluded.

The string of domestic judgments reviewed should be welcomed precisely because they offer the sort of legal redress that would otherwise be denied to the victims of human rights violations. National courts are very reluctant to deprive individuals of their right to reparation by guaranteeing states acting on international missions some sort of immunity. Until the UN and – to a lesser extent – the EU decide to subject their action to the legal scrutiny of an independent court, able to order the payment of compensation to the victims of human rights violations that occur during international military missions, the attitude of domestic tribunals should not only be welcomed, but actively supported.

⁹⁵ For an opinion favouring the interpretation of detention measures (in the context of Operation Atalanta) as 'restrictive measures', see C. Hillion, 'Decentralised Integration? Fundamental Rights Protection in the EU Common Foreign and Security Policy', 1 *European Papers* 2016, at 60.

⁹⁶ CJEU, Case C-72/15, *Rosneft Oil Company OJSC v. Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority* [2015], pending.

⁹⁷ See *supra*, note 92.

⁹⁸ On the CJEU's opinion on the accession of the EU to the ECHR, see B. De Witte and S. Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court', 40 *European Law Review* 2015, 683-705, and the numerous scholarly articles mentioned in note 3.