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Protecting Human Rights in the European Union's External Relations Sara Poli (ed.)
CLEER PAPERS 2016/5

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# Protecting Human Rights in the European Union's External Relations

Sara Poli (ed.)

CLEER PAPERS 2016/5

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

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

**SARA POLI (ED.)**

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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

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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]

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[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: Bruyllant 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] Myanmar[17] and Ukraine[18]). 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-

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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.

sures. The Court has broadly interpreted this notion. This is witnessed by the rulings in *Tomana*,[19] *Mikhalchanka*[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 Mikhalchanka* 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.

sures, 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 courts[32] 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.