Extraterritorial Human Rights Obligations and the European Union

Obligaţiile extrateritoriale privind protecţia drepturilor omului şi Uniunea Europeană

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Abstract

The present paper aims to analyse some of the elements that could help substantiate the EU's legal duty to protect human rights extraterritorially in its participation in international trade and investment instruments, as well as some of the processes through which the EU's self-regulated .

Approach could bring about change in the larger sphere of international law, by popularization of its own standards for extraterritorial human rights protection. To this end, the paper first explores the general shift from a territorial to a functional approach to jurisdiction, as well as the extraterritorial application of human rights obligations by international courts. The analysis then turns to the sources that could be relevant for identifying the EU's obligations to protect human rights abroad, as well as the wider effects of Articles 3(5), 21 TEU and existing case-law of the European Court of Justice concerning extraterritorial human rights obligations.

Keywords: *human rights, extraterritorial obligations, European Union, extraterritorial jurisdiction, international trade agreements.*

Rezumat

Prezenta lucrare îşi propune să analizeze câteva dintre elementele care ar putea contura obligaţia Uniunii Europene de a proteja drepturile fundamentale în afara teritoriului său, în cadrul participării în tratatele internaţionale privind comerţul şi investiţiile. De asemenea, lucrarea evaluează procesele prin care autoreglementarea conduitei Uniunii ar putea declanşa o evoluţie în planul mai larg al dreptului internaţional, prin popularizarea propriilor standarde referitoare la protejarea drepturilor omului în context extrateritorial. În acest sens, articolul descrie tendinţa generală privind exercitarea jurisdicţiei (ca element al suveranităţii), dinspre o abordare teritorială înspre una funcţională, precum şi aplicarea extrateritorială a obligaţiilor privind protecţia drepturilor omului în jurisprudenţa instanţelor internaţionale. Analiza continuă apoi cu sursele potenţial relevante pentru identificarea obligaţiilor UE de a proteja drepturile omului în afara teritoriului său, precum şi cu descrierea efectelor mai largi ale art. 3(5), 21 TUE şi ale jurisprudenţei Curţii Europene de Justiţie privind obligaţiile extrateritoriale în discuţie.

Cuvinte-cheie: *drepturile omului, obligaţii extrateritoriale, Uniunea Europeană, jurisdicţie extrateritorială, tratate de comerţ internaţional.*

I. Introduction

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The importance of the European Union as an agent for change on the international plane is uncontested. The "Brussels effect"[1] appears to have permeated most fields of international regulation, but the EU's role in shaping the international landscape is far from being a merely *de facto* one. Through express treaty provisions such as those in Article 3(5) and Article 21 TEU, the EU has committed to actively and deliberately contribute to the attainment of "fair trade, the eradication of poverty and the protection of human rights" and to conduct its external action policies in line with "democracy, the rule of law, human rights and the principles of international law".

These provisions have been the topic of ample discussions in legal literature, with scholarly opinions divided on whether they constitute a sufficient legal basis for asserting extraterritorial human rights obligations of the EU. Furthermore, attempts to discern a framework of international law provisions that could provide a basis for engaging the responsibility of a state or an international organization for human rights violations resulting from the extraterritorial effects of their policies have so far yielded controversial results. Nonetheless, without being vested with general competence in the field of human rights, the EU appears to be willing to wield its normative power in order to effect change in international trade and investment instruments with respect to extraterritorial human rights obligations.

Against this background, the present paper aims to analyse some of the elements that could help substantiate the EU's legal duty to protect human rights extraterritorially in its participation in international trade and investment instruments, as well as the process through which the EU's self-regulated approach could bring about change in the larger sphere of international law, through the popularization of its own standards for extraterritorial human rights protection.

To this end, the paper will explore the general shift from a territorial to a functional approach to jurisdiction (part II), as well as the extraterritorial application of human rights obligations by international courts (part III). Part IV then turns to the sources that could be relevant for identifying the EU's obligations to protect human rights abroad, as well as the wider effects of Articles 3(5) and 21 TEU and existing case-law of the European Court of Justice concerning extraterritorial human rights obligations, while part V offers a tentative conclusion.

II. Extraterritorial obligations and the shift from a territorial to a functional approach to jurisdiction

The ever-changing dynamics of state interaction on the international plane as well as the growing impact of activity undertaken by states and international organizations in foreign territories raise constant questions about the meaning and content of 'jurisdiction' in relation to human rights obligations. Under the traditional view, the notion is understood through a 'spatial model' pursuant to which states have jurisdiction (and therefore incur international obligations) whenever they exercise effective control over a given area. However, an additional 'personal model' is increasingly being employed to describe a dimension of jurisdiction that refers to control and authority exercised by a state over individuals and the duties stemming from their actions in the international sphere[2]. In this broader sense, states are responsible not only towards individuals within their territory, but also towards individuals located outside of their territory, who are subject to their jurisdiction[3]. An even further (and more recent) development of extraterritorial obligations raises the question whether the concept may

[1] This term has been coined by professor Anu Bradford to designate the global power of influence of the EU's legal institutions and standards, a type of regulatory soft power – see Anu Bradford, 'The Brussels Effect', 107 *Northwestern University Law Review* 2012, p. 1, available at https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1275&context=faculty_scholarship.

[2] This terminology of jurisdiction models is used in M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*, (Oxford: Oxford University Press 2011) 127, 173 et seq. For more detailed discussions on the topic of extraterritorial obligations see also M. Gibney and S. Skogly (eds.), *Universal Human Rights and Extraterritorial Obligations* (Philadelphia: University of Pennsylvania Press 2010); M. Gondek, *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia 2009).

[3] R. McCorquodale and P. Simons, „Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law", 70 *Modern Law Review* 2007, p. 602, available at https://ssrn.com/abstract=998664.

be applied to (and accordingly, whether international responsibility can be engaged for) policies of states or international organizations giving rise to extraterritorial effects contrary to human rights.

In this context, legal scholarship has become more concerned with determining the manner in which human rights obligations to respect, protect and fulfil operate in an extraterritorial setting. For instance, Skogly and Gibney show that '[t]here is a negative right to respect human rights in other countries, *inter alia* through avoiding taking part in extraordinary rendition, or through avoiding pollution of water or restricting the water resources for a neighbouring country'[4]. The obligation to protect is manifested in an extraterritorial setting, for instance, through the duty of states to regulate 'the activities of transnational corporations over which they exert jurisdiction in order to avoid having these entities engage in practices that breach human rights standards in other countries', such as regulation against the use of child labour[5]. In what the positive obligation to fulfil is concerned, it involves a duty 'to support foreign countries in their quest to implement human rights within their own domestic setting through measures such as developing assistance that is human rights conducive, or assistance to develop a human rights infrastructure'[6]. This being said, the precise content of such duties and the approach to implement them in activities with extraterritorial effects is far from clear and even farther from being universally agreed upon.

Against this background, the International Court of Justice (ICJ), as well as various regional courts, have had to grapple with the expanding use of extraterritorial human rights obligations in cases brought before them. The following section will briefly illustrate some instances in which the notion of extraterritorial obligations was discussed in relation to different human rights instruments in the international system. Section IV will subsequently zoom in on the approach taken by the EU and the European Court of Justice (ECJ).

III. Extraterritorial human rights obligations in the language of international courts

While the ICJ is not a specialized human rights court, its case-law involving issues of human rights is significant enough to constitute a starting point for an analysis of the general approach to extraterritorial obligations. As Rosalyn Higgins repeatedly affirmed, 'notwithstanding that the International Court of Justice is not a human rights court as such, it is fully engaged in the judicial protection of human rights'[7]. A look at the case-law of the ICJ is important also because its pronouncements on the matter of extraterritorial application of human rights obligations were made during a time when this was a highly contested issue.

When making determinations concerning extraterritorial human rights obligations, the Court's reasoning built on its previous observations in the *Namibia Advisory Opinion*, according to which states' international obligations are not limited by the existence of a sovereign title over a territory but they rather stem from the exercise of control: '[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States'[8]. In its subsequent *Advisory Opinion on the Construction of a Wall*, the ICJ discussed, among others, the scope of application of the International Covenant on Civil and Political Rights (ICCPR) and concluded that it was not limited to acts committed on the state's territory, but it also extended 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory'[9]. The Court employed the same reasoning in its *DRC v. Uganda*

[4] M. Gibney and S. Skogly, *supra* note 1, at 6.

[5] *Idem.*

[6] *Ibid.*

[7] R. Higgins, *The International Court of Justice and Human Rights,* in K. Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (Amsterdam: Martins Nijhoff 1998), p. 703.

[8] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16 (hereinafter *Namibia Advisory Opinion),* para. 118.

[9] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 2004 ICJ Reports 163 (9 July) (hereinafter *Advisory Opinion on the Construction of a Wall), para.* 111.

judgement, where express reference was made to the findings in the *Advisory Opinion on the Construction of a Wall*[10].

Furthermore, in its order for provisional measures in *Georgia v. Russia*, the ICJ offered an extensive interpretation to the field of application of the Convention on the Elimination of All Forms of Discrimination (CERD) and concluded, contrary to Russia's submissions, 'that there is no restriction of a general nature in CERD relating to its territorial application; (…) it further notes that, in particular, neither Article 2 nor Article 5 of CERD, alleged violations of which are invoked by Georgia, contain a specific territorial limitation; (…) the Court consequently finds that these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory'[11].

As noted by various scholars, this interpretation is significant because it lays down a tool for determining jurisdiction in respect of human rights instruments which, similarly to CERD, do not contain clauses expressly limiting their territorial application. To this end, 'the enquiry on extraterritorial applicability depends not on establishing this in a positive sense, but, rather, establishing whether it has been ruled out negatively though restrictive provisions'[12].

Other regional human rights adjudication bodies have in their turn dealt with issues concerning the extraterritorial application of obligations stemming from human rights instruments. Remarkably, in *Saldaño v. Argentina*, the Inter-American Commission on Human Rights stated that it '[did] not believe, however, that the term "jurisdiction" in the sense of Article 1(1) is limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents *which produce effects or are undertaken outside that state's own territory*. This position finds support in the decisions of the European Court and Commission of Human Rights which have interpreted the scope and meaning of Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)'[13]. [emphasis added]

What is notable here is the broad interpretation of the scope of application of the American Convention, extending not only to acts undertaken by a state's agents outside its territory, but also to those producing extraterritorial effects.[14] This conclusion is even more important for the analysis of the ECJ's case-law on extraterritoriality and for the debates concerning the EU's potential international responsibility for the harmful extraterritorial effects of its policies.

The European Court of Human Rights (ECtHR) has given similar answers to questions of jurisdiction under the European Convention on Human Rights (ECHR). For example, in *Loizidou* v. *Turkey* Turkey was found to be responsible for the actions of the TRNC in Cyprus, given that the 'obligation to secure (…) the rights and freedoms set out in the Convention derives from the fact of such control [by the state] whether it be exercised directly, through its armed forces, or through a subordinate local administration'[15]. Similarly, in *Öcalan* v. *Turkey*[16] the Court ruled that responsibility for the extraterritorial acts committed in Kenya was attributable to Turkey based on the temporary effective control exercised by Turkish security forces in the limited area where the events took place.

In *Issa and others* v. *Turkey* the ECtHR reached the final conclusion that it was unclear whether 'the applicants' relatives were within the "jurisdiction" of the respondent State for the purposes of Article 1

[10] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda),* Judgment, ICJ Reports 2005 (hereinafter *DRC* v. *Uganda*), para. 216-220.

[11] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation),* Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, para. 109.

[12] R. Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties', 12 *Chinese Journal of International Law* 2013, p. 668.

[13] *Victor Saldaño* v. *Argentina*, Inter-American Commission on Human Rights, Report no. 38/99, March 11, 1999, para. 17.

[14] See, for ampler discussions on the extraterritorial application of the American Convention, C.M. Cerna, 'Extraterritorial Application of the Human Rights Instruments of the Inter-American System' in Fons Coomans and Menno T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, (Antwerp: Intersentia 2004), pp. 141-174.

[15] ECtHR, *Loizidou* v. *Turkey* (Preliminary Objections), Appl. no. 15318/89, 23 March 1995, para. 62.

[16] ECtHR, *Öcalan* v. *Turkey*, Appl. no. 46221/99, 12 May 2005, para. 91.

of the Convention'[17]. Nonetheless, its analysis of the applicable principles for determining jurisdiction under the Convention is relevant for the purposes of this paper. After having indicated that the classic conception of a State's jurisdictional competence is primarily territorial, the Court turned to show that there are however exceptional circumstances in which 'the acts of Contracting States *performed outside their territory or which produce effects there ("extra-territorial act") may amount to exercise by them of their jurisdiction* within the meaning of Article 1 of the Convention'[18]. [emphasis added]

In the line of cases concerning extraterritorial jurisdiction under the ECHR, the 'odd one out' – and the one to generate constant unease in the Court's efforts to streamline its approach – is by far *Bankovic* v. *Belgium*[19]. Ruling on admissibility, the ECtHR insisted on the exceptional character of extraterritorial jurisdiction[20] and introduced the much contested notion of 'legal space' *(espace juridique)* of the Convention[21] before concluding that the Former Republic of Yugoslavia did not fall within such space and that consequently there was no 'jurisdictional link between the persons who were victims of the act complained of and the respondent States. Accordingly, it [was] not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question'[22].

In subsequent case-law the Court tried to somewhat soften its stance in *Bankovic*[23] and to appease the perception of inconsistency of its approach to extraterritorial jurisdiction. One of the most relevant cases in this sense is *Al-Skeini* v. *UK*[24], in which the ECtHR went as close as possible to overruling *Bankovic* v. *Belgium*, although not explicitly, and its reasoning was arguably half-hearted[25]. The judgment discussed *inter alia* the legal space of the Convention and emphasized that '[w]here the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a "vacuum" of protection within the "legal space of the Convention" (see *Cyprus* v. *Turkey*, cited above, § 78, and *Banković and Others*, cited above, § 80). However, the importance of establishing the occupying State's jurisdiction in such cases *does not imply*, a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States. The Court has not in its case-law applied any such restriction* (see, among other examples, *Öcalan*; *Issa and Others*; *Al-Saadoon and Mufdhi*; and *Medvedyev and Others*, all cited above)'[26]. [emphasis added]

The Court went on to attribute responsibility to the UK for the killing of all six applicants based not on the UK's overall effective control over Basra, but rather by employing the personal model of jurisdiction – due to its exercise of public powers[27].

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[17] ECtHR, *Issa and others* v. *Turkey*, Appl. no. 31821/96, 16 November 2004, para. 82.

[18] ECtHR, *Issa and others* v. *Turkey*, Appl. no. 31821/96, 16 November 2004, para. 68.

[19] ECtHR, *Bankovic and others* v. *Belgium and others*, Appl. no. 52207/99, 12 December 2001 (hereinafter *Bankovic* v. *Belgium).*

[20] *Bankovic* v. *Belgium*, para. 67-71.

[21] In relation to this notion, the Court stated that 'the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an *essentially regional context and notably in the legal space* (espace juridique) *of the Contracting States*. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.' [emphasis added] – see *Bankovic* v. *Belgium*, para. 80.

[22] *Bankovic* v. *Belgium*, para. 82.

[23] In fact, *Issa* v. *Turkey*, discussed above, is a good example in this sense. See also M. Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg', 23 *European Journal of International Law* 2012, p. 124.

[24] ECtHR, *Al-Skeini and others* v. *The United Kingdom*, Appl. no. 55721/07, 7 July 2011 (hereinafter, *Al-Skeini* v. *UK*).

[25] M. Milanovic, *supra* note 22, at 129.

[26] *Al-Skeini* v. *UK,* para. 142.

[27] See, for ampler analyses, B. Miltner, 'Revisiting Extraterritoriality after Al-Skeini: The ECHR and Its Lessons', 33 *Michigan Journal of International Law* 2012, 697-700 and M. Milanovic, *supra* note 22, at 129-131.

The conclusion to be drawn from the cases above is that, while the ECHR allows for its extraterritorial application, the conditions for this type of jurisdiction remain highly contextualized, giving a 'lasting impression of continued confusion'[28]. In the words of judge Bonello, the case-law of the Court on extraterritoriality remains 'bedevilled by an inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies'[29]. Examples of disconcerting judicial acrobatics such as *Bankovic v. Belgium* amply display the underlying political implications of extraterritoriality and the numerous difficulties that it poses for international adjudication bodies.

IV. Extraterritorial human rights obligations and the EU

In recent years, discussions concerning the existence, scope and operation of the EU's extraterritorial human rights obligations have become increasingly frequent and complex. Numerous scholarly works dedicate ample space to the identification of the sources of such obligations both within the rules of international law, as well as within the EU's legal order[30].

1. Obligations stemming from international law

In what general international law is concerned, it is universally accepted that the European Union – as a derived subject endowed with functional legal personality – is bound by norms of customary international law,[31] which can generate specific extraterritorial obligations in connection to human rights. However, the concrete relationship between EU and international law – specifically, the level of permeation of international norms within the EU's legal system – is strongly dependent on the ECJ's approach.

The case-law of the Court on this issue has not always been consistent – rather, as often observed in legal doctrine, the approach of the ECJ towards international law has oscillated over time between 'open' and 'closed' or, in other words, between a monist and a dualist one[32]. Klabbers, for instance, affirms that the perceived 'friendly disposition' of the EU towards international law is in fact a deceptive image: '[t]he fact that EU law prescribes monism with respect to its own domestic effect is understandable and has in all likelihood contributed greatly to the longevity and success of the EU, but is not based on a particularly friendly attitude towards international law'[33]. Especially after its much criticized judgment in *Kadi*[34]*,* the ECJ's stance has been qualified as 'sharply dualist' in relation to the international legal order[35], placing more emphasis on the autonomy and separateness of EU law than on its self-professed commitment to international law and institutions[36].

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[28] B. Miltner, *supra* note 26, at 745.

[29] *Al-Skeini* v. *UK,* Concurring Opinion of Judge Bonello, para. 4.

[30] See, for instance, L. Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', 25 *European Journal of International Law* 2015, 1071-1091; C. Ryngaert and R. Fransen, 'EU Extraterritorial Obligations with Respect to Trade with Occupied Territories: Reflections After the case of Front Polisario Before EU Courts', 2 *Europe and the World: A law review* 2018; 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* 2015, 1093-1099; A. Berkes, 'The Extraterritorial Human Rights Obligations of the EU in Its External Trade and Investment Policies', 2 *Europe and the World: A law review* 2018.

[31] See also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 1980, ICJ Reports 89-90, para. 37.

[32] Odermatt gives a comprehensive overview of the characterizations used in literature to describe this relationship – see J. Odermatt, 'The Court of Justice of the European Union: International or Domestic Court?' 3 *Cambridge Journal of International and Comparative Law* 2014, 697-700.

[33] J. Klabbers, *The European Union in International Law*, (Paris: Ed. A. Pedone 2012), p. 71.

[34] ECJ, Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v. *Council of the European Union and Commission of the European Communities* [2008] EU:C:2008:461 (hereinafter, *Kadi).*

[35] G. de Búrca, 'The European Court of Justice and the International Legal Order After *Kadi*', 51 *Harvard International Law Journal* 2009, p. 2. See also C. Eckes, 'International Law as Law of the EU: The Role of the ECJ', in E. Cannizzaro *et al.* (eds.), *International Law as Law of the European Union* (Leiden: Brill 2012), 363-364.

[36] G. de Búrca, *supra* note 52, at 2.

Nonetheless, at least on a declaratory level, the Court still pays heed to international law as a cornerstone of the EU's legal order which it (alongside all other EU institutions) is bound to observe in exercising its competences. Language to this effect is repeated and referenced in numerous decisions dealing with rights and obligations of the Union stemming from international law. Statements such as that in the *Poulsen and Diva Navigation* decision, according to which 'the European Community must respect international law in the exercise of its powers and … consequently [secondary EU law] must be interpreted and its scope limited, in the light of the relevant rules of the international law …'[37]. have subsequently appeared under various formulations in *Racke*[38]*, Kadi*[39]*, ATAA*[40] and *Brita*[41]*.* In light of this, it is important to take a closer look at the international obligations applicable to the EU in an extraterritorial setting.

In this sense, the analysis will focus on the relevant rules concerning (a) the application of the due diligence standard to the EU's extraterritorial conduct and policies having extraterritorial effects; (b) the obligation to act and to cooperate in order to put an end to violations of *jus cogens* norms and (c) the duty of non-recognition of situations resulting from such violations of peremptory norms.

The observance of the due diligence standard requires states (and international organizations acting within the sphere of their functional competences) 'not to allow knowingly [their] territory to be used for acts contrary to the rights of other states'[42]. In the realm of human rights, this rule has been understood to include the obligation of states to take adequate measures (to regulate and/or to intervene) in order to ensure that the conduct of private actors on their territory does not lead to human rights violations in the territory of other states[43]. The inference that this standard automatically gives rise to extraterritorial human rights obligations[44] has been regarded by some as 'something of an overstatement'[45]. It is however agreed that, *mutatis mutandis,* the EU might incur an obligation, for instance, 'to prevent the export of products, such as poisoned food, that it knows, or should know, will cause personal injury in third countries. Such harm could also be described in terms of the human rights of those persons if the EU were subject to an international obligation to respect those human rights in the first place'[46].

The obligation to cooperate internationally in order to put an end to violations of *jus cogens* norms entails, in what the EU is concerned, the duty to take active measures, through its external actions in the field of trade and development, in order to ensure the elimination of grave violations such as, for instance, slavery, torture or trafficking of human beings.[47] The connected obligation not to recognize situations resulting from violations of peremptory norms has been widely discussed in relation to the EU, especially in the context of the *Front Polisario* case[48]. The judgments of the General Court and of the CJEU

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[37] ECJ, Case C-286/90, *Anklagemyndigheden* v. *Peter Michael Poulsen and Diva Navigation Corp.* [1992] EU:C:1992:453 (hereinafter, *Poulsen and Diva Navigation*), para. 9.

[38] ECJ, Case C-162/96*, A. Racke GmbH & Co.* v. *Hauptzollamt Mainz* [1998], EU:C:1998:293 (hereinafter, *Racke) para.* 45-46.

[39] Kadi, par 291-292. The latter paragraph refers in particular to the EU's obligations stemming from the United Nations system: 'the powers of the Community provided for by Articles 177 EC to 181 EC in the sphere of cooperation and development must be exercised in observance of the undertakings given in the context of the United Nations and other international organizations (Case C-91/05 *Commission* v *Council* [2008] ECR I-0000, paragraph 65 and case-law cited).'

[40] ECJ, Case C-366/10, *Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc.* v. *Secretary of State for Energy and Climate Change* [2011], EU:C:2011:864 (hereinafter, *ATAA), para.* 101, 123.

[41] ECJ, Case C-386/08, *Brita GmbH* v. *Hauptzollamt Hamburg-Hafen* [2010], EU:C.

[42] *Corfu Channel Case (United Kingdom v. Albania),* Judgment, 1949, ICJ Reports 22, para. 3.

[43] See O. de Schutter *et al.*, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of states in the Area of Economic, Social and Cultural Rights', 34 *Human Rights Quarterly* 2012, 1095-1096, [commentary 9 to principle 3].

[44] *Idem*.

[45] L. Bartels, *supra* note 29, at 1082.

[46] *Idem*, 1082-1083.

[47] A. Berkes, *supra* note 29, at 7.

[48] ECJ, Case T-512/12, *Front populaire pour la libération de la saguiaelhamra et du rio de oro (Front Polisario)* v. *Council of the European Union* [2015] ECLI:EU:T:2015:953 and Case C-104/16 P, *Council of the European Union* v. *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)* [2016] ECLI:EU:C:2016:973 (hereinafter, *Front Polisario).*

are generally criticized for not having engaged with, and explicitly applied, the duty of non-recognition in respect of the acts of Morocco as an occupying power in Western Sahara[49].

Human rights obligations resulting from customary norms are supplemented at the international level by conventional norms resulting from multilateral[50] or bilateral treaties entered into by the EU with third parties. For instance, the EU has concluded multiple partnerships, association and trade agreements with third states, the majority of which include human rights clauses that follow a standard formula: references to other universal human rights instruments and a declaration of the essential character of such commitments. This formula is supplemented by a general non-execution clause that allows the parties to take appropriate measures in case of non-compliance with the obligations undertaken (including the human rights clause)[51]. However, the efficiency of such clauses may be discussed in light of several aspects, such as for instance, the concrete mechanisms of enforcement in case of a violation, which depend on the framework adopted by each negotiated instrument. An additional concern could be the broad margin of discretion that EU institution enjoy in deciding whether to suspend the agreement for violations of fundamental rights, as well as the fact that such clauses are not in principle self-executory in character.

2. Obligations stemming from within the EU's own legal order

The provisions concerning the EU's objectives and obligations in respect of human rights are scattered throughout the Treaty on the European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union (CFREU). For the purposes of this paper, the most relevant are articles 3(5) and 21 of the TEU and article 51 CFREU.

Situated within Title I (Common Provisions) of the TEU, article 3(5) applies across the policy areas of the EU. It provides that "[i]n its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter".

The values of the Union are enumerated in article 2 TEU and include, among others, respect for human rights and the rule of law[52]. Although the wording of article 3(5) TEU is drafted using language that indicates a binding commitment – *'shall* uphold and promote', *'shall* contribute' [emphasis added] – its normative strength is relatively low given the general formulation. It guides the Union's action in its policies in relation to third parties by imposing an obligation not to act in a manner contrary to the values and objective set out in articles 2 and 3(5), but also a positive obligation to contribute to their attainment in the 'wider world'.

Article 21 TEU, included in Title V, Chapter I, on the other hand, contains more precise language in what the external action of the Union is concerned. It stipulates, in the first paragraph, the obligation of the EU to guide its action on the international scene by using '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 f*reedoms, respect for

[49] See for ampler discussions on this point, C. Ryngaert and R. Fransen, *supra*, note 29, at 13 et seq. See also for a critical view on the CJEU's judgment, E. Kassoti, 'The Council v. Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)', 2 *European Papers* 2017, 23-42.

[50] For instance, the EU is a party to the Convention on the Rights of Persons with Disabilities (CRDP), which it ratified in December 2010.

[51] For an analysis, see A. Berkes, *supra* note 29, 8-9.

[52] Article 2 TEU: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.

human dignity, the principles of equality and solidarity, and *respect for the principles of the United Nations Charter and international law.*' [emphasis added]

The third paragraph of article 21 TEU is normatively stronger, providing that '[t]he Union *shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action* covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, *and of the external aspects of its other policies*.

The Union shall ensure *consistency between the different areas of its external action and between these and its other policies*. (…)' [emphasis added]

Commentators generally note that this paragraph refers not only to the external action of the EU, but also to the external aspects of its policies (be they external or even internal). Bartels, for instance, interprets the above provision as implying an obligation of the EU to respect human rights in its internal and external policies, thus concluding that the EU incurs extraterritorial human rights obligations[53]. Nonetheless, this is not a foregone conclusion: while it is relatively undisputed that the EU's human rights obligations are applicable when jurisdiction is exercised outside EU territory, there is much less agreement (or clarity, for that matter) in respect of the potential responsibility entailed by EU policies with extraterritorial effects.

Another relevant provision in this sense is article 51 CFREU which, while indicating the Charter's application *ratione materiae* and *ratione personae*, does not include any limitation *ratione loci*[54]*.* Therefore, the rule may be interpreted as instituting an obligation of the EU to comply with the CFREU whenever it acts in performance of its powers and prerogatives, whether on the territory of the Member States or elsewhere. As Berkes suggests[55], this inference is also supported by language used within secondary EU legislation, such as the Regulation (EU) 2016/1624 of the European Parliament and of the Council concerning the European Border and Coast Guard[56]. However, what remains unclear is whether such extraterritorial obligations of the EU are extensive enough to comprise not only a duty to respect human rights (which is acknowledged), but also a positive duty to protect and fulfil. Bartels concludes that while there is an implication that the EU must act in some way in order to pursue the objectives and achieve these declared aims, it is not prescribed a particular course of action, an aspect which thus dilutes its concrete obligations. For instance, 'it cannot be said that the EU is required to act positively to protect persons located extraterritorially from the acts of EU businesses operating in other countries, or even to provide development aid to developing countries in order to fulfil their human rights'[57]. Consequently, the EU is under a negative obligation to respect human rights universally, but its positive obligations to protect and fulfil are confined to the EU's own territory.

This approach is also consistent with what Ganesh terms as the 'compliance reading' of the EU treaty provisions on human rights obligations[58]. Under this view, the provisions analysed above regulate the EU's own conduct and not that of third parties. They imply, on the one hand, an obligation for the EU to comply in its external conduct with the human rights norms internally applicable within its system (also

[53] L. Bartels, *supra* note 29, 1074-1075.

[54] Article 51(1) CFREU provides that from the perspective of their field of application 'the provisions of [the] 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. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties'.

[55] A. Berkes, *supra* note 29, at 5.

[56] For instance, article 54(2) provides that '[t]he Agency may cooperate with the authorities of third countries competent in matters covered by this Regulation with the support of, and in coordination with, Union delegations. When doing so, *it shall act within the framework of the external relations policy of the Union, including with regard to the protection of fundamental rights and the principle of non-refoulement.* It shall also act within the framework of working arrangements concluded with those authorities in accordance with Union law and policy. (…) The Agency *shall comply with Union law, including norms and standards which form part of the Union acquis*'. [emphasis added]

[57] *Idem,* at 1075. See also A. Ganesh, 'The European Union's Human Rights Obligations Towards Distant Strangers', 37 *Michigan Journal of International Law* 2016, 479-480.

[58] A. Ganesh, *supra* note 46, at 479.

in light of the absence of *ratione loci* limitations of the CFREU); on the other hand, through their reference to the United Nations Charter and international law, the provisions of article 21 TEU convert 'international law norms into norms of EU law binding upon EU institutions and actions'[59]. The Court appears to highlight this understanding of Article 21 TEU in its case-law. For instance, in the Parliament v Commission case, the Court stated that:

„[a]s regards, in particular, provisions of the EU-Tanzania Agreement concerning compliance with the principles of the rule of law and human rights, as well as respect for human dignity, it must be stated that *such compliance is required of all actions of the European Union, including those in the area of the CFSP, as is clear from the provisions, read together, set out in the first subparagraph of Article 21(1), Article 21(2) (b) and (3) TEU, and Article 23 TEU"*[60]. [emphasis added]

V. Conclusion

As a tentative conclusion regarding the normative framework of the EU's extraterritorial human rights obligations, it may be affirmed that under international law and the EU's primary rules (more specifically, the TEU and the CFREU) the EU incurs a negative obligation to respect human rights while acting outside its territory. However, neither international law nor EU primary law support a strong conclusion in respect of the EU's responsibility for potential extraterritorial effects of its policies or for the existence of positive obligations to protect and fulfil the human rights of distant strangers. In this context, a closer look at the evolving case-law of the ECJ might in the future offer some necessary clarifications with respect to the EU's own position concerning the scope and content of its (extraterritorial) human rights obligations.

In addition, over the course of several years, various communications and action plans were put forth by the European institutions with regard to their human rights agenda in connection with the conclusion of trade and investment agreements. However, the question remains whether such documents, predominantly political and non-binding in character, are indicators of progressive self-regulation of the EU's external conduct and whether they have the potential to lead to the consolidation of binding international standards of conduct (such, as for instance, the obligation to perform human rights impact assessments before concluding trade agreements). On this point, future developments will show how the due diligence standard might be shaped by the influence of the EU's approach towards extraterritorial human rights protection, or whether the EU's policies might remain largely declaratory on the international plane.

[59] *Ibid.*

[60] Case C-263/14, *European Parliament v Council of the European Union*, EU:C:2016:435, para. 47.