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Article

The extraterritorial human rights obligations of the EU in its external trade and investment policies

Antal Berkes

Manchester University, UK; antal.berkes@manchester.ac.uk

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Abstract

The EU is bound by human rights obligations toward individuals outside the territory of its Member States who are affected by its trade and investment policies. Internal rules of the EU, namely the Founding Treaties and the Charter of Fundamental Rights, and various external norms, that is international law sources, impose human rights obligations on the EU. Those human rights obligations are increasingly interpreted by treaty monitoring bodies as requiring extraterritorial due diligence duties from States parties, in the sense that the creation of substantial and foreseeable effects outside the State's territory establishes the jurisdiction of the State party. This jurisdiction leads to positive obligations, namely the duty to exert due diligence on trade and investment policies. The EU is expected to assess the risks of human rights violations by its trade and investment partners in and outside its Member States and take all reasonable efforts to avoid foreseeable human rights violations. Although those human rights are likely to continue to be unenforceable before the Court of Justice, the consistent reference to due diligence obligations by treaty monitoring bodies, the European Ombudsman and the European Data Protection Supervisor should encourage EU institutions to comply with their due diligence obligations.

Keywords: human rights; extraterritorial obligations; due diligence; external trade and investment

1. Introduction

It is generally accepted in the case law, and arguably under customary international law, that international human rights conventions protect individuals when the State party performs its conduct outside its territory.[1] However, it is much more uncertain whether international human rights law protects individuals abroad from the extraterritorial effects of the domestic policies of States, and a fortiori international organisations (IOs). Since 2014, fruitful debates have contributed to the theoretical framework of the human rights obligations of the European Union (EU) in its external policies.[2] The opposing arguments for and against its binding so-called extraterritorial obligations focus on the scope of the human rights obligations of the EU, namely whether they impose a merely negative conduct to respect the human rights of persons affected by the policies of the EU outside its territory or indeed positive obligations to protect and that should be fulfiled.[3] The scholarly debate also addresses the enforceability of those human rights obligations by persons affected by the policies of the EU outside its territory. However, as at summer 2018, few authors have focused on specific policies of the EU's external action such as trade and investment treaties,[4] which, because of the wide range of the EU's partner States, might affect most individuals outside of the EU's territory.

Moreover, several recent legal developments might now contribute to the debate. The first significant development is the case law of the Court of Justice of the European Union (CJEU) regarding trade in products from Western Sahara, occupied by Morocco. The EU and Morocco successively concluded an association agreement in 1996, a partnership agreement in the fisheries sector ('Fisheries Agreement') in 2006 and a liberalisation agreement with respect to agricultural and fisheries products in 2012 ('Liberalisation Agreement'). The Front Polisario, a national liberation movement representing the Sahrawi people, brought an action before the General Court seeking the annulment of the decision on the Liberalisation Agreement, claiming among other reasons that applying the Liberalisation Agreement to Western Sahara would violate EU law and international law. By the first *Polisario* judgment, delivered on 10 December 2015, the General Court annulled the decision, finding, first, that the Liberalisation Agreement was applicable 'to the territory of the Kingdom of Morocco'.[5] The General Court held that the Council had failed to fulfil its obligation to examine, before the conclusion of the Liberalisation Agreement, whether there was any evidence of the exploitation of the natural resources of Western Sahara under Moroccan control likely to be to the detriment of its inhabitants and to infringe their fundamental rights. After the Council brought an action before the CJEU seeking the annulment of this judgment, on 21 December 2016 the CJEU concluded that the Liberalisation Agreement does not apply to the territory of Western Sahara and set aside the judgment of the General Court.[6] The Court based its conclusion mainly on the rules of international law applicable to relations between the EU and Morocco, as required by the 1969 Vienna Convention on the Law of Treaties. In line with this second *Polisario* judgment, the

[1] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 180, para 112 (*Wall* Advisory Opinion); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 243–4, para 217; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation)* (Provisional Measures) [2008] ICJ Rep 386, para 109.

[2] Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2014) 25 European Journal of International Law 1071; Enzo Cannizzaro, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels' (2014) 25 European Journal of International Law 1093; Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (1st edn, Nomos Verlagsgesellschaft mbH & Co KG 2014); Cristophe Maubernard, 'Prendre La Promotion Externe Des Droits de l'homme Par l'Union Européenne' in Romain Tinière and Claire Vial (eds), *Protection des droits fondamentaux dans l'Union européenne* (Bruylant 2015); Aravind Ganesh, 'The European Union's Human Rights Obligations Towards Distant Strangers' (2015) 37 Michigan Journal of International Law 475.

[3] For the former view: Bartels (n 2) 1075; for the latter: Ganesh (n 2) 479; Cannizzaro (n 2) 1097–8.

[4] Samantha Velluti, 'The Promotion and Integration of Human Rights in EU External Trade Relations' (2016) 32 Utrecht Journal of International and European Law 41.

[5] Case T-512/12 *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v Council of the European Union* [2015] ECLI:EU:T:2015:953, para 103 (*Front Polisario v Council*, General Court judgment).

[6] 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 (*Polisario* case, judgment of the Court of Justice).

CJEU later confirmed in a preliminary ruling that neither the Fisheries Agreement nor the Protocol thereto are applicable to the waters adjacent to the territory of Western Sahara, and consequently the EU acts relating to their conclusion and implementation are valid.[7] What this case law shows is the importance of the protection of human rights in the external action of the EU.

Furthermore, beyond the case law of the CJEU, some other control mechanisms, such as the European Ombudsman and the European Data Protection Supervisor, reviewed the EU's compliance with human rights in its external trade actions. Those control mechanisms addressed non-binding recommendations to the EU institutions as to the protection of human rights against extraterritorial effects of EU policies and might have influenced certain procedures of the CJEU.[8]

The present paper examines the EU's human rights obligations in the context of its external trade and investment policies and submits that while the dominant case law and the primary law of the EU impose an enforceable obligation to respect the human rights of persons affected by the Common Commercial Policy, a dynamic view addressing due diligence obligations is recommended by human rights bodies inside and outside the institutional structure of the EU. Under this due diligence standard, the EU is expected to carry out a human rights impact assessment before engaging in any international trade policy to ensure that the envisaged policy measure complies with existing human rights obligations and standards and will have no adverse effects on human rights of individuals outside the EU. The paper answers two particular questions: (1) what are the legal foundations, and (2) is the duty to protect extraterritorially enforceable?

The paper thus focuses on regulation or conduct of the EU at the international level, which is considered as, strictly speaking, extraterritorial conduct or the Union's external action,[9] but it does not examine in details domestic regulation or conduct of the EU that produces detrimental effects from the perspective of human rights outside EU's order and territory (domestic conduct having extraterritorial effects).

The paper proceeds as follows. Section 2 examines the legal foundations of the EU's duty to protect extraterritorially, namely, the EU law foundations first (2.1), and the international law foundations second (2.2). Subsection 2.2 will illustrate that sources extraneous to the EU rules stemming from international law confirm the positive obligations of the EU to protect the human rights of individuals outside the EU affected by its trade policy. The same subsection discusses among the international law sources a substantial law obligation, the so-called due diligence standard. Section 3 explains that the same due diligence-focused interpretation might shape the enforcement of the human rights obligations of the EU. The conclusions clarify that the EU's extraterritorial human rights obligations include procedural duties both as to the negotiation phase of international trade agreement and in respect of their implementation.

2. The legal foundations of the duty to protect extraterritorially

2.1. EU law foundations

Among the primary rules (the founding treaties and their amendments) addressing or giving guidance on the EU's human rights obligations, the following main sources protect human rights: Articles 3(5), 6 and 21 of the Treaty on the European Union (TEU) and the Charter of Fundamental Rights of the European Union (EUCFR). The EUCFR was attached to the TEU by the Treaty of Lisbon and has the same legal value as the treaties.[10]

Article 3(5) TEU states the aims of the EU '[i]n its relations with the wider world' to be, namely, the obligations to 'uphold and promote its values and interests' and to 'contribute' to certain norms such as 'fair trade, eradication of poverty and the protection of human rights'. Consequently, when the EU adopts an act, 'it is bound to observe international law in its entirety, including customary international law'[11] and

[7] Case C-266/16 *The Queen, on the application of Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs* [2018] ECLI:EU:C:2018:118 (*Western Sahara Campaign UK*).

[8] See in particular Opinion 1/15 [2017] ECLI:EU:C:2017:592 below, in subsection 3.1.

[9] Part V of the Consolidated version of the Treaty on the Functioning of the European Union [2012] *OJ* C 326/47 (TFEU) and other external aspects of domestic policies, eg those of the common agricultural policy, such as the conclusion of fishing agreements with third States under art 43 TFEU.

[10] TEU, art 6(1).

[11] Case C-366/10 *Air Transport Association of America and Others* [2011] ECR 2011-00000, para 101; Case C-507/13

its international human rights obligations.[12] Article 21(1) TEU is the other important provision concerning the EU's human rights obligations. It provides that the EU 'shall be guided by' similar principles in its external action, including by 'the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'. Among the objectives of its external action, Article 21(2)(b) provides that the EU shall 'consolidate and support democracy, the rule of law, human rights and the principles of international law'. These principles and objectives equally apply to the Common Commercial Policy.[13]

Furthermore, Article 21(3)(1) TEU provides:

> The 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.[14]

This last provision is arguably wider than the others because it binds the EU not only in its external action, but also in all 'the external aspects of its other policies', including its internal policies having extraterritorial effects.[15] Furthermore, respecting the aforementioned principles ('the universality and indivisibility of human rights') necessarily implies the duty to respect human rights.[16]

As the Court recognised in the *European Parliament v. Council of the European Union* case, compliance [with the principles of the rule of law, human rights and human dignity] is required of all actions of the European Union, including those in the area of the Common Foreign and Security Policy (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.[17]

Even though these treaty provisions use wordings that express positive obligations, such as 'promote', 'contribute', 'consolidate and support', some authors argue that they do not require the EU to act in a particular way to protect or fulfil the human rights of individuals outside the EU.[18] Nevertheless, as the recent case law of the CJEU shows (below), it is more plausible to interpret those treaty Articles as imposing positive obligations.

Finally, Article 6(1) TEU provides that '[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union',[19] while Article 6(3) considers fundamental rights 'as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR]' and 'as they result from the constitutional traditions common to the Member States', as 'general principles of the Union's law'.[20] These provisions bind all EU institutions in all their policies as common provisions and do not contain any territorial limitation. Similarly, the EUCFR defines its scope *ratione materiae* without defining any scope *ratione loci*. Its Article 51(1) provides that 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', 'in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties'.[21] Unlike several other international human rights

United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union [2014] ECR 2011-00000, Opinion of AG Jääskinen, para 41.

[12] See below, in subsection 2.2.3.

[13] TFEU, arts 205 and 207; Opinion 2/15 of the Court (Full Court) [2017] ECLI:EU:C:2017:376, para 145.

[14] TEU, art 21(3)(1).

[15] Bartels (n 2) 1074.

[16] ibid.

[17] Case C-263/14 *European Parliament v Council of the European Union* [2016] ECLI:EU:C:2016:435, para 47; confirmed in: Opinion of AG 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] (Opinion of AG Wathelet), para 255 (Opinion of AG Wathelet, *Polisario* case).

[18] Bartels (n 2) 1075; *a contrario*, with regard to international environmental law: Nelson F Coelho, 'Extraterritoriality from the Port: EU's Approach to Jurisdiction over Ship-Source Pollution' (2015) 19 Spanish Yearbook of International Law 269, 278.

[19] TEU, art 6(1).

[20] ibid, art 6(3).

[21] EUCFR, art 51(1).

treaties, which limit their territorial scope to the 'jurisdiction' of the State party, the EUCFR does not have such a provision. Indeed, it implies the general understanding that EU institutions are bound by its provisions while 'implementing Union law', whether it takes place within the territory of the Member States or outside the EU.[22] From EU instruments, it is clear that whenever EU institutions act outside the territory of the EU, they are bound by the Charter.[23] However, it is doubtful whether the Charter requires the EU to respect and protect the fundamental rights of individuals affected by extraterritorial effects of EU policies. Most provisions of the EUCFR do not distinguish between EU citizens and non-citizens, except the right to work and the citizens' rights enshrined in Title V,[24] and some provisions are expressly addressed to non-EU citizens.[25]

Some CJEU precedents confirm the view that the EUCFR is applicable to protect individuals against extraterritorial effects of EU policies. In the *Mugraby* case, the Court did not question the applicant's assumption that damages can be claimed from the EU in respect of injuries that occurred as a result of the failure of the EU to adopt measures against the Republic of Lebanon on the basis of a human rights clause in the Association Agreement between the Community and the Republic of Lebanon.[26] In the *Petruhhin* and *Schotthöfer* cases, the Court held more explicitly that the Charter is applicable where a Member State intends to extradite an EU national at the request of a third State, and the Member State shall verify that the extradition will not prejudice the rights referred to in Article 19 of the EUCFR.[27] In various cases, the Court held that Articles 4 and 19(2) EUCFR require any Member State to assess in removal, expulsion or extradition proceedings whether there exist substantial grounds for believing that the third country national would face a real risk of being subjected to inhuman or degrading treatment if sent back to the country of origin.[28] This case law follows also from the absolute nature of the prohibition of inhuman or degrading treatment,[29] and the rule of harmonious interpretation with the case law of the European Convention on Human Rights (ECHR) under Article 52(3) EUCFR,[30] and, in particular, the rich case law of the European Court of Human Rights applying Article 3 ECHR.[31] Similarly, agents of the European Border Guard and Coast Guard 'shall ensure that no person is disembarked in, forced to enter, conducted to, or otherwise handed over or returned to, the authorities of a country in contravention of the principle of non-refoulement'.[32] In all of the above-mentioned cases, the risk assessment prevents human rights violations likely to occur in a third State as a consequence of the internal decision of a Member State.

In the *Polisario* judgment of December 2015, annulled by the Grand Chamber of the Court of Justice, the General Court held that before any export facilitation agreement, 'the Council must examine, carefully and impartially, all the relevant facts in order to ensure that the production of goods for export is not conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights'.[33] On appeal, the Advocate General seemed to accept the obligation of the EU to

[22] Opinion of AG Wathelet, *Polisario* case (n 17) para 270; Moreno-Lax and Costello (n 2) 1662, 1679, 1682.

[23] eg Regulation (EU) 2016/1624 on the European Border and Coast Guard [2016] *OJ* L 251/1, arts 36(7) and 54(1)–(3) and art 34(1).

[24] EUCFR, arts 15(2) and 39–46.

[25] ibid, arts 15(3), 18, 45(2).

[26] Case T-292/09 *Muhamad Mugraby v Council of the European Union* [2011] 2011 II-00255, Order approved in appeal: Case C-581/11 P *Muhamad Mugraby v Council of the European Union* [2012] 2012-00000.

[27] Case C-182/15 *Aleksei Petruhhin* [2016] ECLI:EU:C:2016:630, paras 52–3; Case C-473/15 *Peter Schotthöfer & Florian Steiner GbR* [2017] ECLI:EU:C:2017:633, paras 23–4.

[28] eg Case C-394/12 *Shamso Abdullahi v Bundesasylamt* [2013] ECLI:EU:C:2013:813, paras 60, 62; Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida* [2014] ECLI:EU:C:2014:2453, paras 46-53; Case C-353/16 *MP v Secretary of State for the Home Department* [2018] ECLI:EU:C:2018:276, paras 43-44.

[29] Case C-578/16 PPU *C. K., H. F., A. S. v Republika Slovenija* [2017] ECLI:EU:C:2017:127, para 69.

[30] Case C-239/14 *Abdoulaye Amadou Tall v Centre public d'action sociale de Huy* [2015] ECLI:EU:C:2015:824, para 54; *C. K., H. F., A. S. v Republika Slovenija* (n 29) para 67.

[31] ECtHR, *Gebremedhin* v *France* (2010) 50 EHRR 29, para 67; *Hirsi Jamaa and Others* v *Italy* (2012) 55 EHRR 21, para 200.

[32] Regulation (EU) 2016/1624 (n 23), art 43(2).

[33] *Front Polisario v Council*, General Court judgment (n 5) para 228; on the doctrinal comments, see: Álvaro de Elera, 'The Frente Polisario Judgments: An Assessment in the Light of the Court of Justice's Case Law on Territorial Disputes' in Jenő Czuczai and Frederik Naert, *The EU as a Global Actor – Bridging Legal Theory and Practice: Liber Amicorum in honour of Ricardo Gosalbo Bono* (BRILL 2017); Sandra Hummelbrunner and Anne-Carlijn Prickartz, 'It's Not the Fish That Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union' 32 Utrecht Journal of

resort to a prior human rights impact assessment under the said conclusion, but excluded the applicability of the EUCFR to extraterritorial effects.[34] His reasoning was inspired from the case law of othe European Court of Human Rights (ECtHR) and the 'jurisdiction clause' of the ECHR. He claimed that the Charter does apply extraterritorially 'where an activity is governed by EU law and carried out under the effective control of the EU and/or its Member States but outside their territory', but could not apply in the case under consideration to Western Sahara 'since in this case neither the European Union nor its Member States exercise control over Western Sahara and Western Sahara is not among the territories to which EU law is applicable'.[35] He seemed to apply, without any reason, the territorial limitation of the 'jurisdiction clause' of the ECHR to the Charter and the spatial type of extraterritorial 'effective control' over an area developed in the case law of the ECtHR,[36] disregarding the scope of application of the EUCFR as defined exclusively *ratione materiae*. However, the Court of Justice did not specifically address this point in its judgment and annulled the judgment for other reasons, namely on the basis of the territorial non-applicability of the Liberalisation Agreement to the territory of Western Sahara.[37]

These few precedents do not establish a coherent case law confirming the application of the EUCHR to protect individuals against extraterritorial effects of EU policies. However, they indicate the possibility of the CJEU continuing to follow such a broad interpretation in the future. As the next subsection (2.2) will show, the international law norms binding the EU provide additional legal basis for the EU's obligations to protect human rights against extraterritorial effects of its policies.

2.2. International law foundations

Among the international law sources that impose human rights obligations on the EU are customary international law (2.2.1), human rights clauses of bilateral treaties concluded with third States (2.2.2), and multilateral human rights conventions to which the EU is or intends to be party (2.2.3). As a further foundation, the paper examines a substantial obligation, namely the so-called due diligence standard in trade and investment policies (2.2.4), which originates both from customary international law and treaty obligations.

2.2.1. Customary international law

As derived subjects of international law, IOs are automatically bound by the rules of general international law,[38] including customary international law. A customary international law norm binds any IO as far as its content is applicable to the functional legal personality of that IO.[39]

Various customary international law rules[40] are binding on the EU[41] and apply to EU policies that have extraterritorial effects. The customary rules relevant to this paper are the due diligence standard;

International and European Law 19; Denys Simon and Anne Rigaux, 'Le Tribunal et Le Droit International Des Traités: Un Arrẹt Déconcertant… – (Trib. UE, 10 December 2015, Aff. T-512/12, Front Polisario c/Conseil Soutenu Par Commission)' (2016) 26 Europe 5.

[34] Opinion of AG Wathelet, *Polisario* case (n 17) paras. 262, 268–9.

[35] ibid, paras 270–1.

[36] *Loizidou v Turkey* (Preliminary Objections) (1995) 20 EHRR 99; *Al-Skeini and Others v The United Kingdom* (2011) 53 EHRR 18; *Al-Jedda v The United Kingdom* (2011) 53 EHRR 23.

[37] *Polisario* case, judgment of the Court of Justice (n 6); on the doctrinal comments, see: Alan Hervé, 'La Cour de Justice de l'Union Européenne Comme Juge de Droit Commun Du Droit International Public?' (2017) 53 Revue trimestrielle de droit europeen 23; Jed Odermatt, 'Council of the European Union v Front Populaire Pour La Libération de La Saguia-El-Hamra et Du Rio de Oro (Front Polisario)' (2017) 111 American Journal of International Law 731; de Elera (n 33).

[38] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 89–90, para 37.

[39] Gérard Cahin, *La coutume internationale et les organisations internationales: l'incidence de la dimension institutionnelle sur le processus coutumier* (Pedone 2001) 520–7; Mathias Forteau, 'Organisations internationales et sources du droit' in Évelyne Lagrange and Jean-Marc Sorel (eds), *Droit des organisations internationales* (LGDJ-Lextenso éditions 2013) 272.

[40] Customary international law is one of the main sources of international law, defined by the Statute of the International Court of Justice (ICJ) 'as evidence of a general practice accepted as law'. See ICJ Statute, art 38(1)(b).

[41] Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* [1992] ECR 1992 I-06019, paras 9–10; Case T-115/94 *Opel Austria GmbH v Council of the European Union* [1997] ECR 1998 II-02739, paras 84, 90; Case C-162/96 *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR 1998 I-03655, paras 45–6; *Air Transport Association of America and Others* (n 11) paras 101, 123; *Western Sahara Campaign UK* (n 7) para 47.

the obligation to cooperate to bring a breach of a *jus cogens* norm to an end; and the obligation not to recognise the situation created by such a breach or to render aid or assistance in maintaining that situation.

First of all, customary international law requires States to comply with the so-called due diligence standard under which 'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein'.[42] Certain human rights experts interpret this customary norm as requiring the State 'to respect and protect human rights extraterritorially',[43] while the customary norm does not a priori create in itself a human right of the injured persons.[44] An exception can be foreseen when the responsible State owes already the injured State a pre-existing obligation to respect the human rights of its citizens,[45] for example under a human rights clause forming part of a bilateral trade treaty concluded between the EU and the third State.

Customary international law also obliges States and international organisations to cooperate internationally to bring to an end the *jus cogens* violations,[46] understood as breaches of peremptory norms.[47] In its case law on the review of the lawfulness of EU measures implementing UN Security Council resolutions, the CJEU itself recognised 'the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*'.[48] Such peremptory norms include, for example, the right to self-determination, the prohibitions against genocide, crimes against humanity, war crimes, slavery, racial discrimination, extra-judicial executions, enforced disappearances, and torture, and other cruel, inhumane or degrading treatment or punishment.[49] Thus, the duty to cooperate internationally to bring to an end those violations of peremptory norms requires the active cooperation of the EU, through its external action such as trade or development policies to eliminate for example slavery, torture or trafficking of human beings.[50] The duty to cooperate includes the obligation to collaborate in investigating those international crimes and prosecuting the perpetrators. This is a so-called due diligence duty, as explained by the International Court of Justice (ICJ) in the case of *Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.[51] Indeed, the ICJ recognised the applicability of the same customary norms to IOs when it held in the *Wall* Advisory Opinion:

> The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion.[52]

[42] *Trail smelter case (United States, Canada)* (1938, 1941) III *UNRIAA* 1905, 1965; in the same sense: *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 22, para 3 ('every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States').

[43] Extra territorial obligations (ETOs) for Human Rights Beyond Borders, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (Heidelberg, 2013), Principle 3, <https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23> accessed 15 September 2016 (Maastricht Principles); Olivier De Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 Human Rights Quarterly 1084, 1095–6 (Commentary to Principle 3).

[44] Bartels (n 2) 1082.

[45] ibid.

[46] ILC, Draft articles on responsibility of States for internationally wrongful acts [2001] II (Part 2) *YbILC* 26 (ARSIWA), 113–4, art 41(1); Draft articles on the responsibility of international organisations [2011] II (Part 2) *YbILC* 2 (DARIO), 66–8, art 42(1).

[47] A norm of *jus cogens* is defined as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.' Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, art 53.

[48] Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR 2005 II-03649, para 226; Case T-306/01 *Ahmed Ali Yusuf v Council and Commission* [2005] ECR 2005 II-03533, para 286; unlike the Court of First Instance, the Grand Chamber of the CJEU did not however make reference to *jus cogens* or customary law in its appeal decision. Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi* [2013] ECLI:EU:C:2013:518.

[49] De Schutter and others (n 43) 1096.

[50] Eg in cases involving trafficking of human beings: *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, para 289; *M. and Others v Italy and Bulgaria* App no 40020/03 (ECtHR, 31 July 2012) para 167; *L.E. v Greece* App no 71545/12 (ECHR, 21 January 2016) para 85; *J. and Others v Austria* App no 58216/12 (ECHR, 17 January 2017) para 105.

[51] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, para 430.

[52] *Wall* Advisory Opinion (n 1), 200, para 160.

Furthermore, no State or international organisation shall recognise as lawful a situation created by a breach of a peremptory norm, nor render aid or assistance in maintaining that situation.[53] For the same reason, in order to avoid a trade treaty that could contribute to the maintenance of a serious breach, the Advocate General proposed that 'before concluding international agreements, the EU institutions must ensure compliance with the very short list of peremptory norms of international law'.[54] Indeed, some authors are of the view that an EU trade agreement with respect to products originating from an occupied territory might breach the customary duty of non-recognition of violations of peremptory norms unless the EU ensures that these goods benefit the local population.[55]

2.2.2. Human rights clauses of bilateral treaties

Bilateral and multilateral conventions concluded by the EU, once they enter into force, impose international obligations on the Union and form an integral part of the EU legal order.[56] The EU has concluded many bilateral partnership and trade agreements with third States. Since the 1990s it consistently inserts so-called human rights clauses in its framework agreements, which provide that the Parties respect human rights and are considered as an essential element clause. Most human rights clauses follow a standard formula, such as in the Association Agreement between the EU and Ukraine:

> Respect for democratic principles, human rights and fundamental freedoms, as defined in particular in the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the Charter of Paris for a New Europe of 1990, and other relevant human rights instruments, among them the UN Universal Declaration of Human Rights and the European Convention on Human Rights and Fundamental Freedoms, and respect for the principle of the rule of law shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement.[57]

An important feature of such human rights clauses is that they include reference to basic human rights instruments such as the Universal Declaration of Human Rights, considered as enshrining customary international law, or to human rights conventions to which the third State is already party to or to 'other relevant human rights instruments'. The latter formula leaves 'an open-ended possibility for future inclusion of international human rights instruments',[58] especially those conventions that are generally accepted to apply extraterritorially and to extraterritorial effects of domestic State policies such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) (see 2.2.3).

Furthermore, the human rights clauses are usually supported by a non-execution clause, which enables each of the Parties to adopt 'appropriate measures' in case of non-fulfilment of the obligations, including the human rights clause.[59] A human rights clause prohibits, for example, involvement in human rights violations in other countries; the EU could accordingly take appropriate measures under the Cotonou Agreement against Liberia as a result of that country's assistance to the *Front uni révolutionnaire* in Sierra Leone.[60] The decision on taking such appropriate measures under the non-execution clause falls within the discretion of the given Party;[61] in practice, such decisions have been rarely taken,[62] and always as a reaction to violations of the human rights clause by the third State. However, the majority of

[53] ARSIWA (n 46) 113–4, art 41(2); DARIO (n 46) 66–8, art 42(2).

[54] Opinion of AG Wathelet, *Polisario* case (n 17) para 259.

[55] See the contribution of Cedric Ryngaert and Rutger Fransen in the present issue.

[56] Case 181/73 *R. & V. Haegeman v Belgian State* [1974] ECR 1974 00449, para 5.

[57] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] *OJ* L 161/3 (Association Agreement EU-Ukraine), art 2.

[58] Velluti (n 4) 55.

[59] Association Agreement EU-Ukraine (n 57) art 478(1).

[60] Letter annexed to Council Decision of 25 March 2002 concluding consultations with Liberia under Articles 96 and 97 of the ACP-EC Partnership Agreement [2002] OJ L96/23, cited in The European Parliament's role in relation to human rights in trade and investment agreements (study, written by Lorand Bartels) EXPO/B/DROI/2012-09 (February 2014) (The European Parliament's role in relation to human rights) para 20.

[61] *Muhamad Mugraby v Council of the European Union* [2011] (n 26) paras 59, 60 and below, subsection 3.1.

[62] See the instances, until 2015, in Answer given by Vice-President Mogherini on behalf of the Commission, 5 August 2015, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-008626&language=EN> accessed 5 July 2018.

authors accept that human rights clauses are legally binding,[63] and not only on the third State, but also on the EU.[64]

The essential element clauses are considered as applying to the internal and external policies of the Parties.[65] This is clear from the wording of human rights clauses, on the one hand, and from the human rights impact assessment policy of the European Commission, on the other hand. Regarding the wording of the human rights clauses, they generally provide that the respect for the democratic principles and fundamental human rights 'shall form the basis of' (or 'inspire') 'the domestic and external policies of the Parties and constitute essential elements of this Agreement'.[66] The Commission conducts its human rights impact assessment with a global view of the EU's policies: it held that when considering the impact of trade policies on human rights issues, the EU's '[i]nternational trade policy should be seen as one component in a jigsaw of policies' including domestic policies in areas having an impact on the overall relations with the country/ies concerned.[67] This is because trade agreements themselves are often unlikely to produce serious impacts on human rights on their own, but it is rather domestic policies that create such impacts.[68] Consequently, essential element clauses apply both to external policies and the extraterritorial effects of domestic policies of the EU.[69]

2.2.3. Multilateral human rights conventions

Multilateral human rights conventions are normally open for signature by States, while it is rare that they allow the signature by IOs. As of June 2018, the EU has ratified only one multilateral human rights convention and recently signed another one.

The EU is formally party to the Convention on the Rights of Persons with Disabilities (CRPD), which is open for signature not only by States but also by regional integration organisations. It signed the Convention in 2007 and ratified it on the 23 December 2010.[70] The CRPD itself requires the EU to adopt measures with extraterritorial effects: it provides for the obligation of international cooperation. The inclusion of this obligation in the CRPD was inspired by the general duty of international cooperation in Article 2(1) ICESCR and some rights in other core human rights treaties such as Article 28 Convention on the Rights of the Child (on education) or Article 11 ICESCR (on the right to an adequate standard of living).[71] The major model provision, Article 2(1) ICESCR, is a clear obligation of means, as opposed to obligations of result, which require the achievement of a certain outcome, because it provides only on the way in which States parties shall act. Under the provision, each State party undertakes 'to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the

[63] Bartels (n 2) 1079; Narine Ghazaryan, 'A New Generation of Human Rights Clauses? The Case of Association Agreements in the Eastern Neighbourhood' (2015) 40 European Law Review 391, 406; Francesca Martines, 'Human Rights Clauses in EU Agreements' in Sara Poli (ed), *Protecting Human Rights in the European Union's External Relations* (TMC Asser Instituut 2016) 49–50 <http://www.asser.nl/media/3344/cleer016-05_web.pdf> accessed 7 May 2018; *a contrario* Vincent Depaigne, 'Protecting Fundamental Rights in Trade Agreements between the EU and Third Countries' [2017] European Law Review 562, 564–5. ('"political" clauses rather than strictly legal provisions').

[64] European Ombudsman, Decision on complaint 933/2004/JMA (28 June 2005) para 1.4.

[65] Bartels (n 2) 1079; The European Parliament's role in relation to human rights (n 60) para 20; Decision on complaint 933/2004/JMA (n 64) para 1.3.

[66] Association Agreement EU-Ukraine (n 57) art 2; Euro-Mediterranean agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2000] *OJ* L 70/2, art 2; Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 [2000] *OJ* L 317/3, art 9(2).

[67] European Commission, Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives, 2015, 4 <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf> accessed 3 November 2017.

[68] Berne Declaration, Canadian Council for International Co-operation & Misereor (2010), Human Rights Impact Assessment for Trade and Investment Agreements, 6 <http://www2.ohchr.org/english/issues/food/docs/report_hria-seminar_2010.pdf> accessed 5 December 2017.

[69] Bartels (n 2) 1080.

[70] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006) 2515 UNTS 3 (CRPD), art 42.

[71] Marianne Schulze, *Understanding the UN Convention on the Rights of Persons with Disabilities: A Handbook on the Human Rights of Persons with Disabilities* (3rd edn, Handicap International 2010) 173.

rights recognized in the present Covenant by all appropriate means'.[72] Among the general obligations, the CRPD reiterates the same duty of international cooperation with regard to economic, social and cultural rights of persons with disabilities.[73] Furthermore, Article 32(1) provides more generally:

> States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities.[74]

It is clear that the provision expects a positive obligation from States parties, namely to support, through international cooperation, 'the realization of the purpose and objectives' of the CRPD. The same article enumerates some measures as examples implementing international cooperation, such as making development programmes inclusive of and accessible to persons with disabilities, facilitating and supporting capacity-building, facilitating cooperation in research and access to scientific and technical knowledge or '[p]roviding, as appropriate, technical and economic assistance'.[75] From the first concluding observations formulated by the control body, the Committee on the Rights of Persons with Disabilities (Committee RPD), it is clear that Article 32 is addressed not only to subsidised States benefiting from development aids[76] but also to donor countries offering various international cooperation programmes to other countries. The Committee RPD held that the obligation has a clear extraterritorial effect in the sense that the States parties shall formulate their programmes of international cooperation, such as development aid, in a certain manner so that the rights of persons with disabilities in third countries could be promoted.[77]

As a Party to the CRPD, the EU reiterated several times its commitment to 'promote the rights of people with disabilities in their external action, including EU enlargement, neighbourhood and development programmes'.[78] Indeed, the Committee RPD welcomes as positive aspects the trend 'to include the rights of persons with disabilities in the financing of its external actions' and 'the inclusion of disability in priority areas of the European Union communication on the post-2015 Sustainable Development Goals'.[79] However, the Committee noted with concern 'the lack of a systematic and institutionalized approach to mainstream the rights of persons with disabilities' in the EU international cooperation policies, 'the lack of coordination and coherence among European Union institutions', 'the lack of disability focal points' and the fact that EU 'international development funding is used to create or renovate institutional settings for the placement of persons with disabilities, segregated special education schools and sheltered workshops, contrary to the principles and provisions of the Convention'.[80] This confirms that the treaty monitoring body, arguably the international body enabled to provide the most authoritative interpretation of the CRPD, is of the view that Article 32 requires the EU to protect and promote the rights of persons with disabilities in third countries through its policies and programmes. As the Committee's recommendations clarified, the EU development programmes, in particular, are appropriate policies to implement the duty of international cooperation. It recommended the EU among others to 'adopt a harmonized policy on disability-inclusive development and establish a systematic approach to mainstream the rights of persons with disabilities' in all of its international cooperation

[72] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966) 993 UNTS 3 (ICESCR), art 2(1).

[73] CRPD (n 70) art 4(2).

[74] ibid, art 32(1).

[75] ibid.

[76] In this sense: Schulze (n 71) 174.

[77] Eg Committee RPD 'Concluding observations: New Zealand' (31 October 2014) UN Doc. CRPD/C/NZL/CO/1, paras 71–2; Committee RPD 'Concluding observations: Germany' (13 May 2015) UN Doc. CRPD/C/DEU/CO/1, paras 59–60.

[78] European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe, Brussels, 15.11.2010, COM(2010) 636 final, 9; Committee RPD 'Initial report of the EU' (3 December 2014) UN Doc. CRPD/C/EU/1, paras 208, 213; 'Replies of the European Union to the list of issues' (8 July 2015) UN Doc. CRPD/C/EU/Q/1/Add.1, para 14.

[79] CRPD 'Concluding observations: European Union' (2 October 2015) UN Doc. CRPD/C/EU/CO/1, para 4.

[80] ibid, para 74.

policies and programmes and to 'identify and put in place mechanisms to disaggregate data on disability in order to monitor the rights of persons with disabilities in European Union development programmes'.[81] It also recommended that the EU 'interrupt any international development funding that is being used to perpetuate the segregation of persons with disabilities, and re-allocate such funding towards projects and initiatives that aim at compliance with the Convention'.[82]

Beyond the CRPD, the EU has committed itself to respect and accede to the ECHR,[83] although the technical implementation of the accession to the convention has been and will be problematic. In its opinion 2/13 of 2014, the CJEU held that the agreement on the accession of the EU to the ECHR is not compatible with Article 6(2) TEU or with Protocol (No 8).[84] The opinion has been much criticised by commentators as an attempt of the Court of Justice to safeguard the distinctiveness of the EU's autonomy while risking undermining the agenda to adhere to the ECHR.[85] The Court of Justice based its conclusion mainly on the assumption that the proposed accession agreement 'is liable adversely to affect the specific characteristics and the autonomy of EU law' in a number of its provisions. Among other issues, the Court held problematic that the envisaged agreement failed to respect the specific characteristics of judicial review in the area of CFSP: while certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the CJEU, under the accession agreement the ECtHR would be empowered to rule on the compatibility with the ECHR of those acts escaping the jurisdiction of the CJEU.[86] If accession happens, the ECHR would undoubtedly bind the EU in relation to its external policies and domestic policies that have an extraterritorial effect.[87]

Less problematic is the recent signature by the EU of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) on 13 June 2017,[88] the text of which expressly enables the EU to sign the convention.[89] Similar to the CRPD, the Istanbul Convention provides direction on international cooperation and imposes obligations on the States parties in an entire chapter concerning international cooperation, consisting of four articles (on general principles, measures relating to persons at risk, information and data protection). From the point of view of trade and investment policies, it is remarkable that its Article 62(4) provides:

> Parties shall endeavour to integrate, where appropriate, the prevention and the fight against violence against women and domestic violence in assistance programmes for development provided for the benefit of third States, including by entering into bilateral and multilateral agreements with third States with a view to facilitating the protection of victims in accordance with Article 18, paragraph 5.[90]

The aim of the integration of 'the prevention and the fight against violence against women and domestic violence in assistance programmes for development' is under Article 18(5) of the Istanbul Convention the provision of consular and other protection and support to nationals and other victims of

[81] ibid, para 75.

[82] ibid, para 75.

[83] TEU, art 6(2)–(3).

[84] Opinion 2/13 (Full Court) [2014] ECLI:EU:C:2014:2454.

[85] Adam Lazowski and Ramses A Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR Special Section – Opinion 2/13: The E.U. and the European Convention on Human Rights' (2015) 16 German Law Journal 179; Jed Odermatt, 'The EU's Accession to the European Convention on Human Rights: An International Law Perspective' (2014) 47 New York University Journal of International Law and Politics 59; Louise Halleskov Storgaard, 'EU Law Autonomy versus European Fundamental Rights Protection – On Opinion 2/13 on EU Accession to the ECHR' (2015) 15 Human Rights Law Review 485.

[86] ibid, paras 251–7.

[87] The ECtHR prohibits transferring a person to a country where he or she will face a risk of a violation of arts 3 (torture, inhuman and degrading treatment) and 2 (right to life) of the ECHR. See eg *Soering v United Kingdom* (1989) 11 EHRR 439; recently the list of foreseeable violations was extended to art 6 ECHR (right to a fair trial). See *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1. The ECtHR also added to the list the risk of violation of ECHR, art 13 (right to effective remedies), see *M.S.S. v Belgium and Greece* (2011) 53 EHRR 2, paras 286 etc, especially para 293.

[88] Council of Europe, The European Union signs the Istanbul Convention, <http://www.coe.int/en/web/genderequality/-/european-union-signs-the-istanbul-convention> accessed 19 June 2017.

[89] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (adopted 11 May 2011) CETS No. 210 [Istanbul Convention], art 75(1).

[90] ibid, art 62(4).

violence. This means that in their development assistance programmes benefiting third States, States parties shall 'take account of and duly incorporate issues relating mainly to the prevention of these forms of crimes [of violence against women and domestic violence], including with a view to facilitating the protection of victims'.[91] The EU committed itself to give the Istanbul Convention 'a more effective role in international fora', 'through internal and external EU policies'.[92] As in relation to the CRPD, it is submitted that once the EU ratifies the Istanbul Convention, it is bound to promote the prevention and the fight against violence against women and domestic violence in third countries through its internal policies and external action, including EU enlargement as well as neighbourhood and development programmes.

In sum, the CRPD obliges the EU to shape in a certain way the extraterritorial effects of its international cooperation policies and programmes, especially its development policy, EU enlargement or neighbourhood policies, so that they support, through international cooperation, 'the realization of the purpose and objectives' of the CRPD in third States. Beyond this, the aforementioned customary international law norms and the human rights clauses in trade agreements also oblige the EU to respect human rights in its domestic policies that have extraterritorial effects on persons in third States, but it is less clear whether they also require positive measures to protect and promote the human rights of those individuals, as in the case of the CRPD.

2.2.4. Due diligence standard with respect to trade and investment policies

'Due diligence' or 'vigilance' is a substantial law obligation that requires that the State take all reasonable efforts within its power to prevent and repress the commission of internationally wrongful acts law by others, that is non-state private actors or other States.[93] Considered by the ICJ as a customary norm[94] or general principle of law,[95] due diligence is understood in the doctrine as a 'standard',[96] that is a norm that prescribes the limits of legal conduct while allowing 'a certain margin of attainment within the bounds of reason', as opposed to a 'rule', defined as 'capable of strictly logical application'.[97] Under the due diligence standard in international human rights law, States are obliged to protect human rights against violations by third parties such as corporations. As the Inter-American Court of Human Rights recognised in the often-cited *Velásquez Rodríguez v. Honduras* case:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[98]

Other universal and regional human rights bodies followed this standard when they confirmed that States have due diligence obligations to protect individuals from the infringement of their human rights by corporations.[99] In trade and investment policies, human rights monitoring bodies and the CJEU have guided three main developments with respect to: (2.2.4.a) the application of the due diligence standard to

[91] Explanatory Report to the Istanbul Convention [2011], para 332.

[92] Proposal for a Council decision on the signing, on behalf of the EU, of the Istanbul Convention [2016], COM (2016) 111 final, 2016/0063 (NLE), 7.

[93] Timo Koivurova, 'Due Diligence', MPEPIL (2010) para 2.

[94] Pulp Mills on the River Uruguay (Argentina v Uruguay) [2010] ICJ Rep 55–6, para 101.

[95] *Corfu Channel case* (n 42) 22; Koivurova (n 93) para 2.

[96] *Corfu Channel case* (n 42) 22; Koivurova (n 93) para 2.1. The ILC usually applies this term, see ILC 'International responsibility. Second report by F. v Garcia Amador' (15 February 1957) UN Doc A/CN.4/106, 122, para 3; ILC 'The law of the non-navigational uses of international watercourses' (15 February 1957) UN Doc A/49/10, 103, para 5.

[97] This is the terminology used in: Roscoe Pound, 'Standards in International Law' (1921) 34 Harvard Law Review 776, 776.

[98] *Case of Velásquez Rodríguez v Honduras* (Merits) IACtHR Series C No. 4 (29 July 1988) para 172.

[99] *Bevacqua and S. v Bulgaria* App no 71127/01 (ECtHR, 12 June 2008) para 53; *Opuz v Turkey* (2010) 50 EHRR 28, paras 83–4; in the same sense, without referring to the *Velásquez* case: *Case of Gonzales Lluy et al. v Ecuador* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 298 (1 September 2015) para 90; *Guerra and Others v Italy* (1998) 26 EHRR 357, para 58; *Osman v The United Kingdom* (2000) 29 EHRR 245, para 115; *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe* African Commission on Human and Peoples' Rights Communication 295/04 (18 April–2 May 2012) para 133 (ACommHPR); *The Social and Economic*

the external action of States, (2.2.4.b) the extension of those obligations to IOs in general and (2.2.4.c) to the EU, in particular.

2.2.4.a. The application of the due diligence standard to the external action of States

Increasingly, UN treaty monitoring bodies interpret treaties in a way that requires States parties to exert due diligence in their trade and investment policies. The Committee on Economic, Social and Cultural Rights (CESCR) is a pioneer in interpreting the States parties' extraterritorial obligations, on the basis of the territorially unlimited scope of the Covenant and its Article 2(1) on international cooperation. The CESCR interpreted the Covenant as requiring States parties to 'ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments', and that the States parties 'should take steps to ensure that these instruments do not adversely impact upon the right to health'.[100] In its General Comments relating to the right to water,[101] the right to social security,[102] the right to just and favourable conditions of work,[103] as well as in its examination of States' periodic reports, the CESCR has reiterated these positive obligations with regard to extraterritorial effects of the States parties' policies. In this light, the creation of substantial and foreseeable effects outside the State's territory establishes the jurisdiction of the State party.

Especially with regard to investment policy, treaty monitoring bodies recommend that States parties exercise due diligence over corporate nationals abroad by all means at their disposal whenever they know or should have known about the risk of a human rights violation. The Human Rights Committee recommended to certain States parties that all business enterprises domiciled in their territory and/or their jurisdiction respect human rights standards in accordance with the Covenant throughout their operations and that they establish investigation and legal redress mechanisms regarding the harmful activities of such business enterprises operating abroad.[104]

In its general comments, the CESCR often reiterated that States parties shall protect some economic, social and cultural rights by preventing their own citizens and national entities from violating those rights in other countries, even by expressly requiring the home State to establish its extraterritorial jurisdiction.[105] The CESCR generally requires the capacity to influence the conduct of the corporate national, recommending that '[w]here States parties can take steps to influence third parties (non-State actors) within their jurisdiction to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.'[106] In its recent General Comment on State obligations in the Context of Business Activities, it reiterated that 'States Parties are required to take the necessary steps to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction'.[107] Based on this requirement, the Maastricht Principles, a set of guidelines elaborated by human rights experts aiming to clarify the content of extraterritorial State obligations to realise economic, social and cultural rights, also recognised the home State's duty to regulate the extraterritorial operations of its corporate nationals.[108]

Other UN treaty bodies similarly recognised the home States' duty to respect, protect and fulfil

Rights Action Center and the Center for Economic and Social Rights/Nigeria, ACommHPR Communication No. 155/96 (October 2001) para 57.

[100] Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 14 (2000)' (11 August 2000) UN Doc. E/C.12/2000/4, para 39 (CESCR, General Comment No. 14).

[101] CESCR, 'General Comment No. 15 (2002)' (20 January 2003) UN Doc. E/C.12/2002/11, paras 31, 33.

[102] CESCR, 'General Comment No. 19' (4 February 2008) UN Doc. E/C.12/GC/19, para 54.

[103] CESCR, 'General comment No. 23 (2016)' (27 April 2016) UN Doc. E/C.12/GC/23, para 70.

[104] UN Human Rights Committee 'Concluding observations: Germany' (12 November 2012) UN Doc CCPR/C/DEU/CO/6, para 16; UN Human Rights Committee 'Concluding observations: Canada' (13 August 2015) UN Doc CCPR/C/CAN/CO/6, para 6.

[105] CESCR 'General Comment No. 19' (n 102) para 54.

[106] ibid; CESCR 'General Comment No. 14' (n 100) para 39; CESCR, 'General Comment No. 15 (2002)' (n 101) para 33; CESCR 'Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights' (20 May 2011) UN Doc. E/C.12/2011/1, para 5.

[107] CESCR 'General Comment No. 24' (23 June 2017) UN Doc. E/C.12/GC/24, para 26.

[108] Maastricht Principles (n 43) art 24.

human rights in the context of their corporate nationals' extraterritorial activities and operations.[109] The numerous recommendations suggest that States parties are required to prevent the violation of human rights in third countries through regular human rights impact assessments and the States' influence on third parties such as their trade partners or their corporate nationals. They are encouraged to appropriately regulate the investments and activities of their corporate nationals abroad[110] and to adapt their legislative framework (civil, criminal and administrative) to ensure the legal accountability of companies and their subsidiaries operating in or managed from the State party's territory in relation to abuses of human rights.[111] Beyond the mere negative duty to respect, risk assessment and prevention that due diligence requires imply positive obligations to protect.

2.2.4.b. The extension of the due diligence standard to international organisations

From the early 2000s, international human rights monitoring bodies, especially UN Charter-based mechanisms, have started to address recommendations to both States and IOs. While admitting that States are clearly the primary addressees of human rights obligations, human rights monitoring bodies began to consider 'the ways in which States acting collectively through international organizations, including those most closely related to globalization, also hold responsibilities to respect human rights in their fields of activity'.[112] With respect to business and human rights, IOs were called on to take concrete steps to implement and facilitate human rights due diligence by small and medium-sized enterprises,[113] to promote the implementation of the UN Guiding Principles on business and human rights[114] and to ensure that focus on economic growth does not ignore human rights.[115]

Treaty monitoring bodies, empowered to give authoritative interpretation of the respective human rights treaty while reviewing its enforcement, initially emphasised the obligation of States parties to ensure that their actions as members of IOs take due account of the human rights enshrined in the relevant treaty.[116] The Committee on the Rights of the Child expressly recommended, with regard to a Member State in the EU, that the State party engages 'its responsibility within the European Union to ensure that cotton originated from child labour (produced in Europe or elsewhere) does not enter into the European market, using its leverage to ensure that children's rights are respected within European trade agreements'.[117]

Beyond the compliance by the States parties with their treaty obligations as members in IOs, the CESCR recommended that IOs 'should cooperate more effectively, building on their respective expertise, on the implementation of the right to food at the national level' and that international financial institutions 'should pay greater attention to the protection of the right to food' in their conduct.[118] The Committee on the Rights of the Child recently went beyond the membership of the States parties and emphasised that '[i]nternational organizations should have standards and procedures to assess the risk of harm to

[109] Committee on the Rights of the Child (CRC) 'General comment No. 16 (2013)' (17 April 2013) UN Doc. CRC/C/GC/16, para 43 (CRC, General comment No. 16); CEDAW 'General recommendation No. 28' (16 December 2010) UN Doc CEDAW/C/GC/28, para 36 (CEDAW, 'General recommendation No. 28').

[110] CRC 'Concluding observations: Sweden' (23 January 2012) UN Doc CRC/C/OPSC/SWE/CO/1, para 21.

[111] CRC 'Concluding observations: Bosnia and Herzegovina' (29 November 2012) UN Doc CRC/C/BIH/CO/2-4, para 28(a).

[112] Analytical study of the High Commissioner for Human Rights on the fundamental principle of participation and its application in the context of globalisation (23 December 2004) UN Doc. E/CN.4/2005/41, paras 43, 52.

[113] Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (24 April 2017) UN Doc. A/HRC/35/32, para 77.

[114] 'Guiding Principles on business and human rights' (21 March 2011) UN Doc. A/HRC/17/31; 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (14 March 2013) UN Doc. A/HRC/23/32, para 74; 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (10 August 2012) UN Doc. A/67/285, para 78.

[115] 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on the Asia Forum on Business and Human Rights' (30 May 2016) UN Doc. A/HRC/32/45/Add.2, para 89.

[116] CESCR 'General Comment 12' (12 May 1999) UN Doc. E/C.12/1999/5, para 38 (CESCR, General Comment 12); CESCR 'General Comment No. 14 (2000)' (n 100) para 39; CRC 'General comment No. 16 (2013)' (n 109), paras 47–8; CEDAW 'General recommendation No. 30' (1 November 2013) UN Doc. CEDAW/C/GC/30, paras 9, 12(a).

[117] CRC 'Concluding observations: Italy' (31 October 2011) UN Doc. CRC/C/ITA/CO/3-4, para 21.

[118] CESCR 'General Comment 12' (n 116) paras 40–1.

children in conjunction with new projects and to take measures to mitigate risks of such harm'.[119] The wording 'should' instead of 'shall' implies that treaty bodies could only address those conclusions in a recommendatory sense, contributing to the progressive development of the treaty interpretation rather than creating new obligations.

It is noteworthy that States, in accordance with these recommendations, also accept that IOs have such obligations. Recently, the Human Rights Council adopted a resolution on the right to food that invited IOs

> to promote such policies and projects that have a positive impact on the right to food, to ensure that partners respect the right to food in the implementation of common projects, to support strategies of Member States aimed at the fulfilment of the right to food and to avoid any actions that could have a negative impact on the realization of the right to food.[120]

This clarifies that IOs, just like States, are expected to assess the risks of human rights violations by their trade and investment partners in and outside their Member States and take all reasonable efforts to avoid such foreseeable human rights violations. These positive obligations bind the EU[121] on the basis of its pre-existing internal and external sources of human rights duties.

2.2.4.c. The extension of the due diligence standard to the EU

Various EU instruments recognise that before concluding any trade or investment agreement, the risk of possible human rights violations should be assessed. The Council and the Commission committed themselves to 'insert human rights in Impact Assessment, as and when it is carried out for legislative and non-legislative proposals … and trade agreements that have significant economic, social and environmental impacts'.[122] As mentioned above (2.1), the General Court held in the *Polisario* case that before any export facilitation agreement is finalised, a human rights impact assessment must be carried out;[123] on appeal, the Advocate General seemed to accept this obligation, and in final judgment the Court of Justice did not specifically address this point.[124]

Some commentators welcomed the General Court's conclusion on prior human rights assessment in external trade policy.[125] Nevertheless, it was criticised by others on several grounds: (1) the General Court departed from established case law; (2) the autonomy of the Union's legal order would be compromised by making the legality of Union acts dependent on acts of third States;[126] (3) the unlimited formulation; and (4) the unconvincing legal basis of the EU's obligation. As this part explains, none of these criticisms convincingly weakens the extension of the due diligence standard to the EU.

As regards the first objection, the Court established the Council's alleged obligation to examine 'carefully and impartially all the relevant facts of the individual case' in the *Technische Universität München* and *Gowan* cases,[127] but not in an external relations context.[128] Those cases concerned individual/administrative decisions or administrative procedures entailing complex technical evaluations

[119] CRC 'General comment No. 16' (n 116) para 48.

[120] Human Rights Council 'Resolution No. 28/10' (2 April 2015) UN Doc. A/HRC/RES/28/10, para 38.

[121] In the same sense: Ganesh (n 2) 530.

[122] Council conclusions of 25 June 2012 on Human Rights and Democracy, the EU Strategic Framework on Human TFEU Rights and Democracy and an EU Action Plan on Human Rights and Democracy, 11855/12, Annex III, I.1, 11; Joint Communication from the Commission to the European Parliament and the Council of 28 April 2015 JOIN(2015) 16 final, 24.

[123] *Front Polisario v Council*, General Court judgment (n 5) para 228.

[124] *Polisario* case, judgment of the Court of Justice (n 6).

[125] Susan Power, 'EU Exploitation of Fisheries in Occupied Western Sahara: Examining the Case of the Front Polisario v Council of the European Union in Light of the Failure to Account for Belligerent Occupation' (2016) 19 Irish Journal of European Law 27, 37; Eyal Benvenisti, 'The E.U. Must Consider Threats to Fundamental Rights of Non-E.U. Nationals by Its Potential Trading Partners' (*GlobalTrust*, 13 December 2015) <http://globaltrust.tau.ac.il/the-e-u-must-consider-threats-to-fundamental-rights-of-non-eu-nationals-by-its-potential-trading-partners/> accessed 23 December 2017; Hummelbrunner and Prickartz (n 33) 32–3.

[126] De Elera (n 33) 282–5.

[127] C-269/90 *Technische Universität München* [1991] ECR 1991 I-05469, para 14; C-77/09 *Gowan comércio Internacional e Servios* [2010] 2010 I-13533, para 57.

[128] De Elera (n 33) 282–3.

by EU institutions. In the context of external relations, the *Odigitria* case laid down the applicable test. In the latter case, the Court held that in the field of the Community's external economic relations, 'review by the Community Court must be limited to examining whether the measure in question is vitiated by a manifest error or misuse of powers, or whether the authority in question has manifestly exceeded the limits of its discretion'.[129] Nonetheless, the two tests can be reconciled: it is possible to assess a high number of complex factors in the external relations domain to the extent that the EU has the knowledge of foreseeable human rights violations and the means to prevent them.

With respect to the second objection, the prior human rights assessment would not compromise the autonomy of the EU's legal order because it would focus only on foreseeable risks, that is, it would be an objective evaluation within the power of the EU.

The third objection is against the unlimited formulation of the EU's obligation. While the General Court implied that the foreseeable risk of any violation of fundamental rights should exclude the conclusion of an agreement by the EU, the Court of Justice did not rule on this question. Advocate-General Wathelet, however, suggested a more restricted view – namely, to limit the EU's obligation only to ensure compliance with *jus cogens* and *erga omnes* obligations rather than with the full range of fundamental rights.[130] This view reflects the customary international law duty to refrain from rendering aid or assistance in maintaining situations created by *jus cogens* violations, and the duty to cooperate internationally to bring to an end human rights violations of peremptory norms such as slavery, torture or trafficking of human beings in the case law of the ECtHR.[131]

The fourth criticism concerns the unconvincing legal basis of the judgment. While the General Court based the EU's obligation of risk assessment on Article 73 UN Charter, the UN Charter imposes obligations on States administering a non-self-governing territory and not on third States or IOs.[132] Yet, while the General Court's judgment failed to explain the source and the limits of the obligation of care/due diligence, customary international law and the human rights treaty obligations of the EU to protect the physical integrity of individuals should be the correct legal basis.[133]

To summarise this section, the EU has an obligation under its own 'constitutional law', customary international law and its human rights treaty obligations to assess and prevent foreseeable human rights violations in third countries as a consequence of its domestic policies. Therefore the EU has to integrate risk assessment in its trade and investment policies; furthermore, whenever it has knowledge of foreseeable human rights violations and the means to prevent them, it has to act proactively. The core of the due diligence standard is the EU's obligation to ensure compliance with *jus cogens* and *erga omnes* obligations, especially to protect the physical integrity of individuals in third States against the harmful effects of its trade and investment policies.

3. The enforcement of the duty to protect extraterritorially

The enforcement of EU law and the enforcement of the EU's international law obligations are regulated by different rules regarding enforcement and liability. While the institutions of the EU supervise the respect of the EU 'constitutional law', especially the CJEU (3.1), treaty monitoring bodies enforce the EU's international law obligations (3.2).

3.1. The enforcement of the EU's 'constitutional law' obligations

As some scholars argue, individuals affected by extraterritorial effects of EU policies in third countries cannot challenge the measures affecting their human rights and thus enforce the human rights obligations

[129] Case T-572/93 Odigitria AAE v Council of the European Union and Commission of the European Communities ECR 1995 II-02025, paras 36, 38.

[130] Opinion of AG Wathelet, *Polisario* case (n 17) paras 257–8, 276.

[131] See n 50.

[132] Simon and Rigaux (n 33) paras 29–30.

[133] In the same sense, Vivian Kube, 'The Polisario Case: Do EU Fundamental Rights Matter for EU Trade Policies?' (*EJIL: Talk!*, 2 March 2017) <https://www.ejiltalk.org/the-polisario-case-do-eu-fundamental-rights-matter-for-eu-trade-polices/> accessed 13 November 2017.

of the EU.[134] The reason is the narrow definition of the standing rules of individual applicants before the CJEU under Article 263(1) of the Treaty on the Functioning of the European Union (TFEU). In the *Commune de Champagne* case, Swiss producers of wine brought action against the Council and the Commission, requesting the CJEU to annul the Agreement between the Community and the Swiss Confederation on Trade in Agricultural Products. Under Article 263(1) TFEU, the CJEU can only review the legality of EU acts 'intended to produce legal effects vis-à-vis third parties'. Nonetheless, the Court of Justice held that the rule applies only to acts within the territory of the EU for two reasons. First, the Court points out 'that the principle of sovereign equality enshrined in Article 2(1) of the United Nations Charter means that it is, as a rule, a matter for each State to legislate in its own territory and, accordingly, that generally a State may unilaterally impose binding rules only in its own territory'.[135] Second, it held 'that an act of an institution adopted pursuant to the Treaty, as a unilateral act of the Community, cannot create rights and obligations outside the territory thus defined' and therefore 'the scope of the contested decision is limited to that territory and it has no legal effect in the territory of Switzerland'.[136] This results in the exclusion of individuals in third countries from having the standing to challenge an EU unilateral act before the CJEU on the basis of violations of their human rights extraterritorially.

The reasoning is contestable because the principle of sovereign equality does not *ipso jure* exclude States from exercising their jurisdiction in third States.[137] In fact, the EU does exercise in various policies its prescriptive jurisdiction over individuals outside the territory of the Member States.[138] The Advocate General[139] and Court of Justice[140] later recognised in other judgments that Member States may exercise their prescriptive jurisdiction with respect to situations in third countries.

However, the recent *Polisario* case does not change the *Commune de Champagne* case law.[141] Moreover, the *Polisario* case did not address the issue of standing of individuals, given the fact that the General Court only accepted the direct and individual concern of Front Polisario as the representative of the people of Western Sahara. Another criterion of the 'direct and individual concern' is that the contested act affect the given natural or legal persons 'by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed'.[142] The General Court held that this condition was fulfilled in the *Polisario* case because '[t]he Front Polisario is the only other participant in the UN-led negotiations between it and the Kingdom of Morocco with a view to determining the definitive international status of Western Sahara.'[143] On appeal, the standing of the Front Polisario was neither addressed in the merits nor contested by the judgment of the Court of Justice.[144]

Likewise, individuals cannot enforce human rights clauses of bilateral agreements: the CJEU held in the *Mugraby* case that (1) the suspension of the agreement on account of the human rights clause is discretionary; each party to the agreement is free to decide whether there may be an infringement of the clause; (2) the discretionary power left for the parties means that the human rights clause could be attributed direct effect; and (3) individual applicants cannot establish how they could acquire a right from

[134] Bartels (n 2) 1088; Ganesh (n 2) 487.

[135] Case T-212/02 *Commune de Champagne v Council and Commission* [2007] ECR 2007 II-02017, para 89.

[136] ibid, para 90.

[137] Bartels (n 2) 1088.

[138] See eg Regulation (EC) No. 810/2009 of the European Parliament and of the Council establishing a Community Code on Visas [2009] *OJ* L 243/1, art 39 (conduct of consular staff); Council Joint Action 2008/851/CFSP 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 [2008] *OJ* L 301/33, Article 11 (Status of EU-led forces). This jurisdiction of the EU over persons accused of piracy was approved in Case C-263/14 *European Parliament v Council* [2016] ECLI:EU:C:2016:435, paras 52–3; Moreno-Lax and Costello (n 2) 1670–6.

[139] Case C-507/13 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* [2014] ECLI:EU:C:2014:2394, Opinion of AG Jääskinen, para 32. The case was withdrawn by the applicant governments and not examined by the Court.

[140] Case C-525/14 *European Commission v Czech Republic* [2016] ECLI:EU:C:2016:714, para 54.

[141] In the same sense, Ganesh (n 2) 488.

[142] *Front Polisario v Council*, General Court judgment (n 5) para 112 and the references cited there.

[143] ibid, para 113 and the references cited there.

[144] *Polisario* case, judgment of the Court of Justice (n 6) paras 130–1.

those expectations.[145] It is no wonder that an author considered human rights clauses of bilateral trade agreements as 'soft political conditions'.[146]

Notwithstanding the non-enforceability of extraterritorial human rights obligations by the affected individuals in third States, some non-judicial mechanisms might incite EU institutions to change their conduct or bring an action before the CJEU. As is well known, EU institutions and EU Member States are privileged applicants before the CJEU in the sense that they can challenge an EU act or omission even in the absence of direct effect, without the need to prove the fulfilment of the criteria direct effect and individual concern.[147]

The first possible intervener in any allegation of human rights violations caused by the extraterritorial effects of EU policies is the European Ombudsman. Only citizens of the Union or any natural or legal person residing or having its registered office in a Member State can file complaints with the European Ombudsman concerning instances of maladministration, that is, the breach of the right to good administration under Article 41 EUCFR, in the activities of the Union institutions, bodies, offices or agencies.[148] Nevertheless, the right to good administration is not restricted to EU citizens, but '[e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.'[149] Moreover, nothing prevents the Ombudsman opening an inquiry on their own initiative[150] or requires that legal persons be founded in a Member State with the sole purpose to represent individuals outside the EU. The outcome of the mechanism, if an instance of maladministration is found, is the non-binding reference of the matter to the institution, body, office or agency concerned, which shall have a period of three months in which to inform the Ombudsman of its views.[151] Although EU bodies are not obliged to follow the recommendations of the European Ombudsman, they usually comply with the conclusions of any inquiry.

The European Ombudsman might enquire into human rights violations as a consequence of extraterritorial effects under the broader notion of 'maladministration'. The European Ombudsman found, in her decision of 26 February 2016 on the European Commission's failure to carry out a prior human rights impact assessment of the free trade agreement between the EU and Vietnam, that the Commission's failure to provide valid reasons to justify its refusal to carry out such an assessment constituted maladministration.[152] The Ombudsman derived the duty to carry out a human rights impact assessment before the conclusion of a trade agreement from Articles 21(1) and 21(2) TEU.[153] In the *Polisario* case, the Advocate General cited this decision of the European Ombudsman, suggesting that there is no reason not to require that EU institutions, 'before the conclusion of an international agreement, … examine the human rights situation in the other party to the agreement and the impact which the conclusion of the agreement at issue could have there in this regard'.[154] The European Ombudsman recently confirmed the obligation of prior human rights impact assessment in her inquiry about the EU-Turkey Agreement, where she considered this duty 'fundamental, since the implementation of the Agreement reasonably and necessarily has an impact (a) on the human rights of migrants (direct or indirect) and (b) on the ability of the EU and the Member States involved to fulfil their human rights obligations'.[155]

Correspondingly, in a case concerning a business contact concluded between the European External Action Service and a small company located in Tunisia, the Ombudsman derived from the right to good administration the obligation of the EU 'to monitor the behaviour of its contractors and, naturally, the obligation to verify if, and to insist that, the contractor fulfils its obligations towards subcontractors' in

[145] *Muhamad Mugraby v Council of the European Union* [2011] (n 61) paras 59, 61, 71.
[146] Maubernard (n 2) 307.
[147] Case C-377/98 *Kingdom of the Netherlands v European Parliament and Council* [2001] ECR 2001 I-07079, para 54.
[148] TFEU, arts 20(2)(d) and 228(1).
[149] EUCFR, art 41(1).
[150] TFEU, art 228(1).
[151] ibid.
[152] European Ombudsman, Decision in case 1409/2014/MHZ (26 February 2016).
[153] ibid, para 11.
[154] Opinion of AG Wathelet, *Polisario* case (n 17) para 262.
[155] European Ombudsman, Decision in the joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ (18 January 2017) para 26.

third States.[156] Beyond the fact that the Ombudsman recognised extraterritorial due diligence obligations in business relations, it is remarkable that she opened her inquiry upon the complaint of a Tunisian private company. This shows that individuals from third States affected by EU policies and measures might hope for some remedy by addressing their claim to the European Ombudsman.

Another possible intervener in the protection of human rights against extraterritorial effects of EU policies is the European Data Protection Supervisor (EDPS) who is charged with the protection of personal data by the EU institutions. The EDPS is the independent supervisory authority who 'shall be responsible for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to privacy, are respected by the Community institutions and bodies'.[157] Consequently, the EDPS's mandate is not restricted to EU citizens, but protects the 'personal data' of any natural person, that is, 'any information relating to an identified or identifiable natural person' ('data subject').[158] Within their mandate, the EDPS may 'refer the matter to the Community institution or body concerned and, if necessary, to the European Parliament, the Council and the Commission', 'refer the matter to the Court of Justice of the European Communities under the conditions provided for in the Treaty' and 'intervene in actions brought before the Court of Justice of the European Communities'.[159] The EDPS's opinions on the effects of EU policies on personal data might persuade EU institutions to bring the matter to the CJEU, as happened in the case of the draft agreement between Canada and the EU on the transfer and processing of passenger name record data. After the EDPS opined that the international agreement is likely to lower the level of protection of the fundamental right under Article 8 EUCFR,[160] the European Parliament decided to ask for the opinion of the CJEU before adopting the agreement.

In the proceedings of Opinion 1/15, the Court was required for the first time to rule on the compatibility of a draft international agreement with the fundamental rights enshrined in the EUCFR, namely with those relating to respect for private and family life affected by the draft agreement between Canada and the EU on the transfer and processing of passenger name record data.[161] While one can argue that through bringing the procedure before the Court of Justice, the European Parliament intended to protect the personal data of EU citizens and not individuals from third States, the draft agreement has a personal scope covering all passengers flying to or from a third country, Canada and the EU.[162] In his opinion, the Advocate General required compliance by various due diligence duties, such as requiring that the agreement establish effective remedies by Canada,[163] sufficient guarantees for individuals that 'their data will be afforded effective protection against the risks of abuse and also against any unlawful access to and any unlawful use of that data',[164] the control by an independent authority of the respect for the private life and protection of the personal data of passengers,[165] and so on. Several of his recommendations were backed by the EDPS.[166] In its opinion, the CJEU confirmed these concerns. It followed the due diligence logic in so far as it required that the transfer of personal data from the EU to a non-member country shall take place 'only if that country ensures a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union'.[167] As the Court did not find this requirement satisfied, it concluded that the agreement could not be concluded in its current form because several of its provisions are incompatible with the fundamental rights recognised by the EU.

[156] European Ombudsman, Decision closing the inquiry into complaint 2410/2012/MHZ (5 January 2014) para 14.

[157] Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2000] *OJ* L 8/1, art 41(2).

[158] ibid, art 2(a).

[159] ibid, art 47(1)(g)–(i).

[160] Opinion of the EDPS on the proposals for Council decisions on the conclusion and the signature of the agreement between Canada and the European Union on the transfer and processing of passenger name record data (30 September 2013) <https://edps.europa.eu/sites/edp/files/publication/13-09-30_canada_en.pdf> accessed 3 June 2017.

[161] Opinion 1/15 (n 8).

[162] ibid, Opinion of AG Mengozzi, delivered on 8 September 2016, paras 238, 242.

[163] ibid, para 327.

[164] ibid, para 208.

[165] ibid paras 316, 328(2).

[166] Request for an Opinion by the European Parliament, draft EU-Canada PNR agreement (Opinion 1/15), Pleading notes of the EDPS, <https://edps.europa.eu/sites/edp/files/publication/16-04-05_pleading_canada_pnr_en.pdf> accessed 3 June 2017.

[167] Opinion 1/15 (n 8) paras 214, 232(3)(e).

Finally, even if individuals from third States cannot directly challenge the EU's trade and investment policies before the CJEU, they might ask domestic courts in Member States to initiate preliminary reference procedures where the question of admissibility will not be an issue. Such a domestic court procedure initiated by the Western Sahara Campaign, an independent voluntary organisation, led to the preliminary reference procedure in which the Court of Justice concluded that the Fisheries Agreement is not applicable to Western Sahara and to its adjacent waters.[168] From the point of view of human rights, the preliminary ruling was important as it confirmed that including Western Sahara within the scope of the Association Agreement concluded with Morocco would be contrary to certain rules of general international law, especially the principle of self-determination.[169] One must add that, as of April 2018, there is another pending case before the CJEU on Western Sahara: an action for annulment of a Council decision to conclude a Fisheries Protocol with Morocco brought by *Front Polisario*.[170]

In sum, although individuals from third States do not have standing to challenge trade and investment policies and measures of the EU before the CJEU, non-judicial mechanisms – the European Ombudsman or the EDPS – might lead EU institutions to change their conduct or enhance their compliance with their human rights obligations toward individuals outside the EU or to bring applications before the Court.

3.2. The enforcement of the EU's international law obligations

The EU's treaty obligations are enforced, as in the case of States parties to human rights treaties, by the relevant treaty monitoring bodies. The Committee RPD bases its concluding observations on the report prepared by the EU,[171] while the Istanbul Convention's monitoring body, once the EU ratifies the Convention, will be able to monitor the implementation by the EU in a reporting procedure or in an urgent inquiry procedure.[172] While recommendations of those treaty monitoring bodies are non-binding, the international publicity and authority of their conclusions might ensure compliance by the EU. As a sign of its compliance with the CRPD, the EU took measures in conformity with three of the recommendations of the Committee RPD on which the latter requested information within a year,[173] and the EU shall provide information on the implementation of the other recommendations in its next periodic report. In relation to the recommendation by the Committee RPD on the EU's international cooperation policies, the Commission formulated some commitments to ensure that, in its external actions, EU development cooperation reaches persons with disabilities.[174] In the next reporting round, the Committee RPD will consider whether the measures taken fully comply with the positive obligations of the EU in its external action.

4. Conclusion

The EU is bound by human rights obligations toward individuals outside the territory of its Member States who are affected by its trade and investment policies. On the one hand, internal rules of the EU impose such human rights obligations, namely the Founding Treaties and the EUCFR, which all apply to the EU's internal and external policies. On the other hand, various external norms bind the EU, especially customary international law, human rights clauses of bilateral treaties concluded with third States and international human rights treaties to which the EU is or intends to be party. Based on both customary international law and treaty obligations, the due diligence standard, in particular, binds the EU in its trade and investment policies. UN treaty monitoring bodies increasingly interpret the States parties' treaty obligations in accordance with the due diligence standard, expecting extraterritorial obligations to protect. Like States parties to human rights conventions, the EU is expected to assess the risks of human rights

[168] *Western Sahara Campaign UK* (n 7).

[169] ibid, para 63, confirming *Polisario* case, judgment of the Court of Justice (n 6) para 92.

[170] Case T-180/14 *Front Polisario v Council*, Action brought on 14 March 2014.

[171] CRPD, art 36.

[172] Istanbul Convention, arts 68(10)–(13) (reporting procedure) and 68(14)–(15) (inquiry procedure).

[173] CRPD 'Concluding observations: European Union' (n 79) para 90; CRPD 'Information received from the European Union on follow-up to the concluding observations' (23 November 2017) UN Doc. CRPD/C/EU/CO/1/Add.1.

[174] European Commission 'Progress Report on the implementation of the European Disability Strategy (2010–2020)' (2 February 2017) SWD (2017) 29 final, 147.

violations by its trade and investment partners in and outside its Member States and take all reasonable efforts to avoid foreseeable human rights violations. At the very least, the EU has a positive law obligation to ensure compliance with *jus cogens* and *erga omnes* obligations, especially to protect the physical integrity of individuals in third States against the harmful effects of its trade and investment policies.

As for the enforcement of the duty to protect extraterritorially, a wide range of control bodies should consistently monitor the EU's compliance with its obligations. The CJEU and non-judicial control bodies within the EU, such as the European Ombudsman or the EDPS, should ensure the enforcement of the EU's 'constitutional law' obligations to protect extraterritorially. The more they explain the source and the scope of the obligation of due diligence, the more persuasive their impact will be on the conduct of EU institutions. While affected individuals in third States cannot enforce the EU's extraterritorial human rights obligations before the CJEU, they can initiate the mechanism of the European Ombudsman or the EDPS or ask domestic courts in Member States to initiate preliminary reference procedures before the CJEU. The EU's international law obligations should be, however, enforced in dialogue between the EU and the concerned treaty monitoring bodies.

Declarations and conflict of interests

The author declares no conflicts of interest connected to this publication.