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LA RICERCA DEL DIRITTO NELLA COMUNITÀ INTERNAZIONALE
Collana diretta da Maurizio Arcari, Enrico Milano e Attila Tanzi

LA RICERCA DEL DIRITTO NELLA COMUNITÀ INTERNAZIONALE
THE SEARCH FOR LAW IN THE INTERNATIONAL COMMUNITY

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**HUMAN RIGHTS AS A HORIZONTAL
ISSUE IN EU EXTERNAL POLICY**

**Les droits de l'homme comme domaine horizontal
de la politique extérieure de l'Union européenne**

edited by

MARCO BALBONI, CARMELO DANISI

EDITORIALE SCIENTIFICA
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Abbreviations

AA – Association Agreement
ARSIWA – Articles on Responsibility of States for Internationally Wrongful Acts
ASEAN – Association of Southeast Asian Nations
AU – African Union
BIT – Bilateral Investment Treaty
CAT – Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CCP – Common Commercial Policy
CDDH – Steering Committee for Human Rights
CEDH – Convention Européenne des Droits de l’Homme
CERD – Convention on the Elimination of All Forms of Racial Discrimination
CETA – Comprehensive Economic and Trade Agreement
CFR – Charter of Fundamental Rights of the European Union
CFSP – Common Foreign and Security Policy
CJEU – Court of Justice of the European Union
CJUE – Cour de justice de l’Union européenne
CoE – Council of Europe
COHOM – Council of the EU Working Party on Human Rights
Cour EDH – Cour Européenne des Droits de l’Homme
Cour IDH – Cour Interaméricaine des Droits de l’Homme
CRPD – Convention on the Rights of Persons with Disabilities
CRS – Corporate Social Responsibility
CSDP – Common Security and Defence Policy
DARIO – Draft Articles on the Responsibility of International Organizations
DASE – Delegation for Relations with the Countries of Southeast Asia and ASEAN
DCFTA – Deep and Comprehensive Free Trade Area
DAA – Draft Accession Agreement
DG – Directorate General
DROI – European Parliament’s Subcommittee on Human Rights
DUDH – Déclaration Universelle des Droits de l’Homme

EaP – Eastern Partnership
EBA – Everything But Arms
EC – European Community
ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR – European Court of Human Rights
EEAS – European External Action Service
EEC – European Economic Community
EIDHR – European Instrument for Democracy and Human Rights
ENP – European Neighborhood Policy
EOM – Election Observation and Assistance Missions
EP – European Parliament
EPAs – Economic Partnership Agreements
EPP – European Peoples’ Party
ESS – European Security Strategy
EU – European Union
EUGS – European Union Global Strategy
EUSR – European Union Special Representative for Human Rights
FLEGT – Forest Law Enforcement, Governance and Trade
FPA – Fisheries Partnership Agreement
FREMP – Working Party on Fundamental Rights, Citizens’ Rights and Free Movement of Persons
FTA – Free Trade Agreement
GHRSR – Global Human Rights Sanctions Regime
GATT – General Agreement on Tariffs and Trade
GSP – Generalised System of Preferences
GSP+ – Special Incentive Arrangement for Sustainable Development and Good Governance
HRC – Human Rights Committee
HRD – Human Rights Defender
HRIAs – Human Rights Impact Assessments
HRVP – High Representative of the Union for Foreign Affairs and Security Policy and Vice President of the European Commission
ICC – International Criminal Court
ICCPR – International Covenant on Civil and Political Rights
ICESCR – International Covenant on Economic, Social and Cultural Rights
ICJ – International Court of Justice
IHL – International Humanitarian Law
IIDH – Institut International des Droits de l’Homme
ILC – International Law Commission
ILO – International Labour Organization

IOs – International Organisations
LDCs – Least Developed Countries
LGBTI – Lesbian, Gay, Bisexual, Transgender, Intersex
MEP – Member of the European Parliament
MES – Mécanisme Européen de Stabilité
MINURSO – Mission for the Referendum in Western Sahara
NGOs – Non-governmental Organizations
OECD – Organisation for Economic Co-operation and Development
OHCHR – Office of the United Nations High Commissioner for Human Rights
OJ – Official Journal of the European Union
ONU – Organisation des Nations Unies
OSCE – Organization for Security and Cooperation in Europe
PIDCP – Pacte international relatif aux droits civils et politiques
PNR – Passenger Name Record
SADR – Sahrawi Arab Democratic Republic
SIA – Sustainability Impact Assessment
TEU – Treaty on the European Union
TFEU – Treaty on the Functioning of the European Union
TFUE – Traité sur le fonctionnement de l'Union européenne
TSD – Trade and Sustainable Development
TTIP – Transatlantic Trade and Investment Partnership
TUE – Traité sur l'Union européenne
UE – Union Européenne
UN – United Nations
UNGA – United Nations General Assembly
UNHCR – United Nations High Commissioner for Refugees
UPR – Universal Periodic Review
US – United States of America
VCLT – Vienna Convention on the Law of Treaties
WILPF – Women's International League for Peace and Freedom
WHO – World Health Organisation
WTO – World Trade Organisation

Foreword

The European Union (EU) plays a key role in today's international community. Yet, in terms of specific areas, aims and tools, EU external policy is still characterized to a significant degree by fragmentation. Considering that human rights can be viewed as an aim that every specific external action should ultimately serve, human rights could play an increasing role in granting coherence to this broad policy as well as to the nexus between internal and external actions. The need to investigate how human rights horizontally inform EU external policy is therefore stronger than ever.

Thanks to the involvement of academics, practitioners and EU representatives, this collection investigates how the EU aims to be an autonomous human rights actor in the international arena. This research task was initially undertaken at a dedicated Winter School at the School of Political Sciences of the University of Bologna – Campus of Forlì, in cooperation with the Fondation René Cassin – Institut International des Droits de l'Homme and the Higher School of Economics of Moscow, in 2017. During the event, a range of experts explored the relationship between human rights and EU external policy, addressing the legal, institutional and policy developments that have occurred in this field since the entry into force of the Lisbon Treaty. Their work touched on a variety of questions related to: the obligations binding the EU in carrying out its external competences; the definition of the human rights in question; the growing role of some EU institutions, including the European Parliament and the Court of Justice of the EU (CJEU); the role that the Charter plays or may increasingly play going forward; the implications of the EU's accession to the European Convention on Human Rights; and how the horizontal duty to respect human rights has been addressed in key policy areas, such as trade or migration, or in specific relations with third countries.

Without aiming to provide a comprehensive analysis of all aspects of such a broad area, this collection attempts to articulate answers to the questions that emerged in that initial context. All authors adopt their own perspective to analyse and assess the role of the EU as a global human rights actor as well as the new challenges ahead. The collection opens with an introductory chapter by Marco Balboni and Carmelo Danisi offering a horizontal insight

into the scope and content of the human rights-related duties as apply to EU external policy. Three different, but interconnected, sections follow: human rights in the EU's external policy agenda; human rights as a limit to be respected within the framework of EU external policy; and human rights as a value to be promoted through the different areas and tools that make up this broad policy.

Starting with an institutional perspective, in the first Section Natalie Tocci offers a rationale for the evolving role of the EU as a global human rights actor. She advances and explains the notion of "principled pragmatism" that seems to inform the Union's actions worldwide when human rights are at stake (Chapter II). The former Member of European Parliament Barbara Lochbihler then introduces the role of the European Parliament in ensuring that human rights are embedded in EU external policy through an analysis that combines political considerations with an "insider's reading" of the EU Treaties (Chapter III).

The second Section looks at the current fragmented framework to explore existing and potential tools for granting a stronger coherence to, and enforcement of, the EU's human rights obligations worldwide. Chiara Cellerrino opens the Section with an investigation of the CJEU's role in the field of the Common Foreign and Security Policy (CFSP), especially in terms of the case law on restrictive measures against natural or legal persons adopted for implementing United Nations (UN) sanctions. The author argues that the system of judicial protection afforded by the EU Treaties after Lisbon has allowed the CJEU to strengthen respect for the rule of law and human rights in the CFSP domain. However, considering that the CJEU remains prudent in fulfilling this new role, she calls for a fairer balance between international actorness and human rights justiciability within EU external action (Chapter IV). In an attempt to verify the role that the Charter of Fundamental Rights of the EU (CFR) plays in EU external policy, Romain Tinière argues that the Union has been reluctant to use the Charter as a guide for its external actions, preferring instead to resort to international human rights standards in carrying out its external competences. However, he posits that the protection of fundamental rights is increasingly at the heart of EU external policy, which allows the CFR to play a new role in this area (Chapter V). Section II ends with Monica Parodi's analysis of the potential implications of the EU's accession to the ECHR for its external policy. After examining the negotiations on accession, including the arguments advanced by the CJEU in its well-known opinions, the author looks at the CFSP as one of the most sensitive areas of the new round of negotiations. She questions whether the protection of human rights in the CFSP will actually become more effective through a formal accession to the ECHR. In fact, she argues that the same

result could be achieved by maintaining the existing framework, in light of the developments that are already taking place in the broader relationship between human rights and EU external relations (Chapter VI).

The third Section directs our attention to specific policies and cases that have contributed significantly to the shaping of the EU's external human rights policy. First, Marise Cremona analyses how EU trade policy has embedded human rights and questions the practical effects of its commitment in relation to its rhetorical significance (Chapter VII). Second, Sylvie Sarolea investigates EU migration policy and the different tools available to the EU in this field in order to clarify the role that human rights play in this area (Chapter VIII). Third, Carmelo Danisi scrutinises how the Union is guided by the principles provided for in Articles 3.5 and 21 TEU in its approach towards Western Sahara. The analysis sheds light on the interplay between EU law and international law and, more specifically, self-determination as a peremptory rule of international law in connection with EU external policy. The author argues that, if genuinely interpreted, self-determination should shape the EU's international treaties and related internal procedures in a different way, with significant effects on the protection of human rights when the EU intervenes, directly or indirectly, in non-self-governing territories (Chapter IX). The Section closes with a contribution from Samantha Velluti. In bringing to the fore the new generation of Association Agreements with Eastern European countries and their human rights clauses, the author offers to the reader her perspective on the fragmentation of the EU's human rights external framework (Chapter X).

Our sincere gratitude goes to all authors for their willingness to cooperate in finalising this collection and to all institutional actors involved in the Winter School project, including Punto Europa in Forlì. Overall, we hope that this attempt to examine the (existence and content of a) horizontal duty to promote, respect, protect and fulfil human rights worldwide will give the reader a sense of the essential role that the EU could play as a human rights global actor. Although such a role is currently under pressure by the challenges posed by COVID-19, the EU's contribution is needed more than ever, for instance through the adoption of a specific global strategy to address the current pandemic while protecting human rights worldwide. It may be true that, as it appears from this collection's contributions, the Union needs time to integrate horizontally human rights across its external policy. Speeding up this process is not an easy task. Yet, as this collection shows, the EU brings together two unique conditions in order to fulfil this role. First, it can count on a variety of tools and incentives that both States and other international and regional organisations lack. Second, it seems to be driven by a genuine belief that pursuing these goals in the international arena is not (only) a legal

obligation but it is primarily its 'own' global responsibility and in its interests. If the Union is to make the most of these specific qualities, its external human rights policy could also contribute to providing consistency and coherence to the process of European integration even in the difficult times generated by the COVID-19 outbreak.

CHAPTER I

HUMAN RIGHTS AND EU EXTERNAL POLICY: IN SEARCH OF UNITY

MARCO BALBONI, CARMELO DANISI*

‘Our interests and values go hand in hand.
We have an interest in promoting our values in the world. At the same time,
our fundamental values are embedded in our interests.’

EU Global Strategy, 2016

CONTENT: 1. The challenge ahead: unity v. fragmentation. – 2. The legal and institutional framework: between interests and constraints. – 3. Giving meaning to human rights: an EU catalogue, international law principles or a “mixed” bag? – 4. The internal/external nexus as a priority of EU external policy: what role for human rights? – 5. Beyond limits and values: towards an obligation to protect and fulfil? – 6. Concluding remarks.

1. *The challenge ahead: unity v. fragmentation*

Today’s world provides a unique context for researching and assessing the role of international and regional organisations in a variety of areas. When the organisation at stake is the European Union (EU, or the Union) and the area of investigation is human rights, the research takes on an additional degree of complexity but also becomes even more fascinating. One of the thorniest aspects of this challenge lies in the fragmentation of what we comprehensively refer to as “EU external policy”¹

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¹ This term has been deliberately chosen to capture as far as possible all fields of the EU’s action involving an external dimension. As stated elsewhere, ‘[w]hile, traditionally, foreign policy has always comprised those policies of security, defence and diplomacy which a State pursued in relation to the outside world [...] today’s comprehensive

in relation to specific areas, aims and tools², as well as in the imperfect nexus between internal and external actions.³

Human rights have the potential to play an increasing role in granting coherence to this broad policy. These rights can be viewed as ‘one of the questions of general interest’⁴ of the Common Foreign and Security Policy (CFSP) as well as an aim that every specific external policy of the EU ultimately needs to serve.⁵ A recognition of this role requires an investigation into how human rights horizontally inform external policy and, as far as possible, relies on overcoming the sectorial approach in the research on EU External Action (EUEA) through the adoption of a holistic and, to a certain extent, multidisciplinary perspective. Moreover, the tenth anniversary of the entering into force of the post-Lisbon legal

understanding of this policy domain comprises not only these fields of ‘high politics’ [...] but also other areas like economic policy, development policy, international trade [...] as well as a growing number of the external aspects of some domestic policy fields i.e. environment policy, home affairs, data protection, just to name a few’: see P. BAITAY, *Shaping and Controlling Foreign Policy Parliamentary Diplomacy and Oversight, and the Role of the European Parliament*, Bruxelles, 2015, 8.

² The European External Action Service (EASS) identifies 21 policy areas: CFSP; Conflict Prevention, Peace Building and Mediation; Counter-Terrorism; Crisis Response; Culture; Development and Cooperation; Drugs; Education; Energy Diplomacy; Environment and Climate Change; EU Enlargement; EU International Cyberspace Policy; Health; Human Rights and Democracy; Humanitarian Aid and Civil Protection; Migration Partnership; Nuclear Safety; Responsible Sourcing of Minerals; Science Diplomacy; Trade; Water Diplomacy.

³ For two of the many background studies on the EU’s external relations, see P. ECKHOUT, *EU External Relations Law*, Oxford, 2011, and J. CZUCZAI, F. NAERT (edited by), *The EU as a Global Actor. Bridging Legal Theory and Practice – Liber Amicorum in honour of Ricardo Gosalbo Bono*, Leiden, 2017.

⁴ In relation to the CFSP, which is subject to specific rules and procedures, see Art. 24.2 TEU where the Union is called to ‘conduct, define and implement’ a CFSP ‘within the framework of the principles and objectives of its external action’ and based on ‘the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States’ actions’.

⁵ See European Parliament (EP), *Resolution on Human Rights and Social and Environmental Standards in International Trade Agreements*, 25 November 2010, 2009/2219(INI), 19. Consequently, in this study we assume that human rights are not only a matter falling in the CFSP but, at least, inform all policies involving external relations. Interestingly, as noticed elsewhere, ‘the formal constitutional framework established by the Treaties [...] clearly identify human rights protection as a prominent and cross-cutting dimension of the external activities of the EU, thus contrasting with the officially circumscribed role allocated to human rights matters within internal EU activities and policies’: see G. DE BURCA, *The Road Not Taken: The EU as a Global Human Rights Actor*, in *American Journal of International Law*, 2011, 649 ff.

framework provides the momentum for exploring the developments in this area through a human rights lens, especially if these rights are contextualised in the broader role that the EU plays (and may increasingly play⁶) in preventing and addressing international crises.⁷

For the above reasons, this collection is not limited to an analysis of the EU legal framework after Lisbon. Thanks to the involvement of academics, practitioners and EU representatives, it aims to explore how the EU perceives itself as an autonomous global human rights actor and how the general duty to respect human rights has been framed within EU external policy.

Such an investigation raises a number of questions. These include: what are the human rights that bind the EU as a global actor? How are human rights included in the EU's external agenda? Is there a long-term approach in this respect? Does the Charter of Fundamental Rights of the EU (CFR or the Charter) apply in the context of external policy in the same way as it applies internally? Are all rights included in the CFR equally relevant? Has the High Representative of the Union for Foreign and Security Policy – Vice-President of the European Commission (HRVP) embedded human rights as a core aspect of his/her action? What is the role for the European Parliament (EP) in promoting human rights through EU external policy? Has the Court of Justice of the EU (CJEU) strengthened its role in assessing the compliance of EU external policy with the EU's human rights obligations and how? What are the implications for this policy when the EU accedes to the ECHR? How have human rights been promoted in relations with third countries in the post-Lisbon era? Has the internal/external nexus between parallel policies been strengthened by the duty to respect human rights horizontally? And, finally, can this duty to respect be read as a duty to protect and fulfil?⁸

Without representing a comprehensive analysis of all aspects of such a broad area, the chapters included in this collection try to provide an-

⁶ Among other studies, see A. HAMONIC, *Les relations entre l'Union européenne et l'ONU dans le domaine de la gestion des crises*, Bruxelles, 2018.

⁷ See A. DAVI, *Comunità europea e sanzioni economiche internazionali*, Napoli, 1993. In this respect, the new first horizontal global human rights sanctions regime can be an essential tool: see for details, chapter IV, *infra*.

⁸ For the difference between the duty to respect and the obligation to protect and fulfil in the context of international human rights law, see section 5, *infra*.

swers to these and other questions. By way of introduction, the following paragraphs offer various horizontal insights into emerging issues in EU external policy in relation to human rights. We also offer some very initial considerations on the impact of the COVID-19 pandemic⁹ on the relevant aspects of EU external policy discussed here.¹⁰ After a brief analysis of the legal and institutional developments in the area of external policy concerning human rights (section 2), this chapter scrutinises the understanding of these rights within the framework of this policy (section 3) and whether the EU's external and internal policies are joined up through human rights (section 4). Lastly, the existence of an obligation to protect and, even, to fulfil human rights worldwide, at least to the maximum possible extent allowed by the EU Treaties, is investigated (section 5). Some concluding remarks follow in section 6.

2. *The legal and institutional framework: between interests and constraints*

As a common ground for our study, it is necessary to re-assess briefly the relation between human rights and EU external policy from a general point of view.

This relation finds its first answer in the EU Treaties. By the entry into force of the Treaty of Lisbon, Articles 3.5 and 21 of the Treaty on the European Union (TEU) made clear that the values on which the EU is founded, including the universality and the indivisibility of human rights as well as the respect for human dignity and equality¹¹, must also inform

⁹ WHO, *Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)*, 30 January 2020.

¹⁰ For an initial review of the EU's response to COVID-19, see European Commission, *The EU's Response to COVID-19*, 24 February 2020, at https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_307. For a comment on these initial actions, F. CASOLARI, *Prime considerazioni sull'azione dell'Unione ai tempi del Coronavirus*, in *Eurojus*, 1, 2020, 95.

¹¹ Art. 2 TEU reads as follows: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

the Union's external action.¹² As a result, without really introducing something new, the TEU reinforced the awareness of the need to integrate, in a horizontal way, human rights into all external policies.¹³ This is even more the case in light of the requirement to ensure consistency between the different areas of EU external action and *its other policies* (Article 21.3 TEU), for which no doubts exist about the need to comply with the EU's *own* human rights catalogue (see Article 6 TEU).

In light of these enhanced tasks and obligations, it is worth verifying briefly how the EU and, more specifically, some of its institutions have carried out their role in this field.

An examination of the policy documents setting external objectives in the last years can be a starting point in this respect. These policy papers elucidate on how the EU sees itself, and how it should act, as a global actor. Suffice to recall the EU Global Strategy¹⁴, which was presented by the then HRVP in 2016, and (or – even better – to read in combination

¹² Art. 3.5 TEU reads as follows: 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.' According to Art. 21 TEU, '1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. [...] 2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law; (c) preserve peace, prevent conflicts and strengthen international security [...] 3. 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. The Union shall ensure consistency between the different areas of its external action and between these and its other policies. [...].'

¹³ For an initial commentary on Art. 21 TEU, H.-J. BLANKE, MANGIAMELI (edited by), *The Treaty on European Union (TEU). A Commentary*, Berlin-Heidelberg, 2013, 833-874.

¹⁴ *Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy (EU Global Strategy)*, 2016, at https://europa.eu/globalstrategy/sites/globalstrategy/files/pages/files/eugs_review_web_13.pdf.

with) the 2015 Action Plan on Human Rights and Democracy.¹⁵ As the Commission and the HRVP stated in their proposal for the 2020 Action Plan, thanks to these and other initiatives the EU has advanced its 'global leadership on human rights and democracy' and has progressively become 'more coordinated, active, visible and effective in its engagement in and with third countries and more prominently engaged at multilateral level'.¹⁶

Despite its evident concern about defence and security, the Global Strategy was a call for mainstreaming human rights in all dimensions of the EU external policy. These rights are identified among the EU's shared interests and principles to be pursued horizontally.¹⁷ It is not a coincidence that human rights-related issues were included in most of the Strategy's five priorities. In particular, their protection was pursued as a specific aim of the 'State and societal resilience to [EU] East and South' and 'Global governance' priorities. As for the former, the Strategy outlined concrete actions to be implemented in the EU's surrounding area: pursuing tailor-made policies to support inclusive and accountable governance and locally owned rights-based approaches to the reform of the justice, security and defence sectors; using trade agreements for human rights protection and dialogue and support for their promotion, including in the most difficult cases. According to the Global governance priority, the EU was also committed to cooperate with international and regional organisations, as well as States and non-State actors, to promote an international order based on human rights and to support related mechanisms/bodies, such as the UN Human Rights Council.¹⁸ This pri-

¹⁵ Joint communication from the Commission and the HRVP, *Action Plan on Human Rights and Democracy (2015-2019) – Keeping Human Rights at the Heart of the EU Agenda*, JOIN(2015) 16 final. As affirmed at para. 5, the 'responsibility for carrying out the actions listed [in the Action Plan] resides with the High Representative/Vice President assisted by the European External Action Service (EEAS), and with the Commission, the Council and Member States, within their respective fields of competence as defined by the Treaty on European Union.'

¹⁶ Joint communication from the Commission and the HRVP, *EU Action Plan on Human Rights and Democracy 2020-2024*, JOIN(2020) 5 final.

¹⁷ *EU Global Strategy*, *supra*, 7-8.

¹⁸ One of the latest reports on the Global Strategy emphasised this priority, especially in terms of actions to support multilateralism, including by setting up 'the innovative AU-EU-UN partnership' focused on peace and security, investment for youth, climate action and human rights: see *The European Union's Global Strategy Report 2019*, 13 June 2019, at https://eeas.europa.eu/sites/eeas/files/eu_global_strategy_2019.pdf, 15.

ority may today be even pursued by strengthening the cooperation with the World Health Organisation (WHO), other than the UN, in the context of the global response to the COVID-19 emergency.¹⁹ If this is not a new commitment, eventually the Strategy accrued a proactive role in protecting human rights worldwide.

While pursuing a more consistent respect for these rights, the Strategy advanced a realistic and tailored approach to the EU as a human rights global actor that is based on 'priorities and practical steps' towards the realisation of idealistic goals. Following a sort of *principled pragmatism*²⁰, the EU seems increasingly open to establish provisional rules or frameworks to support the implementation of human rights standards worldwide but is also ready to revise them, especially when the monitoring process and the consultation mechanisms, also involving civil society, require it.²¹ Consequently, this method represents a call for *building together* 'common' standards in light of local needs rather than simply imposing *a priori* human rights understandings. However, it is not entirely clear to what extent the implementation of this method collides with the adoption of a consistent EU's own approach in 'seeking to advance' human rights standards worldwide (Article 21.1 TEU) while ensuring the

¹⁹ The need for cooperation, in terms of coordination, with WHO is also stressed in the EU's framework on serious cross-border threats to health: see for instance EP and Council, *Decision (EU) 1082/2013*, OJ, 5 November 2013, L 293/01. More generally, in relation to the EU framework and the EU's ability to react in case of disasters, which may include health emergencies like COVID-19, see M. GESTRI, *La risposta alle catastrofi nell'Unione europea*, in *Disastri, protezione civile e diritto: nuove prospettive nell'Unione europea e in ambito penale*, edited by M. GESTRI, Milano, 2016, 3. On the interplay between the EU and the UN in the global response to previous health emergencies, see F. CASOLARI, *Il contributo delle organizzazioni internazionali e regionali alla gestione delle crisi sanitarie: il caso dell'epidemia di Ebola*, in *Nazioni Unite e Organizzazioni regionali tra autonomia e subordinazione*, edited by E. CIMIOTTA, N. NAPOLETANO, Bologna, 2019, 218; Id., *La dimensione esterna dell'azione dell'Unione europea nella risposta a disastri naturali ed antropici: quale coerenza?*, in *Disastri, protezione civile e diritto*, *supra*, 63.

²⁰ See the analysis carried out on this principle by N. Tocci, *infra*. This approach would be in line with a more general attitude emerging on the EU's own vision in the international arena: A. SKORDAS, *The European Union as Post-National Realist Power*, in *Research Handbook on the EU's Common Foreign and Security Policy*, edited by S. BLOCKMANS and P. KOUTRAKOS, Cheltenham, 2018, 394-444. The positions manifested by the new HRVP Borrell seem to support a growing interest to pragmatic solutions for the years ahead: for instance, see www.project-syndicate.org/commentary/embracing-europe-s-power-by-josep-borrell-2020-02.

²¹ On this kind of approach, G. DE BÚRCA, *Global Experimentalist Governance and Human Rights*, in *ESIL Reflections*, 8, 2017.

promotion of EU values (Article 3.5 TEU). In fact, as the following analysis seems to show, when such a tailored approach implies the passage from general principles to specific human rights standards, the Union might even risk adhering to a level of protection that is set below the internationally accepted minimum human rights standards.

From an institutional perspective, the checks and balances over the external sphere are a case in point. The institutional framework set up for the external policy seems to support the rise of the Union as a global human rights actor because it eventually enhances the EU's accountability. In this respect, despite their (still) limited role provided for by the EU Treaties in the external relations, the EP and the CJEU²² have made a significant use of their powers after Lisbon. As for the EP, it has proved to be an effective check to guarantee the Union's fundamental values in this area.²³ For instance, even irrespective of the results eventually reached at political level, the EP used its powers to require that international agreements concluded by the EU could meet the Union's human rights obligations.²⁴ From its part, the CJEU has increasingly evaluated

²² The CJEU has limited jurisdictional competence in the external domain. Thanks to the Lisbon Treaty, the CJEU has been given the jurisdiction to review 'the legality of decisions providing for restrictive measures against natural or legal persons': see Art. 275 TFEU. On the CJEU's jurisdiction over EU external relations-related acts, see M. CREMONA, A. THIES (edited by), *The European Court of Justice and External Relations Law*, Oxford, 2014. See also C. Cellerino, *infra*.

²³ For instance, P. BAJTAY, *supra*, 24-25: 'consultation and information rights have been extended in both legislative and non-legislative actions, legal procedures of consent and co-decision have been made the norm and budgetary provisions on CFSP have been reinforced. [...] Nevertheless, formal (hard) powers have not been extended to all fields of European external action and Parliament continues to have only limited control functions over the Council's competences in the field of CFSP.' See Title V of TEU, *supra*, and Declaration no. 14 concerning the Common Foreign and Security Policy, attached to the EU Treaties, in OJ, 7 June 2016, C-202/343.

²⁴ For example, EP, *Legislative Resolution on the Draft Council Decision on the Conclusion of a Protocol between the European Union and the Kingdom of Morocco Setting Out the Fishing Opportunities and Financial Compensation Provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco*, 14 December 2011, P7_TA(2011)0569. On the determination to avoid being a passive entity in carrying out the role provided for by Art. 218 TFEU, leading to actions aimed at influencing the negotiations of international agreements by providing *ex ante* controls, see R. PASSOS, *The European Union's External Relations a Year after Lisbon: A First Evaluation from the European Parliament*, in *The European Union's External Relations a Year after Lisbon*, edited by P. KOUTRAKOS, *Cleer Working Papers*, 3, 2011, 49-56 and L.S. ROSSI, *A New Inter-Institutional Balance: Supranational vs. Intergovernmental Method after the Lisbon Treaty*, in *The European Union after the Lisbon Treaty: Visions of*

international agreements against the EU's human rights obligations in the context of actions for annulment, of preliminary ruling proceedings or via the opinion procedure.²⁵ Yet, the room for discretion left to the Council, the Commission and the EU Member States has influenced the way the EU external policy and the cooperation with third countries have been eventually shaped. Two examples are illustrative in this respect. In the area of EU Association Agreements, the European Commission and the Council have negotiated new international arrangements with Morocco with limited consideration for the implications in terms of human rights enjoyment of the Sahrawi people.²⁶ This case is of particular relevance if analysed in light of the peremptory norms of international law applicable to Western Sahara, whose respect can be identified as the essential condition for ensuring that enjoyment.²⁷ In the field of migration,

Leading Policy-Makers, Academics and Journalists, Luxembourg, 2011, 90-107. See also B. Lochbihler, *infra*.

²⁵ See, for example, CJEU, 26 July 2017, *Opinion on the Draft Agreement between Canada and the European Union, on the Transfer of Passenger Name Record Data from the European Union to Canada*, Opinion 1/15; 30 April 2019, *Opinion on the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part*, Opinion 1/17; CJEU, 27 February 2018, *Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs*, C-266/16. As the last case shows, the use of the preliminary ruling procedure for checking the compliance of EU's external actions with the general obligations provided by Articles 3 and 21 TEU depends largely on each Member State's provisions in the matter of *locus standi* before the national judge. See also CJEU, 28 March 2017, *PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others*, C-72/15, in relation to the Court's jurisdiction to give preliminary rulings on the validity of a CFSP act.

²⁶ See the analysis carried out by C. Danisi, *infra*. These new agreements are based on the results of the impact assessments, which also included human rights, carried out by the European Commission. The difficulty to rely on clear data is explicitly mentioned in the relevant Commission's proposal (*Proposal for a Council Decision relating to the Signature, on behalf of the European Union, of the Agreement in the Form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the Amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part*, 11 June 2018, COM(2018)479 final), at 5-6: 'Given the particular circumstances in Western Sahara and the difficulty for the Union as a third party to conduct investigations on its territory, the Commission strove to obtain objective and reliable data [...] In certain cases, the information is nonetheless inconclusive and limited.' Nonetheless, the European Commission suggests that, to a certain extent, the (indirect) impact on human rights can be positive (*ibid.*, 6-7).

²⁷ More generally, on the EU's role in the Western Sahara case, M. BALBONI, G. LASCHI (edited by), *The European Union Approach towards Western Sahara*, Bruxelles,

informalisation shapes key developments. Negotiations with Turkey have thus materialized in a “non-EU agreement” depriving the Union’s human rights guarantees to spread out their effects.²⁸ To some extent, both cases show that the principles inspiring the above mentioned “principled pragmatism” remain unclear, as we will explore in this collection.

In addition to the central role played by the HRVP, who shares the responsibility for the implementation of the relevant EU Action Plans and of the local focal points in the EU Delegations abroad, new institutional mechanisms have been set up for enforcing EU’s obligations in the field of human rights.²⁹ Some are relatively deprived of substantive power in effectively determining the EU’s role in the human rights global scene. This is the case of the EU Special Representative for Human Rights, which is the first thematic representative of the Union with the task of enhancing the visibility of EU human rights policy.³⁰ Other additional and complementary mechanisms for fulfilling the EU’s commitments in our field of analysis may instead generate concrete effects. These include practices of accountability in the external decision-making aimed to ensure transparency and legality in light of the duty to good administration binding the EU.³¹ Tools like impact assessments, *ex ante* and *ex post* evaluations are increasingly in place, eventually limiting – at least to a certain extent – the relevant institutions’ discretion in the external sphere.³² The developments around the conclusion of the EU-Vietnam

2017. Interestingly, see the opposite ratio expressed by the same institutions in relation to the need to use restrictive measures, falling in the context of CFSP, to protect other primary rules of international law violated during the Ukraine-Russia conflict: CJEU, *Rosneft*, *supra*, 150.

²⁸ See General Court, 28 February 2017, *NF v. European Council*, T-192/16; *NG v. European Council*, T-193/16; *NM v. European Council*, T-257/16.

²⁹ Y. NAKANISHI, *Mechanisms to Protect Human Rights in the EU’s External Relations*, in *Contemporary Issues in Human Rights Law*, edited by Y. NAKANISHI, Singapore, 2018.

³⁰ The first EU Special Representative for Human Rights, Mr. Stavros Lambrinidis, was appointed on 25 July 2012, following the adoption on 25 June 2012 of the EU’s *Strategic Framework and Action Plan on Human Rights and Democracy*. See Art. 33 TEU.

³¹ See Art. 41 CFR. On this aspect, see M. CREMONA, P. LEINO (edited by), *The New Frontiers of EU Administrative Law: Is There an Accountability Gap in EU External Relations?*, in *European Papers, Special Section*, 2, 2017.

³² O. DE SCHUTTER, *The Implementation of the Charter of Fundamental Rights in the EU Institutional Framework*, Bruxelles, 2016, 60-62. The duty to carry out such evaluations is also continuously recalled in the EU Action Plans on Human Rights and Democracy: see, for instance, *Action Plan on Human Rights and Democracy (2015-2019)*, *supra*, 24 and 27. Interestingly, these assessments are increasingly not limited to human

Free Trade Agreement are illustrative in this respect. The European Ombudsman found that the failure of the European Commission to carry out a human rights impact assessment was an instance of maladministration.³³ This evolution may also be essential for filling the enforcement gap of the Union's human rights obligations in its external policy. Finally, other mechanisms, including international remedies, may follow in the near future. In fact, if we take into account the obligation binding the Union after Lisbon provided in Article 6 TEU, the EU should accede to the European Convention on Human Rights (ECHR). As a consequence, once jurisdiction is verified, potential victims would be able to submit a claim to the European Court of Human Rights (ECtHR) in case of alleged violations to be attributed to the EU.³⁴

3. *Giving meaning to human rights: an EU catalogue, international law principles or a "mixed" bag?*

If it is undisputed that, according to its founding Treaties, the EU is obliged to respect human rights through its external policy, what is the content of this obligation from a substantive point of view?

As a matter of fact, how specific human rights are identified remains a controversial issue. It is not a coincidence that, as most of the legal provisions and policy documents already mentioned show, the general

rights only but, instead, follow an "integrated approach" often measuring the economic, social, environmental and human rights impacts in a single document. This integrated approach is mentioned *inter alia* in the *Guidelines on the Analysis of Human Rights Impacts in Impact Assessment for Trade-Related Policy Initiatives*, 2015.

³³ European Ombudsman, 26 February 2016, *Decision on the European Commission's Failure to carry out a Prior Human Rights Impact Assessment of the EU-Vietnam Free Trade Agreement*, case 1409/2014/MHZ, para. 28.

³⁴ This obligation has not been put in question by the CJEU in the *Opinion on Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), Opinion 2/13, which addressed the compatibility of the related Draft Agreement with the EU law in view of ensuring the primacy and direct effect of the Union's law. Yet, the modalities and consequences of the accession to the ECHR are still unclear. For a study on the consequence of the accession in relation to the EU external policy, see A. SARVARIAN, *Consequences under the Law of International Responsibility of the Accession of the European Union to the European Convention on Human Rights for Common Foreign and Security Policy Operations pursuant to UN Security Council Resolutions*, in *The EU Accession to the ECHR*, edited by V. KOSTA, N. SKOUTARIS, V. TZEVELEKOS, London, 2014, ch. 8. See the analysis carried out by M. Parodi, *infra*.

“obligation to respect” often refers to the body of “human rights” as a whole. This state of affairs inevitably does not account for the variety of content that this notion entails. Perhaps this is due to the fact that such a question plays a role mostly in two different kinds of situation, which may nonetheless intersect. First, specific human rights tend to come to the fore in the event of their violation through EU actions falling within its external policy.³⁵ Second, specific human rights are central when there is a need to react against violations occurring abroad, which often amount to cases involving “absolute” rights.³⁶ Yet, when the obligation to promote human rights worldwide, or even to fulfil as we argue below, is under scrutiny, the need to identify “the” human rights catalogue at stake arises strongly.

In this respect, a restrictive internationally-oriented answer appeared to emerge from the recalled Council’s 2015 Action Plan on Democracy and Human Rights.³⁷ In addition to measures aimed at protecting human rights defenders and supporting civil society, the Action Plan substantially referred to ‘relevant international human rights’ obligations

³⁵ For an illustrative case in this respect, which has also allowed the CJEU to identify justified restrictions of such specific rights, see the *Kadi* saga: see CJEU, 18 July 2013, *Kadi II*, joined cases C-584/10 P, C-593/10 and C-595/10 P, and the previous case law. More recently, CJEU, *Rosneft*, *supra*, where the right to an effective remedy and to a fair trial, as well as the freedom to conduct a business and the right to property as enshrined in Articles 16 and 17 CFR, were specifically considered. Again, the CJEU stated that these specific rights can be legitimately restricted for objectives of public interest such as for ‘maintaining peace and international security, in accordance with the objectives of the Union’s external action stated in Article 21 TEU’: see paras. 143-151 of the referred judgment. In the same judgment, the Court refers also to Art. 7 ECHR and Art. 49 CFR to assess the compatibility of provisions at stake with the principle *nulla poena sine lege certa* (*ibid.*, 158-170).

³⁶ This does not mean that EU institutions, and especially the European Parliament, never react against violations of non-absolute rights, especially when high profile personalities/human rights defenders or specific minorities are involved. However, EU actions of this kind seem to be connected with the presence of broader international legal and political issues that justify the EU’s intervention. See the conclusion reached by a detailed examination of the EU response towards the protection of human rights in Ukraine, which calls into question the central role played by the EP: ‘the more entrenched the violation of Ukraine’s territorial integrity becomes, the wider the spectrum of human rights issues extends, in protection of which the EP is able to step to the fore and take action’, see A. RACZ, N. GHAZARYAN, S. GERASYMCHUK (edited by), *Human Rights in Ukraine and the EU Response, including Relevant Activities of the European Parliament*, Bruxelles, 2018, 33-35. On the new Agreements with Eastern European countries, see the analysis carried out by S. Velluti, *infra*.

³⁷ *Action Plan on Human Rights and Democracy (2015-2019)*, *supra*.

and standards.³⁸ In doing so, it identified the challenges to be specifically addressed through the EU's initiatives, which appeared to be defined in line with the minimum internationally accepted human rights standards. These included the following freedoms and rights: freedom of expression; right to privacy and data protection; freedom of religion and belief; prohibition of torture and ill-treatment; abolition of the death penalty; gender equality; children's rights; non-discrimination; rights of people with disabilities. Overall, the terminology was to some extent inconsistent. For example, in relation to basic freedoms and absolute rights, the Action Plan referred to the need to support their promotion and protection, while for discrimination issues or economic, social or cultural rights it emphasised raising awareness and promotion. Equally, when it discussed the rights of specific groups for which the EU has undertaken specific obligations, such as children or people with disabilities, it stressed the EU's supportive role in their protection.³⁹ Interestingly, while reference was made to universal human rights treaties (such as the CEDAW, the CAT, or the CRPD) and ILO Conventions, the CFR was never foregrounded, even when the Action Plan called for the need to mainstream human rights into all phases of the Common Security and Defence Policy (CSDP)'s planning, review and conduct.⁴⁰ While the 2020 Action Plan points out the need to deliver a 'new' geopolitical agenda on human rights and democracy, it does not offer any fundamental change on this specific point. In fact, the new Action Plan shifts the focus to the impact of the transition to the digital age, artificial intelligence, climate change and the weakening of a multilateral-based order and of rule of law on the enjoyment of human rights, but it consistently refers to (undefined) 'international standards' with no mention of the Charter.⁴¹

³⁸ *Ibid.*, 7, 8, 13.

³⁹ It is worth recalling that the EU ratified the UN Convention on the Rights of the Persons with Disabilities in 2009 (see Council Decision 2010/48/EC), being the first human rights convention to which the EU has become a party. In relation to children's rights, these are the only rights expressly identified in the Treaties also as a general aim of the Union's external relations (see Art. 3.5 TEU).

⁴⁰ *Action Plan on Human Rights and Democracy (2015-2019)*, *supra*, 20. Although the judicial enforcement might be a problematic issue, it seems uncontroversial that, as EU actions governed by the EU Treaties, the Charter applies to CSDP operations. See A. SARI, R.A. WESSEL, *Human Rights in EU Crisis Management Operations: A Duty to Respect and to Protect?*, in *CLEER Working Papers*, 6, 2012.

⁴¹ But see the Joint communication on the EU Action Plan on Human Rights and

By the same token, in its attempt to specify the human rights at issue, the above-mentioned Global Strategy referred expressly to the Universal Declaration of Human Rights (UDHR) as a common ground with no mention of relevant European (intra- or extra-EU) instruments. Although this may be obvious to some, it should be noted that the same Strategy stressed the so-called ‘internal-external nexus’, namely setting up synergies between foreign policy and the external aspects of the EU’s internal policies.⁴² The need to strengthen this internal-external nexus necessarily shifts the attention to “internal” human rights standards, implying somehow that these standards should be equally considered externally.⁴³ Significantly, the 2020 Action Plan focuses on such a need as well, thus leaving the door open to new developments in this field.

We may, however, wonder whether these internal standards, which have to be located primarily in the Charter, should be embedded horizontally in the EU’s entire external policy, as the CJEU’s General Court assumed in the *Polisario* case⁴⁴ and the CJEU echoed in its *Opinion 1/15*.⁴⁵ Such an argument seems to be supported by the TEU itself. Through Article 6 TEU, the Union recognises the rights, freedoms and principles set out in the CFR, which applies to its institutions, bodies, offices and agencies, including those acting in the context of external policy, in accordance with their respective powers (see Article 51 CFR). It is true that the Charter does not extend in any way the Union’s external or internal competences as defined in the EU Treaties. Equally, the CFR does not change the way in which it should be applied in terms of the policy of the Union or in terms of aims to be pursued, in relation to the duty both to respect and to promote human rights.

Democracy 2020-2024, *supra*, Annex, p. 8, where ‘European’ standards are nonetheless mentioned in relation to data protection and the right to privacy.

⁴² See the *EU Global Strategy Year 1 Report*, 2017, at <https://europa.eu/globalstrategy/en/vision-action>, and the *Union Global Year 2 Report*, 2018, at https://eeas.europa.eu/sites/eeas/files/eugs_annual_report_year_2.pdf. See also the 2017 Joint Communication of the HRVP to the EP and the Council, *A Strategic Approach to Resilience in the EU’s External Action*, JOIN(2017) 21 final, 6, which for example calls for ‘incentives for multinational enterprises to ensure respect for human rights, including labour rights.’

⁴³ As the case of migration shows, this internal-external nexus is not always ensured at the same way in all the fields covered by EU competences: see *infra*, section 4.

⁴⁴ General Court, 10 December 2015, *Front Polisario v. Council*, T-512/12, 227-228. Considering the different reasoning followed by the CJEU, the issue was not addressed in *Council v. Front Polisario*, 21 December 2016, C-104/16 P.

⁴⁵ CJEU, *Opinion 1/2015*, *supra*. On this point, see the analysis carried out by R. Tinière, *infra*.

conclusion may also find support in the Global Strategy itself, especially if we consider the idea of ‘principled pragmatism’⁴⁸ which, as explored above, entails a call for a “realistic assessment” of the specific context. This leads to a case-by-case approach with a limited role for the CFR.

If we look at the different ways through which the EU mainstreams human rights in its external policy, this lack of a coherent reference to a clear human rights catalogue emerges powerfully.

The first example can be found within the context of the efforts aimed at fostering a direct dialogue on human rights with third countries.⁴⁹ The Association Agreement concluded with Ukraine is a case in point. This agreement integrates ordinary formulas with innovative specifications.⁵⁰ As usual, the agreement is based on the respect for common values, including human rights and fundamental freedoms. These are also identified as one of the aims of the EU-Ukraine political dialogue. Given that human rights are considered essential elements of the Association Agreement, economic and political integration is set out as dependent on Ukraine’s progress in that field. The adoption of ‘appropriate measures’, including the agreement’s suspension, is also provided for in case of human rights violations. Despite the practical difficulties associated with implementing such provisions⁵¹, for our purposes it is significant that the body of human rights (and democratic principles) of reference has been

⁴⁸ EU Global Strategy, *supra*, 8 and 16.

⁴⁹ See European Commission, *Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries*, 23 May 1995, COM(95)216 final (approved by Council on 29 May 1995). Despite the European Commission being committed to include human rights as “essential elements” in all agreements with third countries since 1995, it seems that trade agreements that are not included in general cooperation frameworks do not always contain such a clause (see e.g. the 2018 trade agreement with Singapore, *infra*). For this detailed account of the clauses included (or not included) in agreements with third countries, see L. BARTELS, *The European Parliament’s Role in Relation to Human Rights in Trade and Investment Agreements*, Bruxelles, 2015. For their effectiveness, see *ex multis* F. MARTINES, *Human Rights Clauses in EU Agreements*, in *Protecting Human Rights in the European Union’s External Relations*, in *CLEER Working Papers*, 5, 2016, where (at 37) it is noticed that, until 2016, a specific human rights content was introduced only in Agreements concluded with other two Eastern European countries, i.e. Moldova and Georgia.

⁵⁰ *Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part*, entered into force on 1 September 2017, in *OJ*, 29 May 2014, L 161/3, see Preamble, Articles 2, 4 and 478.

⁵¹ See F. MARTINES, *Human Rights Clauses in EU Agreements*, *supra*.

As a matter of principle, it may follow that, even in the field of external policy, a complex human right catalogue comes into play. The Union is obliged (at least) to respect and promote the rights and freedoms as expressed in the CFR, in addition to those enshrined in the international human rights agreements to which the Union is a party, those accepted as being part of customary international law⁴⁶, as well as those that are recognised as forming part of the general principles of Union law.⁴⁷

Alternatively, one may wonder whether the Charter plays only a “limited” role as a constraint on the EU’s actions worldwide, i.e. as a mere parameter of legitimacy for the adoption of external policy-related acts. In fact, in the context of external relations the EU seems to refer to different standards, which are not always in line with the Charter, when it seeks to promote the respect for human rights in positive terms. This

⁴⁶ These rights may include those enshrined in the UDHR or at least, as some authors argue, some of them. On this debate on whether or not human rights, and especially the UDHR, are part of general international law, see T. MERON, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, 1989; O. SCHACHTER, *International Law in Theory and Practice*, Leiden, 1991, 335 ff.; B. SIMMA, P. ALSTON, *The Sources of Human Rights Law – Custom, Jus Cogens, and General Principles*, in *Australian Yearbook of International Law*, 1992, 82 ff.; H. CHARLESWORTH, *Universal Declaration of Human Rights*, in *Max Planck Encyclopaedia of Public International Law*, 2008, 14-18. See also B. CONFORTI, *The Specificity of Human Rights and International Law*, in *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma*, edited by U. FASTENRATH, R. GEIGER, D. KHAN, A. PAULUS, S. VON SCHORLEMER, C. VEDDER, Oxford, 2013, 433-442. The same issue arose also in the activity of the International Court of Justice (ICJ). For example, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 21 June 1971, 76, Judge Ammoun stated in its separate opinion: ‘the Declaration [...] can bind States on the basis of custom [...] because [its affirmations] constituted a codification of customary law [...] or because they have acquired the force of custom through a general practice accepted as law.’

⁴⁷ Not surprisingly, considering the nature of the CSDP missions, this framework (except for the general principles of EU law) is duly recalled with specific references to Charter’s rights and freedoms in the new *Upgraded Generic Standards of Behaviour for CSDP Missions and Operations*, 7 March 2018, doc. 6877/18. Perhaps less surprisingly, the obligation to respect the Charter is also referred to in the *Guidelines on the Analysis of Human Rights Impacts*, cit., at 2-6, where an interesting distinction is introduced between “fundamental rights”, which include the CFR, and “human rights”, as a term used in international law also covering UN core human rights treaties and preferred throughout the document. Yet, the guidelines state: ‘when considering the impact of a trade-related initiative on human rights, CFR compliance will not be sufficient. The assessment must also examine the impact of the measures proposed on human rights obligations under international law’, *ibid.*, 5.

duly specified. Interestingly, the agreement refers to ‘the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe, or the Charter of Paris for a New Europe of 1990, and other relevant human rights instruments’, which includes – *inter alia* – the Universal Declaration of Human Rights and the European Convention on Human Rights and Fundamental Freedoms.

While a common European heritage is evident in the case of Ukraine, as the inclusion of the ECHR shows, wider relationships with other third countries highlight a possible lack of a common understanding of human rights. If we consider one of the “new generation” of trade agreements, for example as concluded with Singapore⁵², it is true that it uses trade to underpin human rights protection in line with the Global Strategy’s explicit commitment.⁵³ Yet, we find references to very general standards, such as the ‘principles’ enshrined in the UDHR⁵⁴, as well as the identification of a few specific rights (freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation) which ‘the Parties commit to respecting, promoting and effectively implementing’.⁵⁵ Despite recalling a minimum international standard in the area of labour protection, the agreement does not appear to set out these rights as fundamental aspects for its implementation. In fact, as Article 12.2 of this FTA seems to imply, these human rights are identified mainly as guiding principles, or as references point for compliance, for pursuing the common aim of ‘striv[ing] towards providing high levels’ of labour protection – instead of as essential clauses. Unless these standards are read in the context of the EU-Singapore Partnership and

⁵² *Free Trade Agreement between the European Union and the Republic of Singapore (FTA EU-Singapore)*, Preamble, available at <http://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement>. The agreement was signed on 19 October 2018. On negotiations of this FTA, L. MCKENZIE, K.L. MEISSNER, *Human Rights Conditionality in European Union Trade Negotiations: The Case of the EU-Singapore FTA*, in *Journal of Common Market Studies*, 4, 2017, 832 ff. On trade agreements, see the analysis carried out by M. Cremona, *infra*.

⁵³ *EU Global Strategy*, *supra*, 26.

⁵⁴ See *FTA EU-Singapore*, *supra*, Preamble.

⁵⁵ *Ibid.*, Art. 12.3.

Cooperation Agreement⁵⁶ and its essential clause⁵⁷, the general references in the FTA risk being deprived of any substantive effect.⁵⁸

A second concurring example is provided by the guidelines designed as operational tools to be used in dealings with non-EU countries.⁵⁹ Despite the non-binding nature of these guidelines, since they are a means of the EU's human rights diplomacy, their content is nonetheless a case in point. In general, the guidelines contain limited references to EU Treaties, including the Charter, while they seem to be consistent in recalling human rights law instruments, including the UDHR. This lack of references may be due to the need to refer to a wider and/or specialised human rights catalogue for identifying the prevailing (to be read also as "accepted") international standards in a specific field. For instance, the Guideline on Torture⁶⁰ and the Guideline on Children⁶¹ are based,

⁵⁶ Council, *Decision on the Conclusion, on behalf of the European Union, of the Partnership and Cooperation Agreement (PCA) between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part*, 7 January 2019, doc. ST 15375 2018 INIT.

⁵⁷ As the FTA's Preamble, *supra*, and the European Parliament seem to suggest. See EP, *Non-legislative Resolution on the Draft Council Decision on the Conclusion, on Behalf of the European Union, of the Partnership and Cooperation Agreement between the European Union and its Member States, of the one Part, and the Republic of Singapore, of the other Part*, 13 February 2019, doc. P8_TA(2019)0093. At para. 4, the EP recalls Art. 44 of the PCA, which is said to complement the FTA, allowing 'for the non-execution of the agreements in cases of systematic and serious violation of essential elements, including democratic principles, the rule of law and human rights.' Interestingly, in the same resolution, the EP stresses key human rights standards, such as the prohibition of the death penalty and the discrimination against LGBTI people, including the decriminalisation of consensual relationships between two men, and labour related basic freedoms, whose respect appears highly problematic in and by Singapore (see *ibid.*, points K and L and paras. 6-9).

⁵⁸ However, see CJEU, 16 May 2017, *Opinion on the Free Trade Agreement between the European Union and the Republic of Singapore*, Opinion 2/15, para. 161, where the Court seems to support the suspension of the trade provisions of a FTA even in case of breach of the commitments undertaken in the trade and sustainable development chapter, where the recalled general labour rights standards are included (see Art. 12.3).

⁵⁹ By the end of 2019, the Council endorsed ten Guidelines related to specific rights (e.g. freedom of religion or belief; prohibition of torture and ill-treatment), specific groups (e.g. children, women and girls, LGBTI people) or specific procedures (e.g. human rights dialogue with third countries). Guidelines are available at https://eeas.europa.eu/headquarters/headquarters-homepage/6987/eu-human-rights-guidelines_en.

⁶⁰ Council, *Guidelines to EU Policy towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 2001, doc. 7369/01.

⁶¹ Council, *EU Guidelines on the Promotion and Protection of the Rights of the Child*, 2017, which replace those adopted in 2007.

respectively, on the UN CAT and on the UN CRC as well as on other relevant regional standards. On the one hand, some see this pattern as a way to provide a normative basis for the guidelines as well as an attempt to strengthen their “international” legitimacy.⁶² On the other hand, in such specific fields the Charter, as a more comprehensive human rights catalogue, might not be able to play a central role. Yet, this assumption does not apply to every set of guideline, especially to those that have the potential to address a wider range of rights than they currently do. For example, the CFR could have driven the elaboration of the Guidelines on LGBTI People⁶³ in the declared effort to promote, abroad, equality as a fundamental value of the Union. Instead, despite recalling the EU’s relevant internal legal framework, these guidelines do not make use of the Charter or of the CJEU’s related case law. Therefore, not surprisingly, in order to ‘effectively promote and protect the human rights of LGBTI persons through EU external action’, the guidelines “restrict” the human rights catalogue to a few selected priority areas (decriminalisation; LGBTI-phobic violence; human rights defenders; equality and non-discrimination). As a result, in spite of a strong emphasis on the principle of non-discrimination, the indivisibility of human rights, and the refusal of allowing cultural, traditional or religious values to deny the universality of human rights, the guidelines limit the potential effect by focusing on “some” international standards in place of the EU’s evolutionary human rights catalogue.

To sum up, giving meaning to “the body of human rights” to which the EU is bound in its relations with the wider world may bring case-by-case answers, rather than a unique term of reference. It cannot be excluded that this kind of pragmatic approach is rooted in the recognition that third countries may support a different understanding of human rights⁶⁴

⁶² J. WOUTERS, M. HERMEZ, *EU Guidelines on Human Rights as A Foreign Policy Instrument: An Assessment*, in *Leuven Centre for Global Governance Studies Working Papers*, 170, 2016, 13.

⁶³ Council, *Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons*, 2013, doc. 11492/13. See C. DANISI, *Promoting Human Rights Through the EU External Action: An Empty “Vessel” for Sexual Minorities?*, in *European Foreign Affairs Review*, 3, 2017, 341-356.

⁶⁴ To mention again the relation with Singapore, the idea of human rights was at the heart of the negotiations of the FTA, especially for the influence that the agreed human rights standards could have on the future trade agreements with other ASEAN countries. For this reason, elsewhere it was suggested that the EU ‘retreat[ed] from strong position

or the arguable idea that non-EU countries, when characterised by different degrees of economic or social development, cannot be expected to engage with human rights standards framed at EU level. As a result, often a mixed and generic content emerges as the predominant feature of the Union's external policy as it depends on the aim pursued by the specific tool/area/partner at stake. Consequently, despite the role that the CFR has the potential to play, it seems to have a limited impact being mostly identified as a constraint for the EU institutions' actions instead of a horizontal guide.

One may still wonder what role, in light of this analysis, the EU can really play in the development of international human rights law, as required by the general objectives set out in Articles 3.5 and 21 TEU. In fact, only a consistent approach, possibly based on the Charter, would enable the Union to consolidate the international consensus on a universal understanding of human rights, even from a customary perspective.⁶⁵ At the same time, identifying specifically what the notion of human rights entails, including its core principles, may be of support for the people directly concerned by the EU's efforts worldwide. These individuals may indeed acknowledge *a priori* the standards at play in demanding or campaigning for their respect. A clearer framework could also support the realisation of an effective and coherent nexus between internal and external policies, which is in itself a priority of EU external policy, as the following paragraph explores.

on these values' for other strategic interests: L. MCKENZIE, K.L. MEISSNER, *supra*, 833. On the different conceptualisation of human rights, especially in relation to Russia and China, see M. BALBONI, C. DANISI, *Reframing Human Rights in Russia and China*, in *Rekindling the Strong State in Russia and China*, edited by S. BIANCHINI, A. FIORI, Leiden, 2020, 61-78.

⁶⁵ On the criticism raised in relation to a non-consistent approach on economic, cultural and social rights, see J. WOUTERS, K. MEUWISSEN, *The European Union at the UN Human Rights Council: Multilateral Human Rights Protection Coming of Age?*, in *European Journal of Human Rights*, 2014, 135.

4. *The internal/external nexus as a priority of EU external policy: what role for human rights?*

The launch of the Global Strategy stressed the importance of a ‘joined-up Union’, in terms of joining up ‘across external policies, between Member States and EU institutions, and between the internal and external dimensions of our policies’.⁶⁶ According to the same Strategy, this effort is particularly necessary for actions in core areas, such as migration and counter-terrorism, along with human rights and gender mainstreaming. In relation to migration, for example, this effort should lead to overcoming the fragmentation of external policies through a ‘human rights compliant policy’ that links the management of migratory flows with the fight against its structural causes.⁶⁷

This is not a novelty.⁶⁸ From the 1980s until the release of the European Agenda on Migration, EU institutions have stressed the need for cooperation with third countries of origin and transit to elaborate a better, and more comprehensive, answer to migratory issues.⁶⁹ Although the 1999 Tampere Programme linked this “internal” necessity with the need to address horizontally human rights issues in those countries and regions of the world, it soon became clear that control imperatives were particularly important for the EU’s external agenda. In fact, supported by the 2004 Hague Programme, a “more for more” approach emerged: the more third countries cooperate in the field of migration, the more they receive back.⁷⁰ Despite the 2009 Stockholm Programme suggested a more principled approach, human rights considerations have eventually played a limited role in this field. Certainly, cooperation has not been based on, or aimed at boosting, human rights’ achievements. More often than not human rights have been treated at best as a mere constraint of the relations with third countries in this field, whose aim remains the

⁶⁶ *EU Global Strategy*, *supra*, 11.

⁶⁷ *Ibid.*, 28, 49-50.

⁶⁸ Among others, M. MAES, M.-C. FOLETS, P. DE BRUYCKER (edited by), *The External Dimensions of EU Asylum and Immigration Policy*, Bruxelles, 2011.

⁶⁹ See, for example, EP, *Resolution on the Right to Asylum*, 12 March 1987, A2-227/86; European Commission, *European Agenda on Migration*, 13 May 2015, COM(2015)240 final and the related 2016 *EU’s Partnership Framework on Migration*, 7 June 2016, COM(2016)385 final.

⁷⁰ L. HESCHL, *Protecting the Rights of Refugees beyond European Borders*, Cambridge, 2018, 32-33.

creation of conditions for a more effective “cooperative” management of migration flows. This ratio also emerges in the 2016 Migration Partnership Framework⁷¹ as well as from the implementation of the Global Strategy. Not surprisingly, the main achievements in the field of migration, as recalled by the then HRVP Mogherini, were the enhanced cooperation with Libya and other African countries to combat smugglers and the high number of readmissions ensured.⁷² These include migrants sent back ‘home in a safe and dignified way’ or held in detention centres in third countries, whose qualification as safe is at least doubtful.

Having this in mind, migration provides a good case to verify whether a joined-up EU is effectively based on a human rights approach and to what extent. To this end, an investigation of the tools of external action that have been used to strengthen internal migration and asylum policies is very useful.⁷³ The range of readmission agreements and the approach towards cooperation with Turkey and Libya are illustrative in this respect.⁷⁴

Some of the latest EU-third countries negotiations in the field of readmission agreements have strengthened the relation between readmissions, investments and support for legal migration.⁷⁵ Dialogues with refugee-producing countries like Mali, Nigeria, Niger, Senegal, Ethiopia and Afghanistan were speed up, in light of the new internal consensus on external objectives, while others with China, Tunisia and Morocco

⁷¹ European Commission, *Communication on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration*, 7 June 2016, COM(2016)385 final, 6.

⁷² HRVP, *EU Global Strategy Year 1 Report*, *supra*, 26-29; Id., *EU Global Strategy Year 2 Report*, 2018, 14, available at https://eeas.europa.eu/sites/eeas/files/eugs_annual_report_year_2.pdf.

⁷³ See Articles 79 and 216 TFEU, as far as international agreements are concerned. See V. MORENO-LAX, *Accessing Asylum in EU*, Oxford, 2018.

⁷⁴ Together with financial and economic measures, these lines of action will be probably maintained as essential for years: see European Council, *Conclusions*, 19 October 2017, EUCO 14/17, 1-4; European Commission, *Progress Report on the Implementation of the European Agenda on Migration*, 14 March 2018, COM(2018)250 final. See, critically, M.G. GIUFFRÈ, *From Turkey to Libya: The EU Migration Partnership from Bad to Worse*, in *Eurojus*, 2017; C. FAVILLI, *La cooperazione UE-Turchia per contenere il flusso dei migranti e dei richiedenti asilo: un obiettivo riuscito?*, in *Diritti umani e diritto internazionale*, 2, 2016, 405.

⁷⁵ Under Art. 79.3 TFEU, the Union is competent to conclude agreements with third countries whose nationals do not, or no longer fulfil, the conditions for entry into or to stay in a Member State. See the analysis carried out by S. Sarolea, *infra*.

have followed.⁷⁶ Crucially, this wave of negotiations has sometimes led to the conclusion of agreements whose nature, from an international law perspective, remains controversial and which, from the point of view of EU law, does not follow the rules provided by EU Treaties, aimed at ensuring the EP's involvement and the related democratic control in terms of human rights compliance.

To mention an example, Afghanistan and the EU signed in 2016 the so-called Joint Way Forward (JWF). Although it reflected a joint commitment and 'identifies a series of actions to be taken', including the establishment of a rapid and effective framework for dignified returns of Afghan nationals, the JWF was not 'intended to create legal rights or obligations under international law'.⁷⁷ Nevertheless, the agreement seemed to provide for commitments that had the effect to create such legal rights and obligations for both Parties. For instance, the JFW stated that, in case no travel document are issued by the Afghan Government within a specific time limit, an EU travel document can be delivered in view of the readmission of the person concerned, even when the nationality of the person at stake is not entirely clear.⁷⁸ Interestingly, through the JWF both Parties confirmed the commitment to all their respective international human rights obligations. It referred specifically to the 1951 Refugee Convention and – perhaps surprisingly – the CFR, and included specific guarantees for vulnerable people, such as unaccompanied minors. In line with these commitments, the JWF also introduced a reintegration package for those who are returned, which seems to imply individualized assessments.⁷⁹ By contrast, the Joint Working Group on migration set up for facilitating the implementation of the Agreement does not cover any human rights impact. Although soon after the EU and its Member States

⁷⁶ See European Commission, *Progress Report on the Implementation of the European Agenda on Migration*, 6 March 2019, COM(2019) 126 final.

⁷⁷ *Joint Way Forward on Migration Issues between Afghanistan and the EU (JWF)*, 2 October 2016, 1, available at https://ec.europa.eu/sites/ecas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf.

⁷⁸ *Ibid.*, 5-6. The JWF entails this possibility when EU Member States have 'evidence of the nationality of the person to be returned' without defining the standards required for such evidence. Later, the same agreement provides that EU Member States 'will ensure that any person readmitted by Afghanistan who, it later emerges, is not of Afghan nationality, is taken back.'

⁷⁹ On the difficulty to comply with these provisions, see ECRE, *EU Migration Policy and Returns: Case Study on Afghanistan*, 2017, 2.

concluded with Afghanistan an Agreement on Partnership and Development, which provides for an essential clause on human rights⁸⁰, there is no evidence that the JWF may be suspended or repealed as a consequence of the violation of this clause.

The policy of the EU and its Member States to prevent migrants' arrival through the conclusion of new agreements with third countries is probably a more striking example of the attempt to avoid human rights constraints that bind the EU and its Member States either internally or externally.⁸¹ The cooperation with Turkey and Libya are two cases in point.

As for Turkey, the General Court rejected the application of three asylum seekers, who risked to be returned to Turkey from Greece on the basis that the so-called 'EU-Turkey Statement'⁸², concluded on the assumption that Turkey is a safe country⁸³, cannot be considered an act of the Union.⁸⁴ In this way, the persons concerned have been deprived of

⁸⁰ See Articles 2.3 and 54 of the *Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part*, which was signed by the Council on 13 February 2017, available at <http://data.consilium.europa.eu/doc/document/ST-12966-2016-INIT/en/pdf>. However, taking into account the general references to the UDHR and other relevant international human rights instruments, it is hard to understand when a 'material breach' of the Cooperation Agreement may arise in order to justify the adoption of appropriate measures as affirmed by Art. 54.

⁸¹ On these new agreements, among others, see G. CARELLA, *Il sonno della ragione genera politiche migratorie*, in *Sidiblog*, 11 September 2017; V. MORENO-LAX, *Assessing Asylum*, *supra*; F. DE VITTOR, *Responsabilità degli Stati e dell'Unione europea nella conclusione e nell'esecuzione di 'accordi' per il controllo extraterritoriale della migrazione*, in *Diritti umani e diritto internazionale*, 1, 2018, 24.

⁸² Agreement reached on 18 March 2016, available at www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/.

⁸³ Despite its human rights record, its limited adherence to the 1951 Refugee Convention and its return policy: among many others, see Parliamentary Assembly of the Council of Europe, *The Situation of Refugees and Migrants under the EU-Turkey Agreement of 18 March 2016*, 20 April 2016, Resolution 2109 (2016); Human Rights Watch, *Turkey: Border Guards Kill and Injure Asylum Seekers*, 10 May 2016; E. CANNIZZARO, *Disintegration Through Law?*, in *European Papers*, 2016, 3-6. As the ECtHR has stressed so far, even when a third country is qualified as a safe destination through similar agreements, individual assessments need to be nonetheless carried out and the burden of proof cannot lay only on the person concerned: see ECtHR, 11 December 2018, *M.A. and Others v. Lithuania*, 59793/17.

⁸⁴ General Court, *N.F., N.G., N.M.*, *supra*, on which E. CANNIZZARO, *Denialism as the Supreme Expression of Realism – A Quick Comment on NF v. European Council*", in *European Papers*, 2017, 251-257; C. DANISI, *Taking out the Union: The EU-Turkey Statement as an Agreement between States*, in *EJIL Talk!*, 20 April 2017.

the possibility to invoke EU fundamental rights guarantees in order to protect themselves against the commitments provided by the Statement.

As for Libya, it has received a great deal of attention from Member States and the EU despite evidence of human rights violations involving migrants in detention centres and the refusal to join international commitments aimed at protecting refugees.⁸⁵ First, the 2017 Memorandum of Understanding reached between Libya and Italy committed the latter, in 'full respect of international human rights treaties', to fund reception centres from where migrants will be returned to their countries (Articles 2 and 5). While this funding also includes amounts made available by the EU, Libya is called upon to conclude readmission agreements with third countries to speed up migrants' returns.⁸⁶ Second, Libya has been one of the first recipients of the EU's new priority action aimed to dismantle smuggling and trafficking networks through integrated operations with countries on migration routes.⁸⁷ The CSDP's EUNAVFOR MED operation Sophia, whose mandate included 'boarding, search, seizure and diversion of smugglers' vessels on the high seas under the conditions provided for by applicable international law', was therefore tasked with the training of the Libyan Coast Guard and Navy. Interestingly, given Libya's human rights records, this operation's founding decision required that all actions should comply with 'the principle of non-refoulement and international human rights law' (Preamble and Articles 2), and demanded that its implementation 'should be consistent with the EU's external action as a whole' (Article 8).⁸⁸

⁸⁵ UN, *Report of the Secretary-General on the United Nations Support Mission in Libya*, 1 December 2016, doc. S/2016/1011; Amnesty International, *Libya's Dark Web of Collusion*, 11 December 2017. Also the EEAS reported human rights abuses: see Council, *EUBAM Libya Initial Mapping Report*, 25 January 2017, doc. 5616/17. On Libya's international commitments, ECtHR, Grand Chamber, 23 February 2012, *Hirsi Jamaa and Others v. Italy*, 27765/09, paras. 33-44; 128.

⁸⁶ See *Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana*, signed in Rome, 2 February 2017. The Memorandum implements the 2008 Agreement between Italy and Libya (Law February 2009, no. 7, on "Ratifica ed esecuzione del Trattato di amicizia, partenariato e cooperazione tra la Repubblica italiana e la Grande Giamahiria araba libica popolare socialista, fatto a Bengasi il 30 agosto 2008").

⁸⁷ European Council, *Declaration on the External Aspects of Migration: Addressing the Central Mediterranean Route*, 3 February 2017.

⁸⁸ Council, 18 May 2015, *Decision (CFSP) 2015/778 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR MED)*, in OJ, 19 May

In short, these agreements aim to help and assist third countries in adopting measures that prevent refugees from reaching EU shores (so-called pullback operations) and in outsourcing the evaluation of asylum requests. This approach has the practical effect to make particularly difficult the rise of a jurisdictional link with the EU and/or with its Member States in the application of EU law, which as a matter of principle is a necessary condition to enjoy the fundamental rights guarantees provided by the EU.⁸⁹ Even human rights impact assessments seem to be absent in this domain, in contrast to other areas of EU external policy.

Elsewhere, it has been argued that, also in these cases, the EU's and/or Member States' responsibility for human rights violations may arise under different circumstances.⁹⁰ These analyses are often based on the argument that pullback operations carried out by third countries could not be possible without the EU or Member States' logistic and financial support.⁹¹

Yet, a definite answer in this respect is still questionable and may lead to different analysis, each one dependent on the specific international legal framework at play and on the particular actor involved, i.e. the EU or Member States.

As for the EU, it is difficult to raise a responsibility of the EU under

2015, L 122/31; 25 July 2017, *Decision (CFSP) 2017/1385 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA)*, in OJ, 26 July 2017, L 194/61. The Operation is based on Articles 42.4 and 43.2 TEU.

⁸⁹ T. SPIJKERBOER, *Bifurcation of Mobility, Bifurcation of Law. Externalization of Migration Policy before the EU Court of Justice*, in *Journal of Refugee Studies*, 2, 2018, 216.

⁹⁰ G. CARELLA, *supra.*; F. DE VITTOR, *supra.*, 24; A. SKORDAS, *A 'Blind Spot' in the Migration Debate? International Responsibility of the EU and its Member States for Cooperating with the Libyan Coastguard and Militias*, in *EU Immigration and Asylum Law and Policy*, 30 January 2018.

⁹¹ Among others, A. LIGUORI, *Migration Law and the Externalization of Borders Controls*, New York, 2019, 25 ff., where it is noticed that 'Italy has significantly contributed to the acts of torture in Libya: actually, it might even conclude that in some cases aid was *essential*' (emphasis added). However, the same author shows that, if we adhere to the thesis that "intent" is required in finding a case of complicity, 'there is no evidence that Italy wishes migrants in Libya to be tortured.' Also R. PALLADINO, *Nuovo quadro di partenariato dell'Unione europea per la migrazione e profili di responsabilità dell'Italia (e dell'Unione europea) in riferimento al caso libico*, in *Freedom, Security & Justice: European Legal Studies*, 2018, 104 ff.; G. PASCALE, *«Esternalizzazione» delle frontiere in chiave antimigratoria e responsabilità internazionale dell'Italia e dell'UE per complicità nelle gross violations dei diritti umani commesse in Libia*, in *Studi sull'integrazione europea*, 2018, 413 ff.

human rights law because, to this day, the EU has not acceded to any general human rights treaty. Even if we argue that the Charter would apply in the externalisation of migration control, the case of the 'EU-Turkey Statement' shows that, in many instances, it can be very hard for the alleged victim to claim that the EU is really involved.⁹² As a consequence, the framework through which a responsibility of the EU could be raised seems based on international law and, more specifically, on the law on international responsibility.⁹³ However, resorting to the rules on international responsibility does not provide easy or uncontroversial remedies. A possibility, which is often raised in literature⁹⁴, is to claim the international responsibility of the EU for aid or assistance in perpetrating human rights violations.⁹⁵ In such a case, some conditions should be satisfied for a claim to be successful. First, the EU shall have carried out the aid or assistance in knowledge that human rights violations could follow.⁹⁶ Second, it is required that the act in question would also be internationally wrongful if committed by the EU itself.⁹⁷ Even assuming – ideally – that these criteria could be satisfied in relation to the EU, it must be noticed that the cooperation of the EU with third countries often translates in

⁹² In fact, even when one may easily assume that an agreement like the Statement was negotiated and concluded by the EU, a claim directed against the EU might nonetheless fail because responsibility lays only on Member States: see the discussion on General Court, *N.F., N.G., N.M.*, *supra*.

⁹³ International Law Commission (ILC), *Draft Articles on Responsibility of International Organisations for Internationally Wrongful Acts*, in *Yearbook of the International Law Commission*, 2011, Vol. II (Part Two).

⁹⁴ Among others, G. CARELLA or F. DE VITTOR, *supra*.

⁹⁵ ILC, *Draft Articles on Responsibility of International Organisations for Internationally Wrongful Acts*, *supra*, Art. 14.

⁹⁶ The existence of a public available knowledge either on the general treatment of migrants or on the lack of a legal framework providing effective protection within the legal order of the third countries concerned cannot be easily denied. For example, in relation to Libya, see UN Support Mission in Libya and Office of the High Commissioner for Human Rights, *Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya*, 18 December 2018.

⁹⁷ This condition requires that the international obligation being violated binds both the subject that aids or assists and the subject that perpetrates the violation. Given that the EU has not ratified general human rights treaties, this element could be nonetheless satisfied if the obligation is part of customary international law, which binds States as well as the EU. As reiterated by scholars mentioned in this chapter, there is a wide consensus that – at least – the prohibition of torture is part of customary international law, thus satisfying the condition here pointed out in case of perpetration of torture on migrants in States that the EU aids or assists. See among others, G. CARELLA or F. DE VITTOR, *supra*.

general economic, material and/or technical support. As a result, it can be particularly hard to show that human rights violations are a direct outcome of EU external migration policy.⁹⁸

As for Member States, generally speaking, responsibility under human rights treaty law may be raised only when States parties of these treaties exercise jurisdiction.⁹⁹ According to the case law of the ECtHR, for instance, this is the case when States parties exercise full control over migrants¹⁰⁰, responsibility that – we may argue – these States also maintain when their agents participate – at least directly and with great discretionary powers – to joint EU operations.¹⁰¹ However, when human rights violations occur in third States, it would be difficult to find that States

⁹⁸ Such a requirement for a specific connection between cooperation and human rights violations may be raised if one espouses the thesis that, along with knowledge that human rights violations would follow from aid or assistance (see above), “intent” to perpetrate these violations in the subject aiding or assisting is necessary to find a case of complicity: see the *Commentary of the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, 66, para. 5. For an in-depth discussion, H. MOYNIHAN, *Aiding and Assisting: The Mental Element under Article 16 of the International Law Commission’s Articles on State Responsibility*, in *International and Comparative Law Quarterly*, 2, 2017, 461 ff.

⁹⁹ In relation to the ECHR, see Art. 1. As for human rights treaties concluded in the UN framework, reference to States parties’ territory is usual to define the scope of application of States’ obligations. Good examples are Art. 2 of the UN Convention Against Torture or Art. 2 of the International Covenant on Civil and Political Rights. Yet, it is accepted that States parties may exercise jurisdiction also beyond their territory if they exercise ‘effective control’. This was clearly stated by the Committees supervising the respect of the mentioned UN Conventions: see, for example, Committee against Torture, 21 November 2008, *J.H.A. v. Spain*, CCT/C/41/D/323/2007, para. 8.2; Human Rights Committee (HRC), *General Comment No. 36* (2018), 30 October 2018, para. 22. For an in-depth discussion, M. MILANOVIC, *Extraterritorial Application of Human Rights Treaties*, Oxford, 2011.

¹⁰⁰ For example, on the high seas: ECtHR, Grand Chamber, *Hirsi and Others v. Italy*, *supra*, para. 129. See Judge Pinto de Albuquerque’s separate opinion in ECtHR, *M.A. and Others v. Lithuania*, *supra*, for an account of this evolution. See among others, in relation to the test used by the ECtHR, C. RYNGAERT, *Clarifying the Extraterritorial Application of the European Convention on Human Rights*, in *Utrecht Journal of International and European Law*, 2012, 57; J.M. ROONEY, *The Relationship between Jurisdiction and Attribution after Jaloud v. Netherlands*, in *Netherlands International Law Review*, 3, 2015, 407.

¹⁰¹ These operations may include, for example, EU agencies, such as the European Border and Coast Guard Agency (Frontex) and/or CFSP missions, such as the above recalled EUNAVFOR MED. The case law of the ECtHR in relation to the involvement of European States in joint international operations seems particularly useful to support this view: see, for example, ECtHR, 20 November 2004, *Jaloud v. the Netherlands*, 47708/08,

parties exercise jurisdiction in those States.¹⁰² From a general international law perspective and, more specifically, under the rules on international responsibility, responsibility may nonetheless be raised when it is shown that Member States aid or assist third States in violating migrants' human rights.¹⁰³ Again, the same conditions mentioned above apply¹⁰⁴ and should be duly verified.¹⁰⁵

In sum, although being an integral part of EU external policy and the corner stone of the EU's response to migration¹⁰⁶, the EU's initiatives here

paras. 151-152. For an in-depth discussion of these aspects, see the chapter of M. Parodi, *infra*.

¹⁰² In such a case, it might be nonetheless argued that jurisdiction may be established for the failure to comply with positive obligations or to adopt measures that are able to prevent human rights violations occurred extraterritorially. For instance, in *Ilascu and Others v. Moldova and Russia*, 8 July 2004, 48787/99, para. 331, the ECtHR found that a positive obligation exists under Art. 1 ECHR when, even if in absence of effective control, a State party can 'take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.' For a broader discussion, see the ECtHR's case law analysed in A. LIGUORI, *supra*, 31 ff.

¹⁰³ ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two), Art. 16.

¹⁰⁴ Similarly to the Draft Articles on Responsibility of International Organisations as applied to the case of the EU above, Art. 16 provides that a State, which aids or assists another State in the commission of an internationally wrongful act, is internationally responsible if: (a) it has carried out the aid or assistance in knowledge that a wrongful act could follow; and (b) the act would be internationally wrongful if committed by that State. For example, in relation to human rights violations in Libya, these two conditions could be satisfied by applying the same elements followed for the case of complicity of the EU: see above and, among many authors, G. CARELLA, F. DE VITTOR and A. LIGUORI, *supra*.

¹⁰⁵ For the sake of completeness, it is worth noting that an additional problem is the access to an effective remedy. In fact, it would be equally hard for alleged victims to raise the claim before a competent judge from third countries. Suffice to recall the example of Australia and the consequences of its pullback policies in this respect: P. VAN BERLO, *The Protection of Asylum Seekers in Australian-Pacific Offshore Processing: The Legal Deficit of Human Rights in a Nodal Reality*, in *Human Rights Law Review*, 1, 2017, 33 ff.

¹⁰⁶ See *EU Global Strategy and European Agenda for Migration*, *supra*. See also European Commission, *Communication on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration*, 7 June 2016, COM(2016) 385 final. Interestingly, in the Communication the Commission stressed the role of external relations and the need for joining up across internal/external policies and EU/Member States: 'The message that migration issues are now at the top of the EU's external relations priorities has not yet been fully communicated to and appreciated by partners. [...] Experience has shown that migration policy inside and outside the Union has a direct link. [...] The ultimate aim of the Partnership Framework is a coherent

analysed seem far from being guided, both in procedural and substantive terms, by the principles established in Articles 3.5 and 21 TEU. The latest attempts to joining-up do not result in a more unified Union as a global human rights actor. The external dimension of the management of migration continues instead absorbed by intergovernmental initiatives¹⁰⁷ and by overlapping relations set forward individually by Member States, with clear implications for human rights protection both intra-EU and abroad.¹⁰⁸

These pitfalls are reflected in the responses to the COVID-19 emergency involving migration control. In an uncoordinated attempt to limit the spread of the virus, Member States' run to close borders and harbors while continuing the deportation of unwanted migrants has been backed up by the decision adopted at EU level to temporarily restrict 'non-essential' travel to the European Union.¹⁰⁹ If it is true that the non-binding Commission's guidelines emphasised that these restrictions at the external borders 'should not' apply to travellers in need of international protection or for other humanitarian reasons¹¹⁰, the pandemic risks consolidating legal obstacles to the access to international (and human rights) protection. During the health emergency, the effects of the externalisation of border controls have been magnified by internal measures justified under EU Treaties (e.g. Art. 72 TEU) and legislation.¹¹¹ The tem-

and tailored engagement where the Union and its Member States act in a coordinated manner. [...] To make change happen, the full range of policies and EU external relations instruments have to be brought to bear.' The main tool of this new approach has been identified in agreements with third countries, the so-called Compacts.

¹⁰⁷ P.G. ANDRADE, *External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum*, in *EU Immigration and Asylum Law and Policy*, 17 January 2018.

¹⁰⁸ For the consequences in terms of potential human rights violations of the decisions adopted individually by Member States to face the migration flows *in cooperation* with third countries during the 2018 Mediterranean "crisis", see among others D. VITIELLO, *Il diritto di cercare asilo ai tempi dell'Aquarius*, in *Sidiblog*, 28 June 2018.

¹⁰⁹ See the Conclusions by the President of the European Council held on 17 March 2020 at www.consilium.europa.eu/en/press/press-releases/2020/03/17/conclusions-by-the-president-of-the-european-council-following-the-video-conference-with-members-of-the-european-council-on-covid-19/pdf.

¹¹⁰ In contrast to exemptions that 'must apply' to EU citizens wishing to return home: see Commission, *COVID-19: Temporary Restriction on Non-Essential Travel to the EU*, 16 March 2020, COM/2020/115 final.

¹¹¹ S. MONTALDO, *The COVID-19 Emergency and the Reintroduction of Internal*

porary suspension of the right to request asylum adopted by Greece¹¹² or the declaration on place of unsafety taken by Italy¹¹³ are good examples of this trend. Whereas the necessity and the proportionality of these measures are highly controversial, their compliance with applicable international and EU human rights obligations, including the absolute principle of *non-refoulement*, is certainly problematic. In other words, even the response to COVID-19 has caused a sort of joining-up exercise which, however, is not guided by the need to protect migrants and asylum claimants so far.

In light of the current framework¹¹⁴ and the challenges ahead also in terms of health emergencies, it would be probably too much to expect that the EU will prevent its Member States from cooperating with third countries when is aware of potential human rights violations. Despite such obligations might ideally be derived from Articles 3.5 and 21 TEU, few developments are expected also at the CJEU if we consider its overall 'hyper formalistic reasoning, a *modus interpretandi* which passes the buck to the States' in this field.¹¹⁵

Unsurprisingly, the ambivalent attitude between the common respect of, at least, internationally accepted human rights standards and a "more for more" approach has also emerged in the EU's involvement within the United Nations. Its controversial contribution to the Global Compact on Migration and the Global Compact on Refugees¹¹⁶ is illustrative. At least

Border Controls in the Schengen Area: Never Let a Serious Crisis Go to Waste, in *European Papers*, 25 April 2020; F. CASOLARI, *Prime considerazioni*, *supra*, 1022 ff.

¹¹² See the Decree of the President of the Hellenic Republic, 2 March 2020 (a translation can be consulted at <http://odysseus-network.eu/news/translation-of-the-greek-decree-on-asylum-at-the-turkish-border-in-english/>).

¹¹³ F. MUNARI, *Il Decreto interministeriale per gestire l'emergenza COVID-19 nell'ambito degli obblighi dell'Italia ai sensi della Convenzione SAR: l'insostenibile "intermittenza" del luogo sicuro per i migranti diretti verso l'Italia*, in *Sidiblog*, 16 Aprile 2020; A.M. PELLICONI, *Covid-19: Italy is not a "place of safety" anymore. Is the decision to close Italian ports compliant with human rights obligations?*, in *EJIL Talk!*, 23 April 2020.

¹¹⁴ See also *Protocol (No 23) on External Relations of the Member States with Regard to the Crossing of External Borders*, attached to the EU Treaties, in *OJ*, 7 June 2016, C 202/303.

¹¹⁵ A. LIGUORI, *supra*, 89 ff.

¹¹⁶ See UN General Assembly, *New York Declaration for Refugees and Migrants*, 3 October 2016, doc. A/RES/71/1; *EU Statement – United Nations Global Compact for Migration: General Statement on the Zero Draft on the Compacts*, 20 February 2018. See E. GUILD, K.T. WEATHERHEAD, *Tensions as the EU Negotiates the Global Compact for Safe, Orderly and Regular Migration*, in *EU Immigration and Asylum Law and Policy*, 6

apparently, the EU was primarily concerned to influence international developments in light of European common interests – such as preventing irregular migration and stressing on States' responsibilities to readmit third countries nationals –, instead of “seeking to advance” human rights protection in light of Articles 3.5 and 21 TEU.¹¹⁷ At the UN, not only could the EU have promoted human rights as set in the CFR. It could have also taken this chance to comply with the horizontal duty to protect and fulfil these rights worldwide, on which the next section finally turns.

5. *Beyond limits and values: towards an obligation to protect and fulfil?*

It is worth noting that, together with negative obligations often framed in term of respect, the evolution of international human rights law has increasingly led to obligations to adopt positive actions where needed to realise the conditions for the full enjoyment of human rights.¹¹⁸ As such, the obligation to respect human rights is often affirmed together with a duty to protect and fulfil. As international and regional human rights bodies have consistently acknowledged, since negative and positive obligations are two sides of the same coin, they are both implied when the focus is placed on protecting human rights in an effective way.¹¹⁹ Is therefore the Union required to take positive actions to protect and fulfil human rights beyond “its” borders?¹²⁰

July 2018, according to which the Union launched ‘an effortless understanding of a legal obligation to readmit.’

¹¹⁷ See *EU Input to the UN Secretary-General's Report on the Global Compact for Safe, Orderly and Regular Migration*, 2017, available at https://refugeesmigrants.un.org/sites/default/files/stocktaking_eu.pdf. Interestingly, the EU's input identifies ‘Human Rights for All Migrants’ as the first priority and sets the core human rights international conventions and standards as a common ground read in an evolutionary way.

¹¹⁸ To remain in the context of extraterritorial application, see for instance Principle 2 of the *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 2012.

¹¹⁹ See, already in 1981, HRC, *General Comment No. 3: Implementation at the National Level*, doc. HRI/GEN/R/Rev.1.

¹²⁰ On EU's human rights obligations and the “extraterritorial” effects of its policies, see L. BARTELS, *The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects*, in *European Journal of International Law*, 4, 2014, 1071, and E. CANNIZZARO, *The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effect: A Reply to Lorand Bartels*, in *European Journal of International Law*, 4, 2014, 1093.

The TEU itself provides initial, but cryptic, answers. In particular, in an attempt to clarify the scope of the EU's action in the field, Article 21 includes specific wording ('seeks to advance') that seems to imply an obligation to adopt, among all possible alternatives, appropriate measures to fulfil human rights *at least* when the Union actively operates in the international arena. Even more significantly, Article 21.2 b) TEU stresses the duty of the Union to 'define and pursue' common policies and actions as well as to cooperate in order to 'consolidate and support' human rights and the principles of international law. By the same token, paragraph 3 of the same Article distinguishes the need to 'respect' from the obligation to 'pursue' human rights worldwide, which relates to the development and the implementation of both the EU's external policies *and* the 'external aspects of its other' (internal) policies. If we add that Article 3.5 TEU requires the Union to 'contribute' to the protection of human rights, this entire framework seems to suggest the existence of an obligation to take action in order to protect and fulfil human rights worldwide.

Such an interpretation would be supported by two different sets of arguments related, on one side, to the Union's post-Lisbon practice and judicial developments and, on the other, to international human rights law principles.

Despite their non-binding legal value, all relevant EU documents seem to be based on the assumption that the Union is bound by the duty to 'promote and protect' human rights, as the Council's human rights guidelines clearly show. This is not only the case for the guidelines on children or LGBTI people, where specific primary law provisions may have played a role (see, for instance, the references to the rights of the child and/or to non-discrimination in Articles 2 and 3 TEU and 19 TFEU¹²¹). The guidelines on trade demand that each policy initiative be assessed to understand how this may 'enhance or impair the enjoyment of the relevant rights of individuals', 'strengthen or weaken the ability of the EU and partner country/ies to fulfil or progressively realise their human rights obligations', as well as interfere with them.¹²² Put this way, it seems that EU institutions are required to, first, assess that, through the conclu-

¹²¹ Among others, see E. DUBOUT, *Une approche comparative du principe de non-discrimination dans le cadre européen: Convention européenne des droits de l'homme et droit de l'Union européenne*, in *The ECHR and the Principle of Non-discrimination*, edited by M. BALBONI, Napoli, 2017.

¹²² *Guidelines on the Analysis of Human Rights Impacts*, *supra*, 9.

sion of a trade agreement, the Union will not violate its human rights obligations, including the CFR. Second, it may be argued the EU is required to protect the enjoyment of relevant human rights by individuals subject to the jurisdiction of its partner countries, at least, by not cooperating with the former in case of violations or by preventing their non-compliance with human rights obligations. If this is true, it follows that EU institutions need to identify, among all possible external measures at their disposal, those that better serve the duty to cooperate in fulfilling human rights worldwide. This procedural obligation implies a need to provide relevant justifications, in terms of necessity and proportionality, when the chosen external measure is deemed to collide with the enjoyment of human rights of people placed beyond “EU’s borders”.

This understanding can be confirmed in how the “new generation” of trade agreements are to be implemented¹²³, as well as previous and current attempts to avoid trade being used for violating, or contributing to violations of, basic human rights. These attempts are based on the competences related to the CCP itself (Article 207 TFEU).¹²⁴ This assumption is echoed by the General Court in the *Polisario* case, where it implies a duty to protect the Sahrawi people’s human rights in the recognition that ‘the protection of fundamental rights of the population of such a territory is [...] a question that the Council must examine before the approval of such an agreement’.¹²⁵ Furthermore, if EU institutions manifestly and gravely disregard their discretion to adopt appropriate measures, they could be liable even for non-contractual damages in third countries.¹²⁶

As it has been noted elsewhere¹²⁷, this reasoning implies that fundamental rights binding the EU may also have also an “extraterritorial”

¹²³ See CJEU, 16 May 2017, *Opinion on the Free Trade Agreement between the European Union and the Republic of Singapore*, Opinion 2/15, paras. 149, 158, 284.

¹²⁴ EP and Council, *Regulation 2017/821/EU Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, their Ores, and Gold originating from Conflict-affected and High-risk Areas*, 17 May 2017, in OJ, 19 May 2017, L 130/1; Council, *Regulation 1236/2005/EC concerning Trade in certain Goods which could be used for Capital Punishment, Torture or other Cruel, Inhuman or Degrading Treatment or Punishment*, 27 June 2005, in OJ, 30 July 2005, L 200/1.

¹²⁵ General Court, *Front Polisario v. Council*, *supra*, paras. 226-228.

¹²⁶ See L. BARTELS, *The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects*, *supra*, 1076, reporting on the case CJEU, 12 July 2012, *Mugraby*, C-581/11.

¹²⁷ O. DE SCHUTTER, *The Implementation of the Charter of Fundamental Rights in the EU Institutional Framework*, *supra*, 60.

effect.¹²⁸ As the EU is a non-State entity with conferred competences, the extraterritorial effect of its policies needs to be primarily established through reference to its capacity to act in line with the Treaties (see Article 5 TEU). In fact, if we consider that, according to the CJEU, ‘the applicability of EU law entails the applicability of the fundamental rights guaranteed by the Charter’¹²⁹, it necessarily follows that the EU’s human rights obligations track all EU actions also in the external sphere.¹³⁰ It is no coincidence that references to human rights obligations have been found, as recalled above, in legislation with an external dimension and in international agreements, while the Charter itself does not include any particular limitation clauses in comparison with other international/regional human rights treaties.¹³¹ Conversely, if a situation does not fall under the scope of EU law, either internal or external, the Union’s human rights obligations do not come to the fore.¹³²

The existence of a duty on the part of the EU to protect and fulfil human rights can also be argued under international law, through different – but interconnected – perspectives.¹³³ On the one hand, we can

¹²⁸ V. MORENO-LAX, C. COSTELLO, *The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model*, in *Commentary on the EU Charter of Fundamental Rights*, edited by S. PEERS, T. HERVEY, J. KENNER, A. WARD, Oxford, 2014, 1657 ff. In international human rights law, the extraterritoriality application of human rights obligation has been recognised widely following the “spatial” and/or the “personal” model of jurisdiction. In addition to the ECtHR’s case law recalled above, see HRC, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, doc. CCPR/C/21/Rev.1/Add. 13, 10. In doctrine, M. MILANOVIC, *Extraterritorial Application of Human Rights Treaties*, Oxford, 2011.

¹²⁹ CJEU, 26 February 2013, *Akerberg Fransson*, C-617/10, para. 21.

¹³⁰ See Opinion of the Advocate General Mengozzi in the case *X and X*, C-638/16 PPU, delivered on 7 February 2017, para. 89: ‘the fundamental rights recognized by the Charter, which any authority of the Member States must respect when acting within the framework of EU law, are guaranteed to the addressees of the acts adopted by such an authority irrespective of any territorial criterion.’ See more generally CJEU, 30 April 1996, *Ingrid Boukbalfa*, C-214/94, paras. 14-15; 27 February 1997, *Ebony Maritime SA*, C-177/95, paras. 17 ff.

¹³¹ See Art. 51 CFR in comparison to Art. 1 ECHR.

¹³² As in the case of humanitarian visas: see CJEU, 7 March 2017, *X and X*, C-638/16 PPU, on which V. MORENO-LAX, *Asylum Visas as an Obligation under EU Law: case PPU C-638/16 X, X v État Belge*, in *Conflict and Compromises between Law and Politics in EU Migration and Asylum Policies*, 2018, 46, at <http://odysseus-network.eu/conference-2018/>; A. LIGUORI, *supra*, 80 ff.

¹³³ To be sure, this is not an easy exercise and would require a longer analysis: for an in-depth discussion, see L. BARTELS, *The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects*, *supra*.

argue that a relevant obligation belonging to customary international law, which binds also the EU, is slowly emerging. To the extent that *erga omnes* obligations are involved, the law on international responsibility requires the EU not to aid any entity in committing serious breaches of international law, including when these have implication for human rights abroad, and not to recognise illicit situations arising from such violations.¹³⁴ Article 42 of the Draft Articles on Responsibility of International Organisations also provides that international organisations have a positive duty to cooperate with third parties to put an end to serious breaches of international law.¹³⁵ It may be argued that these rules imply for the EU, in its external sphere, at least an obligation of due diligence to protect and fulfil the rights of people who could be exposed to such serious human rights violations.¹³⁶ This seems the case of genocide¹³⁷, but the same reasoning would apply to apartheid, torture or slavery. The existence of similar duties for human rights not covered by *erga omnes* obligations is far more problematic. However, it is worth noting that, in the *Front Polisario* saga, the General Court appeared to affirm the existence of due diligence obligations beyond *erga omnes* obligations when it found that, in relation to the application of the Charter¹³⁸, the EU cannot even ‘in-

¹³⁴ ILC, *Draft Articles on Responsibility of International Organisations for Internationally Wrongful Acts*, *supra*, Ch. III. For an application of these rules to a specific case, see the analysis carried out by C. Danisi, *infra*.

¹³⁵ The law on international responsibility does not prescribe what measures this cooperation should entail: see the Commentary to the *Draft Articles on Responsibility of International Organisations*, *supra*, 82-83, which refers to the duties of States under Art. 41 of the *Draft Articles on Responsibility of States*, *supra*.

¹³⁶ J. KLABBERS, *Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act*, in *European Journal of International Law*, 2017, 1133 ff.

¹³⁷ As for the duty to prevent genocide, see ICJ, 27 February 2007, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, on which M. MILANOVIC, *State Responsibility for Genocide: A Follow-Up*, in *European Journal of International Law*, 2007, 669 ff. Being part of customary international law, it binds international organisations as far as they are in a position to act: see J. KLABBERS, *supra*.

¹³⁸ Significantly, the CFR itself is rooted in existing international human rights standards. For instance, the Preamble of the CFR: ‘This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights’ (emphasis added). As the Office of the High

directly encourag[e] violations'¹³⁹ of fundamental rights. The adherence to and continuous reiteration by the Union in its relationship with third countries of "international human rights standards"¹⁴⁰ may support the existence of an *opinio* in this respect, given that an obligation to respect, protect and fulfill is usually included in these standards as codified by human rights treaties.¹⁴¹ On the other hand, in some specific sectors, such an obligation is provided by treaties ratified by the EU itself. People with disabilities are a case in point. The EU ratified the Convention on the Rights of Persons with Disabilities (CRPD), Article 1 of which expressly includes a tripartite obligation to respect, protect and fulfil the rights enshrined therein.¹⁴²

Yet, given the nature of the EU, all these hypotheses raise a problem in relation to conferred powers. Supporters of this reading of EU Treaties are nonetheless sceptical about the operational implications of these "extraterritorial" duties *ex* Articles 3.5 and 21. It is true that the Treaties do not specify how the obligation to protect and fulfil human rights worldwide should be implemented. As it has been pointed out¹⁴³, the EU has not been given a related competence in this field. However, it can be argued that this question would be less relevant if the issue is analysed taking into account the wider framework provided by the EU Treaties.

Commissioner for Human Rights of UN (OHCHR) recalled, a duty to protect, promote and fulfil rights is an integral element of EU Member States' obligations under the human rights treaties concluded under the aegis of the UN, with clear implications in informing the content and the application of the CFR in line with its Art. 53 (as reported above): see OHCHR, *The European Union and International Human Rights Law*, Bruxelles, 2011, 7 ff.

¹³⁹ General Court, *Front Polisario v. Council*, *supra*, para. 231.

¹⁴⁰ See Section 3, *supra*.

¹⁴¹ In relation to the wide acceptance and continuous reaffirmation of this principle within international human rights law and the potential consequences for the EU, see OHCHR, *The European Union and International Human Rights Law*, *supra*, 14 ff. According to the OHCHR, '[b]ecause International Human Rights Law has been developed in this intense written form, the State practice and *opinio juris* that has given rise to the creation of Customary International Law is based largely on these very same standards. [...] Accordingly, there is a strong case to be made not only that the EU is directly bound by a significant body of International Human Rights Law and that this body of law is in substance identical to the standards contained in the UN human rights treaties' (*ibid.*, 24).

¹⁴² Council, 26 November 2009, *Decision 2010/48/EC concerning the Conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities*, in *OJ*, 27 January 2010, L 23/35.

¹⁴³ E. CANNIZZARO, *The EU's Human Rights Obligations*, *supra*, 1093.

Indeed, the Treaties aim to impose, in a horizontal way, the duty to exercise *all* the competences attributed to the Union for fulfilling the general obligations affirmed in Articles 3.5 and 21 TEU. As a result, there would be no need for new, specific, competences because the tripartite obligation – to respect, protect and fulfil – needs to be taken into account in all of the EU's actions, including those internal policies generating external effects.¹⁴⁴ As shown above, provisions related to the CCP have already been used to adopt measures aimed at protecting human rights worldwide. The same is true in the field of development cooperation.¹⁴⁵ The Union may also foster its obligation to protect and fulfil by acceding to/ratifying international human rights treaties whenever possible. For instance, the ratification of the so-called Istanbul Convention, on preventing and combating violence against women, may set an important precedent in this respect reinforcing, at the same time, the duty to protect and horizontally fulfil women's rights as well as the possibility to compel other Convention parties to act in accordance with its provisions.¹⁴⁶

It has also been suggested that, as in any other field, EU institutions may resort to implied powers in line with Article 352 TFEU, if this appears necessary to pursue what Articles 3.5 and 21 TEU demand.¹⁴⁷ We should nonetheless recall that, if framed as a horizontal duty instead of

¹⁴⁴ See Art. 21.3 TEU.

¹⁴⁵ See EP and Council, 11 March 2014, *Regulation (EU) 235/2014 establishing a Financing Instrument for Democracy and Human Rights Worldwide*, in OJ, 15 March 2014, L 77/85, based on Articles 209 and 212 TFEU.

¹⁴⁶ See Council, 11 May 2017, *Decision (EU) 2017/865 on the signing, on behalf of the European Union, of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence with regard to Matters related to Judicial Cooperation in Criminal Matters*, in OJ, 20 May 2017, L 131/11; 11 May 2017, *Decision (EU) 2017/866 on the Signing, on behalf of the European Union, of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence with regard to asylum and non-refoulement*, in OJ, 20 May 2017, 131/13. Interestingly, after a first proposal, the Council decided to adopt two different decisions based, respectively, on two specific provisions reflecting two different EU competences at stake: Articles 81.1 and 82.2 TFEU, respectively on judicial cooperation in civil matters and in criminal matters; and Art. 78.2 TFEU on the adoption of measures related to the common European asylum system. On consequences, see S. DE VIDO, *The Ratification of the Council of Europe Istanbul Convention by the EU: A Step Forward in the Protection of Women from Violence in the European Legal System*, in *European Journal of Legal Studies*, 2, 2017, 69.

¹⁴⁷ In this respect, see also *Declaration No. 41 on Article 352 of the Treaty on the Functioning of the European Union*, in OJ, 7 June 2016, C 202/350. See P. ECKOUT, *supra*, 99; L. BARTELS, *The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects*, *supra*, 1076.

an additional competence of the EU, such a duty probably cannot attract new (implicit) powers. Specific powers in this domain can only follow from a reform of the EU Treaties.¹⁴⁸

Given the global emergency generated by COVID-19, the EU's initial response can be assessed in terms of the implementation of the obligation to protect and fulfil human rights worldwide. It is undeniable that some measures adopted at EU level in order to address such an emergency can have extraterritorial effects, while others could be taken to protect third countries' citizens abroad. In this respect, the financial support to third countries put in place by the EU seems to correspond – at least implicitly – to such a positive duty. In connection with an attempt to pursue its own interests in the prevention and the containment of the virus, the EU initially allocated significant funds to Africa, to neighbouring countries, as well as to the WHO to support its global response especially in countries with weak health systems.¹⁴⁹ These measures were followed by broader action, so-called 'Team Europe', through which the EU has coordinated its efforts and those of Member States to support partner countries and fragile populations.¹⁵⁰ In its overall plan, besides short-term measures¹⁵¹, the EU aims to support long-term strategies to improve access to healthcare and medicines and countries' preparedness to prevent, detect and respond to public health risks. Although the EU refers to a sort of "global" solidarity instead of bringing to the fore the duty to protect and fulfil human rights, such an approach seeks to deliver micro and macro practical results in line with the above principled pragmatism rationale. At least as a matter of principle, owing to a willingness to play a leading international role in responding to disaster, the EU seems committed to acting upon the repeated calls for a multi-lateral and coordinated global response to COVID-19.¹⁵² This would

¹⁴⁸ E. CANNIZZARO, *The EU's Human Rights Obligations*, *supra*, 1093.

¹⁴⁹ *The EU's response to COVID*, *supra*, 4. See all relevant actions at https://global-response.europa.eu/index_en.

¹⁵⁰ More info at https://eeas.europa.eu/headquarters/headquarters-homepage/-/77470/%E2%80%9Cteam-europe%E2%80%9D-global-eu-response-covid-19-supporting-partner-countries-and-fragile-populations_en.

¹⁵¹ These measures may include also the provision of medical supplies to China, through the so-called 'EU Civil Protection Mechanism': see EP and Council, 17 December 2013, *Decision (EU) 1313/2013 on a Union Civil Protection Mechanism*, in OJ, 20 December 2013, L 347/924.

¹⁵² For instance, UN General Assembly, *International cooperation to ensure global*

certainly include fostering the conditions for equal access to a vaccine. Yet, it remains to be seen if such commitments will be translated into an approach that is consistent with the human rights obligations binding the EU. In light of the above analysis as well as other relevant applicable legal frameworks¹⁵³, this approach would – among other things – require the avoidance of unnecessary or unproportional restrictions to trade that may have serious consequences for fragile third countries, as well as bans or limitations on exports of key medical supplies used to tackle the pandemic emergency in such countries.¹⁵⁴ What such an initial response nonetheless suggests is that the EU does not need additional competences, as it is already able to implement its human rights-related duties worldwide, as specified in Articles 3 and 21 TEU, through the existing framework and conferred competences.

To sum up, at least in general terms, a duty to respect, protect and fulfil human rights through external policy seems to bind the EU. The lack of a specific competence may in itself be a proof of the horizontality of such obligation to adopt a proactive role in this field. Given the discretion afforded by Articles 3.5 and 21 TEU on how to carry out this obligation, they provide for at least a need to integrate human rights considerations in positive terms, arguably according to CFR standards, in all actions falling within EU external policy. Equally, such a duty calls for the adoption of all required measures, at legislative, procedural or diplomatic level, to enhance the ability of third-countries to comply with their human rights commitments. Perhaps, irrespective of the conferral of new competences arising in this field, the EU framework lacks effective mechanisms that can be employed to compel compliance with obligations deriving from Articles 3.5 and 21 TEU, along with more transparent and accountable human rights impact assessments.

access to medicines, vaccines and medical equipment to face COVID-19, 20 April 2020, A/RES/74/274.

¹⁵³ B. PIRKER, *Rethinking Solidarity in View of the Wanting Internal and External EU Law Framework Concerning Trade Measures in the Context of the COVID-19 Crisis*, in *European Papers*, 25 April 2020.

¹⁵⁴ In this respect, even distinctions in treatment of third countries may also be problematic: see for example the different treatment reserved to the European Free Trade Association countries in Commission, 19 March 2020, *Implementing Regulation (EU) 2020/426 amending Implementing Regulation (EU) 2020/402 Making the Exportation of Certain Products Subject to the Production of an Export Authorisation*, in OJ, 20 March 2020, L 841/1.

6. *Concluding remarks*

Our analysis has stressed the role of human rights as a unifying pull factor in EU external policy. At least in principle, the desire of the EU to be seen as a responsible human rights actor in the global scene is increasingly evident. As the following contributions also show, post-Lisbon developments confirm that the EU has been increasingly willing to exercise its competences in the external sphere by integrating human rights considerations and to use its powers to promote and, in some cases, fulfil human rights worldwide. Yet, the Union's desire as well as such a mainstreaming activity need to be reconciled with the fragmented framework provided by the EU Treaties in the external sphere, in addition to the problem of enforcing such obligations, especially as far as individuals are concerned. A deeper integration of external relations serving internal policies, such as those related to migration, in the overarching framework governing the EU external policy is equally urgent.

As we have tried to demonstrate here, this fragmentation does not lead to the conclusion that the Union's human rights external policy has a limited scope or, in other words, that the normative effect of the relevant TEU's provisions is limited.¹⁵⁵ Instead, the developments and initiatives that occurred in the post-Lisbon era seem to support the idea that, irrespective of the variety of fields and of different levels of integration at stake, the implementation of all policies having an external dimension could be matched with the EU's obligation to pursue its core principles and values. Consequently, the EU is not only called to respect human rights when it operates beyond Member States' borders. When its actions have concrete effects for the enjoyment of people's human rights abroad, the EU should identify and adopt those measures that protect and fulfil the most human rights at play.

While implementing the horizontal duty 'to seek to advance' the protection of human rights worldwide, the EU Treaties call upon the EU to ensure better coherence across specific external policies and between internal and external policies. To this end, for instance, the Union could reinforce existing procedural administrative obligations (e.g. *ex ante* evaluations of the human rights impact), as well as transparent and account-

¹⁵⁵ E. CANNIZZARO, *The EU's Human Rights Obligations*, *supra*, 1093 and 1098, especially in relation to the combined reading of Articles 23 and 40 TEU.

able processes, and include human rights clauses in all agreements with third parties, not just in general framework cooperation agreements¹⁵⁶ or specific external areas, while strengthening their enforcement. Procedural duties have certainly acquired a great weight in this context but, still, better monitoring, including the involvement of civil society, is necessary. That is also why, despite the limitations it encounters in the external sphere, the increasing role of the CJEU in ensuring that EU external policy complies with the CFR and international law is more than welcomed.

As we have additionally argued, in order to boost unity in its external policy, the EU could also be more consistent in defining the human rights involved from a substantive point of view. This would be equally helpful for identifying positive human rights obligations and for supporting better coherence between the EU's own external policy and the external relations of Member States. In this respect, the duty of cooperation in pursuing the same aims and values binding Member States could be instrumental in the joining up exercise needed for a significant move towards a unified external human rights approach. The Charter could play a central role in this effort. While it may be safely argued that its scope of application is competency-driven, its standards could also serve as a point of reference for the EU's action worldwide. This would enable the Union to ensure that the CFR is unequivocally considered in the definition and the implementation of all of its policies with external effects in order to protect all individuals whose human rights enjoyment is affected by the EU.

While these developments should lead to a more unified framework, the EU's human rights external policy also has the potential to gather a consensus on a common understanding of human rights worldwide. In turn, it can resort to international human rights law to strengthen its compliance with universal standards by acceding to or ratifying whenever possible key international human rights treaties, including the international Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

New challenges therefore lie ahead. The role of the EU as a global human rights actor seems to rely on the effectiveness of the range of EU external policy's tools (including human rights clauses, Council guide-

¹⁵⁶ L. BARTELS, *The EU Parliament's Role in relation to Human Rights in Trade and Investment Agreements*, *supra*, 24.

lines and sanctions) but also on the EU's own willingness to contribute to the evolution of international human rights law and to the joining up across internal and external policies. Despite its constitutional commitments, the EU needs time to horizontally integrate human rights into its wide external policy. If new instruments and procedural arrangements are likely to take root slowly, the range of competences and policy areas at stake may require additional coordination to ensure compliance with EU obligations in the field of human rights. A more difficult path is envisaged if the EU tries to move the dialogue from general principles or "absolute" human rights to other fundamental rights and freedoms, which require the definition of the human rights at stake.¹⁵⁷ The Post-Cotonou agreement may give the EU the chance to take a step forward even in this area.

Speeding up this process is not an easy task, notwithstanding the political effort achieved with the latest comprehensive and long-term global and human rights strategies. Despite the evident challenges generated by COVID-19, the response to such a pandemic emergency may provide a unique opportunity for the EU to rethink its global human rights role as well as its international position as a supporting actor in multilateral based solutions. Indeed, the EU reunites two unique conditions for respecting, protecting and fulfilling human rights worldwide. First, it may count on a variety of tools and incentives that both States and other international and regional organisations lack. Second, it seems to be driven by the genuine belief that pursuing these goals in the international arena is not (only) a legal obligation but is also in line with its "own" global responsibility and interests.¹⁵⁸ If the EU makes the most of these specific features, its external human rights policy could even be instrumental in granting coherence and consistency to the current stage of European integration.

¹⁵⁷ As it has been also suggested for the new agreements of the post-Cotonou era: L. BARTELS, *Human Rights Provisions in Economic Partnership Agreements in light of the Expiry of the Cotonou Agreement in 2020*, Bruxelles, 2017.

¹⁵⁸ See, for example, *EU Global Strategy*, *supra*, 8, 11, 18, 51.