



WORKING PAPERS

LAW 2016/10
Department of Law

The European Union's External Human Rights
Commitment:
What is the Legal Value of Article 21 TEU?

Vivian Kube

European University Institute
Department of Law

**THE EUROPEAN UNION'S EXTERNAL HUMAN RIGHTS
COMMITMENT:
WHAT IS THE LEGAL VALUE OF ARTICLE 21 TEU?**

Vivian Kube

EUI Working Paper **LAW** 2016/10

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author. If cited or quoted, reference should be made to the full name of the author, the title, the working paper or other series, the year, and the publisher.

ISSN 1725-6739

© Vivian Kube, 2016

Printed in Italy
European University Institute
Badia Fiesolana
I-50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Author contact details

Vivian Kube

Ph.D. Candidate

European University Institute

Florence, Italy

vivian.kube@eui.eu

Abstract

The Lisbon Treaty fundamentally changed the constitutional architecture of EU external action. As general principles, Article 21 and 3(5) TEU commit the EU to protect and promote human rights globally when developing and implementing its foreign policies. The legal value of this mandate and its concrete policy implication, however, have remained neglected by policy makers and legal scholarship. Aiming to provide a clear framework (of what can be done and what must be done) in EU foreign policy, this paper analyses the meaning of the human rights objective in the context of the vertical and horizontal division of competence (the 'can') and in context of fundamental rights protection endorsed by the EU (the 'must'). This analysis leads to two conclusions. In terms of the 'can', the human rights objective gives new normative impetus that enables EU human rights policy to overcome its previous limited conception as being primarily a development concern or a mechanism for third country conditioning. In terms of the 'must', Article 21 TEU should be seen in connection with the EU's fundamental rights responsibility that breaks with the territorial/extraterritorial dichotomy, which still cabins conventional international human rights jurisprudence and doctrine. The 'can' allows for sufficing the 'must', which prescribes a human rights policy that is global in its extent and self-constraining in substance. Thereby the human rights objective exhibits a progressive concept of human rights responsibility that is able to adequately take into account the global reach of the EU's legislative action.

Keywords

EU external relations law, extraterritorial human rights obligations, EU Charter of Fundamental Rights, EU human rights policy, EU trade and investment policy.

Table of contents

AUTHOR CONTACT DETAILS	5
ABSTRACT.....	7
KEYWORDS	7
TABLE OF CONTENTS	8
INTRODUCTION.....	1
OVERVIEW AND MAPPING OF THE RELEVANT PROVISIONS	2
THE HUMAN RIGHTS OBJECTIVE: EXPANDING THE ‘CAN’ AND THE ‘MUST’	4
The ‘can’: Human rights policy across the competences	4
The situation pre-Lisbon – human rights policy fettered by fragmentation	5
What does the human rights objective change?	10
Conclusion.....	15
The ‘must’: Responsibility beyond the territorial paradigm	15
Responsibility concepts under international human rights law	15
International human rights obligations of the EU	19
Extraterritorial obligation under the EU Charter of Fundamental Rights	21
What does the human rights foreign policy objective add?.....	26
Conclusion.....	29

Introduction

The reforms of the Lisbon Treaty fundamentally changed the constitutional architecture of EU external action. Today, a set of general guiding principles and objectives overarches the EU's external constitution with a central role for the global protection and promotion of human rights (Art. 21(1),(2)(b) TEU, Art. 3(5) TEU).¹ This fundamental reform, however, seems to have had varying but mostly only little influence on the actions and choices of political actors.² This may partially be due to the existing EU legal scholarship which emptied the so called 'wish list for a better world'³ – as the commonly repeated dogma goes – of any legal significance. This paper contends that this uncertainty of political actors and neglect by legal scholars is partly the result of a false analogy with the political nature and the corresponding wide discretion afforded by nation state policy objectives, while losing sight of the unique legal context the general objectives are placed in. That is in relation to, in structural terms, the EU's constitutional complexities and, in substantive terms, the fundamental rights concept endorsed by the EU. The only in-depth analysis of the EU foreign policy objectives builds on the case law and discourse elaborated in the context of nation state policy objectives (for instance, those of the German Constitution: '*Staatszielbestimmungen*').⁴ This comparative approach is an indispensable foundation and justified by the opposite argument that the EU constitution is closely related to the constitutions of its Member States and their legal concepts.⁵ It is also indispensable, because it is precisely the findings of this approach that at the same time reveal the fundamental differences which preclude a simple transfer of concepts elaborated in the nation state policy discourse. These fundamental differences are, first, the distinct legal structures of the EU's external constitution such as enumerated substantive competences as opposed to domestically largely unrestrained external powers of states, the role of the judiciary in defining such external competences and the institutional framework with precise rules on decision making and inter-institutional cooperation. Second, the EU constitutes a fundamentally different political entity, a political project that still justifies its existence and expansion by the pursuance of peace, prosperity and political stability, in Europe and beyond.

¹ The term 'constitution' is used based on the conviction that its decisive criteria are the functions and merits of a legal system which in case of EU primary law arguably reflect constitutional character and less so on its labelling. See Armin v Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch', (2010) 16 *European Law Journal*, 95, at 96. Further, while acknowledging that the human rights objective interrelates and to some degree overlaps with other EU foreign policy objectives and principles, such as democracy and the rule of law, this paper is solely dedicated to an analysis of the human rights objective. This decision is based on the assumption that the human rights objective is a good test case for understanding the foreign policy objectives as it builds on an authoritative catalogue of rights and entitlements with elaborated methodology and assessment tools and hence appears to be more tangible than others ('such as encourage the integration of all countries into the world economy', Article 21(2)(e) TEU).

² E.g. the European Parliament (EP) announced that it is willing to commence Art. 263 and Art. 265 TFEU proceedings if the EU's development policy does not respect Art. 21 TEU, European Parliament resolution of 18 May 2010 on the EU Policy Coherence for Development and the 'Official Development Assistance plus' concept (2009/2218(INI)), para 40. The Council's does not seem to be certain of the precise policy implication flowing from Article 21 TEU. It states that with regards to CCP 'the main focus of international investment agreements should continue to be effective and ambitious investment protection and market access', yet at the same time the 'European investment policy must continue to allow the EU and the Member States to adopt and enforce measures necessary to pursue public policy objectives,' such as human rights. How to align these two mandates remains unclear, Council of the European Union, Conclusions on a comprehensive European international investment policy (October 25, 2010), accessible via http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf, 16, 17.

³ Wiebke Drescher, 'Ziele und Zuständigkeiten' in A Marchetti and C Demesmay (eds), *Der Vertrag von Lissabon: Analyse und Bewertung* (Nomos, 2010) 68.

⁴ For the latter, see the very comprehensive comparison by Joris Larik, *Worldly ambitions: foreign policy objectives in European constitutional law*, PhD (Florence: European University Institute, 2013).

⁵ *Ibid.* referring to Article 4(2) TEU which preserves the constitutional identity of the Member States and Article 6(3) TEU guarantees fundamental rights as resulting from the Member States constitutions as general principles of EU law.

Acknowledging the EU's constitution as the infrastructure for advancing this project's program forbids any simple replication of the logic underlying foreign policy objectives found in the Member States or other nation state constitutions and justifies the contextual approach adopted by this paper. Part of the politico-legal context is the EU's specific mode of action and governance as what has been described as asserting itself on the international plane as a global regulator⁶, normative power⁷ and an actor promoting and being based on the rule of law.⁸

The contextual approach adopted by this paper, therefore, reconceives the human rights objective as in line with the EU's specific mode of global governance through legalization, externalization and norm promotion and as an ordering principle that is responding to the complexities arising from the unique features of the EU legal order. Looking at the human rights objective through that lens, it becomes clear that the human rights objective indeed entails concrete legal consequences – both as an empowerment and as a constraint for EU legal action. In other words, the human rights objective expands the 'can' and the 'must' of EU external action.

This paper, first, maps how fundamental rights and human rights feature in the EU constitution.⁹ In the following analytical part, this paper sets out the specific role of the human rights objective by analyzing its function in the context of the vertical and horizontal competence division (the 'can') and in context of the broader net of fundamental rights protection that the EU endorses (the 'must'). Pinpointing these functions will make the legal value and significance of the human rights objective more tangible and finally provide for clear guidelines for EU law and policy makers as how to comply with the a priori vague human rights objective.

Overview and mapping of the relevant provisions

This section briefly maps the relevant provisions, the patchwork of fundamental and human rights protection of the EU law legal order, which is the context in which the human rights objective has to be seen. It needs to be noted, first of all, that 'the human rights objective' in this paper is used as an umbrella term covering both Art. 3(5) and Art. 21(1),(2)(b) TEU. Art. 3(5) TEU states that '[i]n its relations with the wider world, the Union *shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to [...] the protection of human rights.*' The values of the EU are listed in Article 2 TEU which among others includes '*... the respect for human rights.*'

Furthermore, Art. 21(1) TEU stipulates that:-

⁶ Anu Bradford, 'The Brussels Effect' (2012) 107 *Northwestern University Law Review* 1.

⁷ Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 *Journal of Common Market Studies* 235. The specific link between 'market-related policies' which inform trade policies and the externalization of social norms has been by the Market Power Europe concept elaborated by Chad Damro, 'Market Power Europe' (2012) 19 *Journal of European Public Policy* 682.

⁸ Marise Cremona, 'EU External Relations and the Law', forthcoming in D Patterson & A Sodersten (eds) *A Companion to EU Law and International Law*, Wiley; Marise Cremona, 'Values in EU Foreign Policy', in M Evans and P Koutrakos (eds), *Beyond the established legal orders: policy interconnections between the EU and the rest of the world*, (Oxford: Hart, 2011), 276; While the above mentioned theories have applied different legal and political science perspectives, they share the common premise that the EU exerts global power by exporting its legal institutions and standards to the international plane as well as to third countries' domestic legislations by offering incentives to varying degrees such as market access or enhanced economic and political cooperation.

⁹ As to the terminology: I use the term 'human rights' in this paper as encompassing international human rights as well as the fundamental rights enshrined in the EU Charter. However, the determination of the precise substantive content of 'human rights' as enshrined in Article 21 and 3(5) TEU is debatable and requires further discussion, which in detail goes beyond the scope of this paper. However, section 3.2.3 makes some further suggestions as to the linkage between Article 21 TEU and the Charter.

'[t]he 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.'

Art. 21(2) (b) then specifies that:-

'[t]he 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: [...] consolidate and support [...] human rights [...]*.

The specific external policies in turn explicitly refer back to these guiding principles and objectives. Art. 207 TFEU on the common commercial policy (CCP), for instance, affirms that '[t]he common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.'

Human rights frame EU external action as a founding value (Article 3(5) in conjunction with Article 2 TEU), as a guiding principle (Article 21(1) TEU) and as an objective (Article 21(2)(b) TEU).¹⁰ As a value, the respect for human rights should be upheld and promoted. The principle of universality and indivisibility of human rights should guide EU's external action. The consolidation and support of human rights is the objective according to which the external policies shall be defined and implemented. A closer textual and comparative analysis, which is beyond the scope of this paper, would be necessary to ascertain whether the different provisions entail different obligatory strengths and content or whether the verb 'shall' in this context is to be understood as mandatory and imperative or rather as merely directory and permissive. It is noteworthy at this stage, however, that the Commission according to its latest trade strategy seems to understand the 'shall' as a 'must' (EU trade policy '...*must* promote and defend European values') .¹¹ DG Trade reads these provisions in conjunction as 'demand[ing] that the EU promote its values, including ... respect for human rights around the world.'¹²

Apart from human rights as a founding value, guiding principle and objective of external policies, the Charter of Fundamental Rights of the European Union (EU Charter) in conjunction with Art. 6(1) TEU introduces a full-fledged catalogue of fundamental rights into primary EU law. Additionally, fundamental rights feature the EU legal order as general principle of Union law, which the Court already clarified in its early case-law.¹³ Art. 6(3) TEU codifies this jurisprudence by stipulating that '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.' Furthermore, also international human rights obligations (as part of international customary law, general principles of international law and as part of international agreements the EU is a party to) form an integral part of the EU legal order.¹⁴

¹⁰ This paper will not discuss the meaning of Article 21(2)(a) which also refers to values and hence to human rights. Since Article 21(2)(b) TEU speaks explicitly of human rights, it can be seen as *lex specialis*. Further, Article 21(2)(a) TEU appears to be concerned with safeguarding the internal integrity, security and own interests against external threats, which is not the focus of this paper.

¹¹ Commission trade and investment strategy: 'Trade for All: Towards a more responsible trade and investment policy', 14 October 2015, 7, (emphasis added).

¹² *Ibid.* p. 22.

¹³ First, recognized in Case 29-69 *Erich Stauder v City of Ulm* [1969] ECR-I 00419, para 7.

¹⁴ For a more detailed discussion on the international human rights obligations of the EU, see Section 3.2.2.

To sum up, human rights and fundamental rights permeate the EU legal order in multiple ways, with diverse foci and with different levels of precision, however, all of the sources are placed at the level of primary EU law. With regards the human rights objective the questions arises as to what the legal status and the added value of the commitment to global human rights protection and promotion as a foreign policy objective is in this patchwork of human rights commitments. The following section approaches these questions from two dimensions – the can and the must of EU foreign policy making and implementation.

The Human Rights Objective: Expanding the ‘can’ and the ‘must’

As indicated above, to understand the meaning of the human rights objective and to make its legal consequences tangible, this paper first analyzes the policy objective in the context of the EU’s external competences which reveals its significance for the bases of legal action - the first major legally significant change introduced by the normative reforms to the EU external constitution. The second part puts the human rights objective into the context of the EU’s extraterritorial human rights obligations through which its constraining function becomes clear.

The ‘can’: Human rights policy across the competences

This section argues that the pre-Lisbon structure of external competences made any comprehensive integration of human rights into the EU’s external policies complicated which resulted in fragmented approaches that exhibit a too narrow concept of human rights protection. The different human rights instruments that were developed throughout the polices have been accused of several shortcomings, which can be summarized as being biased, ineffective on the ground, not primarily right-based and as a political pressure instruments in disguise.¹⁵ The limited concept of human rights protection is reflected in the choice of the instruments as well as their content which are primarily geared towards compelling third countries to comply with human rights, while neglecting other threads and other possible pressure points for human rights advancement, such as the role of the private sector including European investors and multinational companies and the perpetuation of impediments and even downward trends of human rights standards by EU trade and investment policy making.

Many shortcomings can be overcome, as this section proposes, by making adequate use of Article 21 and 3(5) TEU. These provisions give human rights a new place in the hierarchy of foreign policy objectives and provide new legal grounds, which advance a renewed normative impetus that should steer policy makers towards rethinking traditional models of human rights policy. This section, first, outlines the pre-Lisbon constitutional structures, which kept human rights limited and fragmented, and the justifications of policy makers and jurisprudence in support of the few crosscutting human rights efforts that nevertheless emerged. These structures were influential if not determinative for the composition of the human rights tool kit of today. The second part argues that the enshrinement of the transversal human rights objective theoretically liberates human rights policies from these limited approaches, enables new perspectives as to the targets and questions the previous hierarchical order amongst competing policy objectives.

¹⁵ E.g., Karen E Smith, ‘The Use of Political Conditionality in the EU’s Relations with Third Countries: How Effective?’ (1997) Working Paper; Elena Fierro, *The EU’s Approach to Human Rights Conditionality in Practice* (M Nijhoff 2003); Andrew Williams, *EU Human Rights Policies: A Study in Irony* (Oxford University Press 2004); Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008); Laura Beke and Nicolas Hachez, ‘The EU GSP: A Preference for Human Rights and Good Governance? The Case of Myanmar’ [2015] Working Paper No. 155; Nicolas Hachez, ‘“Essential Elements” Clauses in EU Trade Agreements Making Trade Work in a Way That Helps Human Rights’ (2015) 53 Cuadernos europeos de Deusto 81.

The situation pre-Lisbon – human rights policy fettered by fragmentation

Prior to the Lisbon reforms, human rights protection (as well as language implying a more pro-active conduct such as ‘consolidation’) was a specific objective of development cooperation¹⁶, CFSP¹⁷ and economic, financial and technical cooperation, the latter covering other existing competences.¹⁸ Apart from human rights as specific external policy objectives, they permeated the EU legal order as general principles and founding values (cf. Article 6 ex-TEU and preamble to the Single European Act) and was confirmed by settled case law.¹⁹ It was therefore debated whether human rights as a general principle of EU law would constitute a sufficient legal base for external action that is primarily directed at human rights and outside an expressed competence. In *Opinion 2/94*, in which the Court ruled on the competence to accede to the ECHR, it rejected that argument and concluded that human rights as a general principle of EU Law can only constrain EU action.²⁰ In the aftermath of this decision, it was argued that the institutional implications of an ECHR accession which the Court already pointed at back then were the main stumbling block.²¹ On that basis, it was concluded that the EU is nevertheless empowered to advance human rights within specific fields in which it does hold competence.²² However, it seems likely that the remaining legal uncertainties played its part in impeding the emergence of any comprehensive and not only ancillary human rights policy.

Nevertheless, the EU has a long history of deploying a wide array of strategies²³ and instruments cross-cutting different policy fields, of which the trade and development nexus is a prime example. Besides using its economic power to advance multilateral reforms in order to shape global economic governance according to its own model, the EU has used concrete ‘carrot and sticks’- strategies in bilateral relations to facilitate human rights compliance of third countries through either providing trade incentives for implementing human rights standards and withdrawing them in case of non-compliance.²⁴ Furthermore, economic sanctions have long been used as a response to state or individual action that has been declared (by the UN and/or the EU) constituting a threat for international security, which may be additionally but not necessarily linked to human rights concerns.²⁵ The external human rights efforts which are linked to trade are hence chiefly focused on inducing others to behave according to certain human rights standards, while the degree and the reference points for the required approximation of legislations vary depending on the motives behind the partnership (for instance, accession, development concerns or general trade relations).

¹⁶ Art. 177(2) of the Treaty establishing the European Community of 2002, OJ C 325/33 (ex-TEC).

¹⁷ Art. 11(1) of the Treaty on the European Union of 2002, OJ C 325/01 (ex-TEU).

¹⁸ Art. 181a(1) ex-TEC.

¹⁹ E.g. Case C-4/73 *Nold v Commission* [1974] ECR 491, para. 13; Case C-260/89 *ERT* [1991] ECR I-2925, para. 41; *Opinion 2/94, Accession by the Community to the ECHR*, [1996] ECR I-01759, para. 33.

²⁰ *Opinion 2/94, Accession by the Community to the ECHR*, [1996] ECR I-01759.

²¹ Joseph Weiler and Philip Alston, ‘An “Ever Closer Union” in Need of a Human Rights Policy’ in Philip Alston (ed), *The EU and human rights* (Oxford University Press 1999) 3, 24.

²² *Ibid.*

²³ Such as the EU Sustainable Development Strategy, first adopted in 2001, which was meant to cover all kinds of different policy fields, see Commission Communication of 15 May 2001 ‘A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development’ (Commission proposal to the Gothenburg European Council) [COM(2001) 264 final – not published in the Official Journal].

²⁴ For a comprehensive demonstration of how the EU ‘constitutionalizes’ global economic relations, see Joris Larik, ‘Much More Than Trade: The Common Commercial Policy in a Global Context’ in Panos Koutrakos and Malcolm D Evans (eds), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the rest of the World* (Hart Publishing 2011) 13, 34; for a contrasting view, see Jan Wouters and others, ‘Global Governance through Trade: An Introduction’ in Jan Wouters and others (eds), *Global Governance Through Trade: EU Policies and Approaches* (Edward Elgar Publishing 2015), who see governing through trade as a newly emerging form of global governance.

²⁵ Economic sanctions against individuals or states are to be based on a Regulations in accordance with Article 215 TFEU and upon a prior CFSP decision.

The policy of human rights advancement vis-à-vis developing countries emerged from trade and association agreements rooted in the specific connections of European countries with former colonies and ultimately led to the human rights toolkit of today: the General System of Preferences (GSP)²⁶ and ‘GSP +’²⁷ for developing countries, ‘Everything but Arms’ for least developed countries²⁸, the EU’s explicit policy to include human rights clauses (‘essential element clauses’) in all trade agreements with third countries and human rights dialogues.²⁹ Originating in the trade and development nexus, cross-cutting human rights policies were constantly broadened and fostered by the general mission to ‘mainstream’ human rights throughout the policies and to enhance coherence.³⁰ Early on the Court interpreted the scope of CCP as allowing for the pursuance of non-economic objectives.³¹ The inclusion of development objectives was based on the observation that trade relations at that time increasingly pursued development aspects and that it is hence necessary to broaden beyond traditional aspects of trade as otherwise the EU commercial policy is ‘destined to become nugatory in the course of time’.³² Restrictions of trade in the pursuance of security objectives were, according to the Court, a matter falling under CCP since individual Member State action to that end would disturb any effective EU common trade policy.³³

Today, the trade related measures of the EU human rights package additionally comprise including sustainable development chapters in trade and investment agreements, incorporating human rights in *ex ante* impact assessments as well as *ex post* evaluations, including clauses on core labour standards, health and safety at work and environment protection (next to the essential element clause), further sector specific and country specific initiatives, regulating export controls, promoting corporate social responsibility and the adoption general human rights guidelines.³⁴ Without going into a detailed discussion of each instrument, I will in the following sketch out some of the shortcomings that the EU human rights package has been criticised for.

The essential element clauses, for example, are aimed at reacting to human rights violations that are unconnected to the obligations contained in the respective agreement. They are meant to secure (formally for both trading partners, in practice so far only for the EU) a right to take ‘appropriate steps’ that may ultima ratio lead to a suspension of the agreements in cases in which upholding economic relations with a regime that is committing, unwilling or unable to counter mass human rights

²⁶ GSP offers non-reciprocal preferential market access to developing countries (Regulation No 978/2012).

²⁷ GSP + offers full removal of tariffs for ‘vulnerable’ countries which ratified and effectively implemented 27 core international conventions in the fields of human and labour right, the environment and good governance.

²⁸ The EBA program grants duty-free quota-free access to all products, except for arms and ammunitions.

²⁹ Lorand Bartels, ‘The Trade and Development Policy of the European Union’ in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008) 129.

³⁰ The Commission first stressed the need to ‘mainstream’ human rights into all external policy fields in its Communication to the Council and the European Parliament - The European Union's role in promoting human rights and democratisation in third countries COM/2001/0252 final of 19 June 2001; For a comprehensive discussion of the development of the mainstreaming und coherence approach, see Michał Gołębek, “‘Weaving a Silver Thread’: Human Rights Coherence in EU Foreign Affairs and Counter-Terrorism” (European University Institute 2013) 307 et seqq.

³¹ Opinion 1/78 *Natural Rubber* [1979] ECR 2871 (allowed for including development objectives); Case 45/86 *Tariff Preferences* [1987] ECR 1495 (allowed for including development aid policy); Case C-70/94 *Werner* [1995] ECR I-3189, para. 10; Case C-83/94 *Leifer* [1995] ECR I, 3231, para. 10,11; Case C-124/95 *Centro Com* [1997] ECR I-81, para. 26 (all of the latter cases allowed for restrictions on trade in the pursuance of foreign policy and security objectives).

³² Opinion 1/78 *Natural Rubber* [1979] ECR 2871, paras 44, 45; Case 45/86 *Tariff Preferences* [1987] ECR 1495, para. 20.

³³ Case C-70/94 *Werner* [1995] ECR I-3189, para. 9.

³⁴ Commission Communication to the European Parliament, the Council and the European Economic and Social Committee, ‘Trade, growth and development’ of January 2012, SEC(2012) 87 final; For an up to date overview and assessment, see EU Strategic Framework on Human Rights and Democracy of 2012 and the EU Action Plan on Human Rights and Democracy 2015 – 2020, in particular No. 25 a)-e); EU Annual Report on Human Rights and Democracy in the World in 2014 adopted by the Council, p. 34et. seqq.

violations becomes politically intolerable. The case that the obligations themselves prescribed by such an agreement could prevent a state from protecting and fulfilling human rights and thus stand in contrast with human rights obligations is not contemplated.³⁵ This is different to general exception or carve-out-clauses, modeled on Article XX of the General Agreement of Tariffs and Trade (GATT), that allow for the adoption of exceptional measures or derivations from trade obligations in case when necessary to protect certain other objectives which are usually enumerated.³⁶

Furthermore, the human rights clauses have been criticized for their general lack of specific procedures for complaints, dispute resolution or suspension.³⁷ The rare and selective enforcement of human rights clauses poses further questions. Many observers have noted that all of the 23 cases in which the human rights clause was actually used concerned Cotonou-Agreement partners and incidents of deep disruption of democratic core values such as coup d'états and flawed elections, whereas many gross human rights violations committed by EU partner countries have not triggered suspension.³⁸ Furthermore, also the fact that a withdrawal of trade benefits entails a high risk of deepening ongoing human rights violations makes it more appropriate to view such clause as a political instruments with which all kinds of interests can be pursued than as a primary human rights instruments.³⁹ Similar criticism as to the inconsistency of implementation and uncertainty with regards to the effects for vulnerable populations are raised against the GSP+.⁴⁰ Ghazaryan, however, also stresses other positive effects that human rights clauses entail apart from threatening with suspensions such as its guiding function for interpretation of the agreement as well as presenting a legal ground for positive measures and financial as well as technical support.⁴¹ Furthermore, the human rights clause is certainly only one piece of the EU's human rights toolkit and considering it in isolation while neglecting the interaction of different mechanism might not do justice to a proper assessment of the EU's human rights efforts. Nevertheless, one has to note that the relevant actors present the human rights clause as a major instrument for making trade coherent and compliant with human rights.⁴² Further, from a right-based perspective even successful diplomacy does not exempt from putting minimum legal and transparent legal safeguards in place.

Also more elaborated conditionality instruments of the EU, within the Enlargement as well as within the Neighborhood Policy are commonly criticized for limited or a complete lack of any objective

³⁵ For a comprehensive critique, see Lorand Bartels, *A Model Human Rights Clause for the EU's International Trade Agreements*, Study for the German Institute for Human Rights and MISEREOR, 2014, 30 et seq., accessible via http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf.

³⁶ The general exception clauses usually refer to public morals, human, animal or plant life or health as in GATT Article XX on which EU clauses are modelled, e.g. The Council Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America (TTIP), 17 June 2013 declassified and made public by the Council on 9 October 2014, No. 12.

³⁷ European Parliament resolution on the human rights and democracy clause in European Union agreements (2005/2057(INI)), 14 February 2006; European Parliament resolution on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights (2008/2031(INI)), of 4 September 2008; Hachez (n 15) 20.

³⁸ Narine Ghazaryan, 'A New Generation of Human Rights Clauses? The Case of Association Agreements in the Eastern Neighbourhood' [2015] *European Law Review* 391, 405; Hachez (n 15) 19.

³⁹ Fierro (n 15) 100.

⁴⁰ GSP+ has only been suspended in three cases, which are Myanmar, Sri Lanka and Belarus; For an illustrative case-study as to the effects, see James Yap, 'One Step Forward: The European Union Generalised System of Preferences and Labour Rights in the Garment Industry in Bangladesh' in Jan Wouters and others (eds), *Global Governance Through Trade: EU Policies and Approaches* (Edward Elgar Publishing 2015).

⁴¹ Ghazaryan (n 38) 408.

⁴² 2014 Annual Report, p. 34.

assessment criteria, which makes their enforcement appear ad hoc and inconsistent.⁴³ These inconsistencies and opaqueness of the monitoring and enforcement mechanisms in addition to vague terminology⁴⁴ used in EU agreements turn human rights conditionality into political leverages which runs contrary to a right-based approach that is focused on the empowerment of individuals and participation of the right-holders. Päivi Leino points out that the use of vague terminology (while she mainly refers to terms such as ‘universality’ and ‘common values’) only fosters dominant power relations in which the stronger party is in the position to determine and tailor the meaning according to its ad hoc interests for which conditionality presents a convenient enforcement mechanism.⁴⁵ The fact that human rights clauses are framed as political instruments is not coincidental. They are in fact primarily understood as a political instrument and therefore preferably separated from hard law trade obligations and placed into the political framework agreements.⁴⁶ This is even more the case for the tool of choice of global human rights protection, the human rights dialogues. They have largely been criticized for the lack of reviewing or reporting mechanism, for diverting human rights issues away from high-level politics discussions and as being used as pressure points for furthering other interests.⁴⁷

Furthermore, many components of the human rights toolbox are not legally binding and rely on voluntary compliance by the regulators as well as by the addressees, e.g. the human rights guidelines and the corporate social responsibility mechanisms.⁴⁸ Political leverage, diplomatic sensitivity and flexibility is, indeed, a crucial factor for the success of highly controversial issues and when people are at immediate risk. However, the fact that the outcome of a balancing process in specific cases might favour ad hoc action, does not justify a general rejection of a right-based approach.

With a right based approach this paper means the integration of human rights as an authoritative legal regime consisting of legally enforceable entitlements. It is based on the premise that taking human rights seriously requires a meaningful inclusion and empowerment of right-holders. What is suggested in this paper as a coherent right based approach that is cross-cutting all fields of external policies is not identical with a ‘human rights based approach to development’ (HRBA) as promoted by international development bodies which the EU transcribed to its development policy according to the 2012 Action Plan on Human Rights and Democracy.⁴⁹ The HRBA is first and foremost a development strategy and

⁴³ Kochenov (n 15); Dimitry Kochenov, ‘The ENP Conditionality: Pre-Accession Mistakes Repeated’ in Elsa Tulmets and Laure Delcour (eds), *Pioneer Europe? Testing EU Foreign Policy in the Neighbourhood* (Nomos 2008); Gołabek (n 30) 312 et seq.

⁴⁴ Such as ‘shared values’ or reference to the UDHR which is not legally binding and only comprises a limited range of rights.

⁴⁵ Päivi Leino, ‘The Journey Towards All That Is Good and Beautiful: Human Rights and “Common Values” as Guiding Principles of EU Foreign Relations Law’ in Marise Cremona and Bruno de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (1st edn, Bloomsbury Publishing 2008), 285 287.

⁴⁶ Lorand Bartels, Study on The European Parliament’s Role in Relation to Human Rights in Trade and Investment Agreements, EXPO/B/DROI/2012-09, February 2014, 7 with further reference to EU Council, *Reflection Paper on Political Clauses in Agreements with Third Countries*, Doc 7008/09, 27 February 2009 (partially derestricted)..

⁴⁷ Fierro (n 15) 202 et. seqq.; Päivi Leino, ‘European Universalism?—The EU and Human Rights Conditionality’ (2005) 24 Yearbook of European Law 329; Gołabek (n 30) 341 et seqq.

⁴⁸ One should be attentive to what extent ‘hard law’ in fact mainly build on voluntary mechanisms such as the draft regulation proposed by the Commission on conflict minerals which is based on a system of self-certification, Proposal for a Regulation of the European Parliament and the Council, setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict affected and high-risk areas; COM(2014) 111 final, 5 March 2014.

⁴⁹ The United Nations Development Group (UNDG) adopted the UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming (the Common Understanding) in 2003, which serves as a reference point for all UN agencies and other international development bodies; accessible via <http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies#sthash.H7zQsbcv.dpuf>;

thus remains within the realm of development programming, conditionality and state aid. Further, HRBA understands solely third states as duty bearers. There is little consensus on a global or EU level as to the precise content of this approach and its policy implications; beyond the aim of integrating and mainstreaming human rights in development policies.⁵⁰ Observers have criticised that the HRBA of EU development cooperation is still missing a 'substantive rethinking from a human rights perspective' and stated that the promotion of local stakeholder to create and use their local policy space, i.e. direct empowerment of right-holder, remains a challenge.⁵¹ This challenge appears even more salient from a cross-cutting policy perspective when other policy fields such as trade and investment remain ignorant towards meaningful participation of civil society and are not sensitive towards their impact on domestic policy space and the actual distribution of power and representation of interests within the respective third state. In sum, the human rights based approach as promulgated within EU development policy remains limited as it is centred around state aid initiatives and conditionality and does not mitigate the concerns elaborated by this paper, namely the limitations resulting from seeing human rights protection and promotion as first and foremost a development concern and falling short of a meaningful integration of human rights across the policy fields.

This neglect of such right-based approach does not only become apparent in the choice of instruments but also in their content. The range of human rights referenced is limited usually to core labour rights, public health and environmental rights. The substantive human rights referred to might be described as rather ancillary to trade and investment enhancement. First and foremost, the rights (workers' rights, health and environmental security) that are promoted are usually those understood as necessary for a stable business environment, which falls in line with the justifications for their inclusion that were endorsed by the ECJ pre-Lisbon.⁵² Such ancillary understanding helps to explain their subordinate inclusion: When human rights rub against the trade rules, they need to be justified and restricted. They are the unnormal, whereas the trade regulations are the norm, the constitution.

Monitoring, reporting and resolution mechanisms and committees are often structured in ways that only allow for very limited or none access by individuals or civil society to the decision-making processes and to remedial instruments and thus impede the realization of basic human rights, access to legal remedy and democratic participation.⁵³ These mechanism are apparently not geared towards promoting the empowerment of local populations or to ensure their democratic participation.

The previous division of competence in which human rights were only part of development cooperation and CFSP likely had some influence on the creation of this limited human rights approach that treats human rights as a 'political' issue and as either an international security and stability or development concern, and thus as only ancillary to other domains. Despite many mainstreaming efforts, the current human rights concept still seems to follow this trajectory and by so doing to perpetuate the focus on a limited range of human rights and on a limited direction. The overall picture is one of a human rights policy that heavily relies on the carrots and sticks method with third

⁵⁰ David D'Hollander, Axel Marx and Jan Wouters, 'Integrating Human Rights in EU Development Cooperation Policy: Achievements and Challenges' [2014] FRAME Working Paper No. 134 - Leuven Centre for Global Governance Studies 9.

⁵¹ Ibid 12.

⁵² The importance of raising the standards of those rights for global trade stems from the assumption that low standards constitute comparative advantages that should be diminished.

⁵³ The structures and the 'jurisdiction' of committees and compliance mechanisms vary considerably, see for instance the survey made by Lorand Bartels (ibid.), p. 11 – 12. The envisaged civil society participation in the recently released text of the FTA EU – Vietnam (1 February 2016) illustrates some of the common limits: It envisions an domestic advisory group that may submit recommendations but solely on sustainable development issues. Although, the composition shall be balanced and include all stakeholders, e.g. workers' organization, it ultimately depends on national procedures, which can be problematic if national legislation heavily restricts trade unions. However, this is the only channel for civil society granted by this FTA (Chapter 15, Article 15.4). The unbalance becomes striking when compared to the strong enforcement tools that foreign investors enjoy in the same agreement.

countries' governments as the target embedded in legal instruments, which are primarily aiming for approximating economic regulations and for establishing the ancillary necessary rules for ensuring a stable legal environment needed for an economy that flourishes and attracts foreign investors. Conceiving external human rights protection as mainly a development issue or a conditionality instruments is likely to neglect the EU's own human rights obligation towards third countries and their populations. Today's human rights toolkit is not framed and not equipped to capture the links between EU policy making and action and the human rights situation of individuals within third countries. The notions that international trade system in which the EU plays a major role is in itself human rights sensitive and that trade obligations can put even more pressure on a state to comply with human rights do not enter the picture. The omission to include respective balancing mechanisms to foster the empowerment and free choice of local population impedes the emergence of a proper human rights protection. Hence, one might conclude that there is not only an 'Internal-External Incoherence', as it has been commonly criticized⁵⁴ but also an incoherence between the EU's own obligation and those of others.

To sum up, the previous structure of EU foreign policy only allowed for measures mainly directed at human rights protection under the framework of CFSP and development policy. The inclusion of human rights concerns within the CCP was only possible to a limited extent – justified on the need for coherence or as ancillary to trade. This limited possibility for including comprehensive approaches was problematic as the human rights approach that developed was conceptually too narrow and practically ineffective. The reform of the EU external constitution that lead to the enshrinement of an overall human rights objective governing all policy fields could turn out to be necessary stepping stone for overcoming these shortcomings as the next section proposes.

What does the human rights objective change?

A comparative look at the texts shows that the post-Lisbon external constitution exhibiting all-encompassing general objectives that guide every fields of EU external action mark a clear departure from the previous constitutional architecture of foreign policy objectives and policies. The wording and the contextual status of Art. 21 and Article 3(5) TEU give an entirely new structure to external relation policies on which a fundamentally different human rights approach can be possible or even mandatory. First of all, it is important to stress that the inclusion of human rights as an external objective alone does not provide for a legal basis for broad human rights measures. In that regard, Art. 3(6) TEU makes clear that the objectives referred to in Art. 3(5) TEU shall be pursued 'commensurate with the competences which are conferred upon it in the Treaties.' Nevertheless, that does not impede the EU from protecting and promoting human rights through all the instruments it has at its disposal. Previous legal uncertainties can be overcome by grounding more adequate human rights instruments on Article 21(1) and/or Article 3(5) TEU in conjunction with the specific competence-conferring norm.

The general human rights objective could give a new normative impetus for rethinking the previous approaches and how to overcome its shortcomings. An overarching status of the human rights principle might help to ignite an approach that is detached from historical path dependencies (such as the trade and development nexus as a relic of colonial trade) and not constrained by the necessity of tailoring human rights strategies to prevent legal base disputes. One could argue that, the EU would fall considerably short of using its full legal potential if the previous piece-meal approach with limited foci on development and security is not adapted according to the prescriptions of Article 21 and 3(5) TEU.

In that regard, it is noteworthy that the Council acknowledged the need for adopting the EU Strategic Framework on Human Rights and Democracy as the first unified strategy in order to fulfil the EU's

⁵⁴ For a discussion, see Williams (n 15) 79 et seq.

commitment of Art. 3(5) TEU.⁵⁵ However, Article 21 and 3(5) TEU enable and mandate moving beyond the revision and marginal reforms of traditional answers. As mentioned above, well before the entry into force of Article 21 TEU the EU was aware that human rights protection is a cross-cutting issue and of major importance for trade.⁵⁶ However, the instruments that were adopted as a response, such as the human rights clause,⁵⁷ are not any longer an appropriate means to foster a transnational human rights regime based on the rule of law, as stipulated by the Article 21 objectives.

Furthermore, also questions of hierarchy between the objectives and the delineation of competences will now have to be answered anew. The Courts reasoning in *Daiichi Sankyo* rendered after Lisbon in the context of determining the new scope of CCP is indicative in that regard. The Court states that “in view of that significant development of primary law, the question of the distribution of the competences of the European Union and the Member States must be examined on the basis of the Treaty now in force.”⁵⁸ The Court then concludes, that that pre-Lisbon case law is not the proper material for determining the scope of the new competences.

Since the human rights objective was removed from development cooperation and placed on top of all foreign policy fields, the previous hierarchical order of foreign policy objectives needs to be reconsidered. The different policy fields are mandated to pursue their specific policy objectives, i.e. Article 206 TFEU lists different aspects of trade liberalization⁵⁹ and development cooperation has the ultimate aim of global poverty eradication⁶⁰, while being required to do so within the framework of the overall objective of human rights protection. Hence, a process of balancing is prescribed for each and within each competence field. However, the external constitution does not establish any a priori hierarchy between the objectives. The difference is nevertheless of considerable legal impact. Compare to the previous situation, in which the incorporation of human rights into trade measures was in need of justifications (on grounds of being needed in order not to disturb other policy fields' objectives or for EU trade policy not to become nugatory), the current structures led to – what might be described as – a reverse burden of proof or a reversed need for justification. Human rights protection has to be taken into account, balancing is required and any trade-off needs to be justified. Current policies will have to be re-evaluated in order for them to comply with the new legal conditions.

Furthermore, in contrast to development cooperation which is a complementary competence (Art. 4 (4) TFEU, Art. 209 (2) TFEU), CCP is exclusive, which means that human rights policies can be pursued by an exclusive competence of the EU. This, in turn, may impact on the Member States' external human rights approaches. To give an example, in the context of the EU taking over international investment protection from the Member States as a consequence of foreign direct investment being added to CCP, the EU adopted a so called ‘grandfathering regulation’ to regulate the

⁵⁵ Press release of the Council of the European Union, *EU adopts Strategic Framework on Human Rights and Democracy*, Doc. 11737/12 PRESSE 285, 25 June 2012, accessible via http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131173.pdf.

⁵⁶ Communication from the Commission to the Council and the European Parliament - The European Union's role in promoting human rights and democratisation in third countries COM/2001/0252 final of 8 January 2001, 3.

⁵⁷ Lorand Bartels, Study on The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements, EXPO/B/DROI/2012-09, February 2014, p. 7 with further reference to EU Council, *Reflection Paper on Political Clauses in Agreements with Third Countries*, Doc 7008/09, 27 February 2009 (partially derestricted).

⁵⁸ Case C-414/11 (*Daiichi Sankyo*) [2013], para. 48.

⁵⁹ Article 206 TFEU names the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers as the overall mission of trade policy.

⁶⁰ Article 208(2) TFEU.

transition phase.⁶¹ According to this regulation, Member States can continue to apply their previous investment agreements and negotiate new ones as long as they comply with certain conditions regards the content and the procedures set out in the regulation. Against this background, it is interesting to consider that the Action Plan on Human Rights foresees that:-

⁶¹ EU Regulation 1219/2012 of the EP and the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

'EU Member States [shall] strive to include in new or revised Bilateral Investment Treaties (BITs) that they negotiate in the future with third countries provisions related to the respect and fulfilment of human rights, including provisions on Corporate Social Responsibility, in line with those inserted in agreements negotiated at EU level.'⁶²

Although the exclusive competence only concerns foreign direct investment as part of CCP, it is very likely that the impact of CSR mechanisms designed at EU level will go far beyond FDI strictly speaking and affect other foreign investment or general company law at Member State level. This is an example of the broader scope and impact of human rights policy that spills over across horizontal as well as vertical power divisions due to the exclusive competence it is based on.

Furthermore, the language of the human rights objective changed from mandating the EU 'to contribute' to 'uphold and promote' (cf. Article 3(5) TEU). The verb 'to promote' arguably entails a higher degree of 'proactiveness' than 'to contribute'. 'Uphold' could be understood as shifting the emphasis to the EU's own conduct instead of 'contributing' to the efforts of others. To what extent this emphasis on promotion entails a duty to act, is discussed below.⁶³ At this point, it should be highlighted that the proactive and promotional aspect is not solely linked to development cooperation anymore, but to all other policies. Additionally, the specific mandate to define the EU's own external as well as internal policies in order to consolidate and support human rights (cf. Article 21(2)(b) TEU) can be read as shifting the focus from improving the human rights situation within third countries, to evaluate the EU's own external measures in light of their human rights compliance.

Article 21 TEU further makes clear that human rights policies are not subordinate to the primary objective of a specific policy (e.g. trade liberalization within CCP) in the sense that the inclusion of human right aims should not be impeded by the need to tailor them in order to pass the 'appropriate legal base test' as to prevent legal base disputes.⁶⁴ The Commission, who traditionally enjoyed a stronger position within CCP, previously might have been incentivized to refrain from adopting trade related human rights instruments and thus risking judicial scrutiny, power gambles with the Council and Member State participation.⁶⁵ This assumption of the general objectives having such effect is supported by *C-377/12 Commission v Council (Philippines agreement)*, in which the Court stated that 'European Union policy in the field of development cooperation is not limited to measures directly aimed at the eradication of poverty, but also pursues the objectives referred to in Article 21(2) TEU.'⁶⁶ One could argue that the center of gravity of the aim of a measure does not necessarily have to coincide with aiming for achieving a specific policy objective. As the scope of each external policy field now also covers the general objectives, they could likewise be the legitimate aim of each measure. The specific policy objectives do not lose relevance. Instead the fact that a measure regulates the field described by the specific objectives (which relates to the content of each measure) can be the decisive factor for delineating competences. Also *Kadi* can be read as supporting this argument. The Court stated that for a measure to be based on the CCP competence it '... has to specifically relate to international trade in that it is essentially intended to promote, facilitate *or* govern trade.'⁶⁷ The third

⁶² No. 25 (c) of Council of the European Union, 20 July 2015, Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019, 10897/15.

⁶³ See section 3.2.2.1.

⁶⁴ In order to determine the correct legal base, the ECJ applies a two pronged test. First the scope of the field of competence is determined and second the aim and the content of a measure is analysed as to whether the predominant aim or the 'center of gravity' falls within that scope. Cf. for instance Case 45/86 *Commission v. Council (General System of Preferences)* [1987] ECR 1493, para. 11.

⁶⁵ Larik points out that the Commission and the Council have quarrelled over the appropriateness of a CCP legal base several times in the past. He further suggests that Article 21 TEU will strengthen the position of the Commission, cf. Larik, 'Global Governance through Trade: Constitutional Moorings' (n 24) 62.

⁶⁶ *C-377/12 Commission v Council (Philippines agreement)*, judgment of 11 June 2014, para. 37.

⁶⁷ *Kadi I*, para 183 (emphasis added).

option ('govern trade') would comprise any measure regulating human rights sensitive trade issues which are also essentially directed at governing trade.⁶⁸ Already early case law asserted that while 'the drafters may only had liberalization of trade in mind' that should not be a barrier to develop an EU trade policy that is essentially directed regulating the world market rather than being limited to trade liberalization,⁶⁹ the reform of the foreign policy objectives now clarifies the scope by listing the general objectives which can be pursued besides genuine trade objectives. At the very least, the inclusion of human rights objectives into trade policy is not in need of special justification such as being required to achieve an effective and worthwhile trade policy or to suffice the principle of coherence since the human rights objective is not any longer merely development or CFSP objective. Hence, the risk of exceeding the limits of CCP by directing trade measures at human rights protection – even as a predominant aim – is considerably mitigated. EU trade action does not have to be focused on trade liberalization to fall into CCP exclusive competence.

Furthermore, the overarching human rights objective in conjunction with the emphasis of the principle of coherence serves as a base for establishing the necessary structures to overcome the problems arising from the division of competence and the consequential diversity of actors. The textual analysis above showed that the principle of coherence became a mandate in its own right. That could mean with regard to trade, for instance, that for a meaningful integration of human rights has to be designed in a way that is not negating other human rights efforts and producing synergies.⁷⁰ Such coherence can only be achieved if overarching structures and monitoring bodies are in place. The human rights objective thus empowers the EU to establish such necessary institutional structures for ensuring cross-cutting human rights coherence and align the normative re-orientation. The need to adequately respond to Article 21 TEU by creating the necessary coherence-enhancing structures that already been acknowledged by the HR and the Commission shortly after the Lisbon reforms.⁷¹ While some efforts to implement the latter have been taken, such as the appointment of the European Union Special Representative (EUSR) for Human Rights⁷², as outlined in the previous section, the necessary shift of concepts has yet to happen.

In sum, the human rights objective, while not constituting a legal base in itself, turns in effect every external policy field into a legal base for a comprehensive human rights policy that is not fragmented by horizontal competence divisions and thus ineffective. Human rights can be pursued as an objective of its own by employing any instrument the EU has at its disposal. It further broadens the normative mission of the EU which enables the necessary policy shift from focusing on compelling third countries to comply with human rights to measure own policies against human rights standards.

⁶⁸ To give an example, one could discuss whether the EU would have exclusive competence to accede to a binding treaty on business and human rights as far as it relates to regulating international trade, as it is currently being elaborated by the Open-ended Intergovernmental Working Group for the Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises, as established by UN Human Rights Council on 24 June 2014.

⁶⁹ Opinion 1/78 *Natural Rubber* [1979] ECR 2871, para. 44.

⁷⁰ For a discussion of the principle of coherence, see C Hillion, *Tous pour un, un pour tous! Coherence in the External Relations of the European Union* in M Cremona, *developments in EU External Relations Law* (Oxford: OUP 2008), 14; Marise Cremona, 'Coherence in European Union Foreign Relations Law' in Panos Koutrakos (ed), *European foreign policy: legal and political perspectives* (Edward Elgar 2011) 12.

⁷¹ The Joint Communication to the European Parliament and the Council High Representative of the European Union for Foreign Affairs and Security Policy and Commission 'Human Rights and Democracy at the heart of EU external action — towards a more effective approach COM(2011) 886 final of 12 December 2011, mainly builds on Article 21 TEU.

⁷² Council Decision (CFSP) 2015/260 of 17 February 2015 extending the mandate of the European Union Special Representative for Human Rights; Article 2 refers to the general objectives of EU external action.

Conclusion

This analysis shows how the restructuring of the foreign policy objectives and competences enables the EU to pursue and implement novel and in particular more comprehensive, less fragmented external human rights policies that overcome the alleged shortcomings and ineffectiveness of previous approaches. Especially, shifting the focus away from development policy and conditionality enables the EU to proactively pursue human rights protection in other human rights sensitive areas such as trade and to more adequately take into account its own role as a regulator of global economic structures for existing impediments for human rights improvements in third countries.

The 'must': Responsibility beyond the territorial paradigm

The previous section analyzed the human rights foreign policy objective of Art. 21 and Art. 3(5) TEU in context of the competence division. The following section tries to define the role of the human rights objective in context of the fundamental rights responsibility the EU adopted and constitutionalized. The analytical framework of this section is based on the hypothesis that the human rights objective has to be understood as part of an integral and progressive concept of human rights responsibility and in particular as a reflection of this concept's peculiarities (which are the application to external policies, focus on promotion, focus on policy and law-making and a rather proactive human rights responsibility instead of reactive one) in the context of external action.

First, a comparative analysis of the human rights responsibility, especially its extraterritorial dimension, under international human rights is sketched to reveal the characteristics of the EU's concept of human rights responsibility as it appears from the Charter. Secondly, the international human rights obligations that are directly applicable to the EU are briefly outlined. The third part describes the concept of human rights responsibility endorsed by the Charter. The fourth part aims to give shape to the meaning of the human rights objective as part of the specific concept of human rights responsibility of the EU and in particular as a clarification of its application to external policy making which in turn should allow to derive the legal obligations.

Responsibility concepts under international human rights law

To understand how the EU's concept of human rights responsibility departed from conventional categories and to grasp the significance of such departure, this section will outline how state responsibility is conceptualized by the key international human rights instruments and corresponding jurisprudence and thus demonstrate why 'extraterritorial obligations' could evolve into a separate and much contested category.

The main 'limitations' that the EU concept overcomes are those arising from the discourse being framed in categories determined by the territorial/extraterritorial divide. Although strategies to transcend this dichotomy have been developed within the discourse, the former nevertheless remains the starting point and as such requires justification for every divergence. The following section focuses on identifying the international common ground on the linkage between territory and state responsibility.

First of all, under international human rights law, state responsibility hinges on whether the violation of a human rights norm occurred within a state's jurisdiction. This concept of jurisdiction has to be distinguished from the understanding of jurisdiction under public international law. Human rights are applicable independently of whether a state is legitimately competent to act under public international

law according to the principle of non-intervention and state sovereignty.⁷³ Hence, human rights jurisdiction is accepted also in the case of, for instance, illegal invasion,⁷⁴ occupation⁷⁵ and any other exercise of public authority on a third state's territory without consent, UN mandate or any other justification under international law. Despite this distinction, human rights jurisdiction remained somehow linked to territory and 'extraterritorial obligations' have long been very controversial as the subsequent brief survey shows.

The jurisdiction, or the applicability of a concrete human right, depends on the criteria established by the specific convention or the specific provision in question. Nevertheless, also in the absence of any explicit jurisdictional requirements or a rather broad and general wording in the treaties' texts, subsequent jurisprudence and an abundance of legal scholarship treated the 'jurisdiction linkage' as the major threshold for state responsibility. The first of all human rights conventions and the one that is most referred to in EU agreements, the Universal Declaration of Human Rights (UDHR)⁷⁶ does not contain any clause limiting its jurisdiction to any criteria. This might be explained by the fact that the UDHR was adopted as a non-binding political declaration, which revolutionary significance lay in its content, namely being the first attempt to formulate and define a set of rights, which were seen as inherent in every human being. Its purpose was thus rather to find globally accepted definitions - against the background of two World Wars and a politically bipolar world that was drifting apart by the Cold War - than to create an enforcement tool. The question of how to attribute responsibility followed in the next step, when these definitions were to be turned operative by specified treaties and enforcement mechanisms: The International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and further 9 core UN human rights treaties as well as regional human rights instruments. In essence, these different human rights treaties conceptualized human rights application along similar lines, which this section will show by summing up the conceptualization of jurisdiction under the key UN human rights treaties and under the ECHR.

Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) stipulates that it is applicable 'within a state's territory and subjects to its jurisdiction'. The Human Rights Committee reads the 'and' as linking alternatives and not cumulative requirements and assumes applicability whenever a state exercises effective control even if outside its territory.⁷⁷ The International Covenant of Economic, Social and Cultural Rights (ICESCR) only links its complaint mechanism to the contracting state's jurisdiction.⁷⁸ The scope of state responsibility, on the contrary, is not expressly limited by any provision of the convention. Furthermore, the ICESCR explicitly spells out the need to international cooperation and assistance.⁷⁹ Despite the absence of any textual limitation to its applications, it is common ground that beyond a state's territory some kind of special linkage between

⁷³ For a more detailed discussion, see Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in Malcolm Langford and others (eds), *Global justice, state duties: the extraterritorial scope of economic, social, and cultural rights in international law* (Cambridge University Press 2013) 163.

⁷⁴ In the case on Iraq's invasion of Kuwait, for example, the Human Rights Committee made it clear that Iraq's human rights obligations expand over the territory of Kuwait despite Iraq's presence there being illegal, HRC, *Fifteenth Annual Report of the Human Rights Committee* (1991) UN Doc. A/46/40, at 652 (1991).

⁷⁵ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, ICJ Reports 2004 (Advisory Opinion), 106; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, ICJ Reports 1996 (Advisory Opinion), 25; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, ICJ Reports 2005, 216. Nevertheless, the precise scope of protection remains debatable as well as whether and in what circumstances international humanitarian law prevails.

⁷⁶ Universal Declaration of Human Rights, UN General Assembly Res 217A, UN Doc A/810 at 71 (1948)

⁷⁷ Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) para 10.

⁷⁸ Article 2 of the Optional Protocol to the ICESCR.

⁷⁹ E.g., Article 2(1) and 11(1) ICESCR.

a state and the person who is deprived of its ESC rights must exist.⁸⁰ Within a state's territory this linkage is taken as a given. For ESC rights infringements that occur extraterritorial, in contrast, establishing legal responsibility is still a rather untested field.⁸¹ In order to provide guidelines on what constitutes a reasonable link between a state and any person outside its territory, a group of international law and human rights experts developed the Maastricht-Principles⁸² based on the general principles that emerged in the case law on civil and political rights and scholarly opinion.⁸³ Principle 9 lays down three scenarios in which the obligations of the ICESCR apply, namely (1) when a state holds effective control over persons or over territory, (2) when the effects of an act are sufficiently foreseeable or (3) when the state is in a position to exercise decisive influence in accordance with international law. All of these requirements apply likewise within and outside a state's territory, whereas they are obviously presumed within a state's territory.

The Convention against Torture (CAT)⁸⁴ also does not contain an expressed territorial limitation except for provisions relating to the enactment and enforcement of legislation. According to the CAT Committee, a state is responsible for violations of the convention in all cases in which the state holds 'de jure or de facto control over a person'.⁸⁵ Similarly, there is no provision in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) that stipulates a territorial linkage as a condition for applicability. The CEDAW Committee applies literally the same interpretation as the Human Rights Committee by stating that the CEDAW obligations apply 'within their territory or in cases of effective control, even if not situated within the territory'.⁸⁶ The ICJ similarly interprets the Convention on Elimination of Racial Discrimination (CERD) as applying to situations falling into these two categories: 'territory or under [a state's] control or influence'⁸⁷ – although only two provisions explicitly mention jurisdiction⁸⁸ in addition to the individual complaint mechanism⁸⁹.

The Convention on the Rights of the Child (CRC) clarifies that the rights of the convention apply within a state's jurisdiction.⁹⁰ According to the Committee on the CRC, legal responsibility can also apply extraterritorial provided that a reasonable link exists, which would, for example, be the case

⁸⁰ Fons Coomans and Rolf Künnemann, *Cases and Concepts on Extraterritorial Human Rights Obligations in the Area of Economic, Social and Cultural Rights* (Intersentia; Hart, 2012).

⁸¹ Malcolm Langford and others, 'Introduction - An Emerging Field' in Malcolm Langford and others (eds), *Global justice, state duties: the extraterritorial scope of economic, social, and cultural rights in international law* 8.

⁸² The Maastricht Principles are themselves not legally binding on States but aim to describe the status quo of applicable human rights law. Further, according to Article 38 1(d) Statute of the International Court of Justice, the scholarly works of prominent jurists is a subsidiary means for legal interpretation; cf. Maastricht Principles on Extraterritorial Obligations in the area of Economic, Social and Cultural Rights (2011) are accessible via www.maastrichtuniversity.nl/web/show/id=596286/langid=42.

⁸³ Margot E Salomon and Ian Seiderman, 'Human Rights Norms for a Globalized World: The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 3 *Global Policy* 458.

⁸⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984

entry into force 26 June 1987.

⁸⁵ CAT, General Comment No 2, CAT/C/GC/2/CRP.1/Rev.4 (2007) para 16.

⁸⁶ General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of CEDAW, CEDAW/C/2010/47/GC.2 (2010) para 12.

⁸⁷ ICJ, Application of the CERD (Georgia v Russian Federation), Provisional Measures, Order of 15 October 2008, ICJ Reports 2008 353, para 149(4).

⁸⁸ Article 3 and 6 CERD.

⁸⁹ Article 14 CERD.

⁹⁰ Article 2(1) CRC.

‘when a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned.’⁹¹

Art. 1 of the ECHR expressly limits the scope of right holders to persons ‘under the jurisdiction’ of the Contracting States. The European Court’s of Human Rights (ECtHR) take on the meaning of Article 1 changed considerably over time and especially after the much criticized *Bankovic* decision which makes it difficult to infer a consistent and generally applicable methodology.⁹² Nevertheless, it is worth looking at it in some more detail since the ECHR jurisprudence is one of the main sources for EU fundamental rights interpretation (Art. 52(3) Charter, Art. 6(3) TEU) and can in general be considered as the most elaborated jurisprudence and as such a powerful voice in the global human rights development. In the *Bankovic* decision, the Court declared a complaint by the survivors and the surviving dependants of the deceased victims of a NATO bombing in Belgrade inadmissible on grounds of lack of jurisdiction. The Court held that the NATO Member States did not have jurisdiction as they were not exercising effective control over that territory at that time in the sense of ‘exercising all or some of the public powers normally to be exercised by that Government’.⁹³

This reasoning seems to exclude any ad hoc state action such as extraterritorial isolated killings⁹⁴ as well as detention and abduction⁹⁵ which the Court nevertheless previously found to be admissible. Later, in the *Al Skeini* judgment⁹⁶ the Court departed from its high threshold for effective control and its ‘essentially regional’⁹⁷ application as advocated in *Bankovic*. It acknowledged that the mere execution of force, *in casu* the killing of six Iraqis by British soldiers, constitutes an act of public authority and as such suffice for establishing a ‘jurisdictional link’. Subsequently, *Ilascu and Others v. Moldova and Russia*, it also abandoned its previous all-or-nothing application of human rights, by admitting that the scope of protection should be adjusted depending on the specific circumstances.⁹⁸

The development this case law underwent was described as a shift away from the effective control doctrine.⁹⁹ Desired as this might be, the much criticized inconsistencies within the reasoning are evidence of the constrains the Court still sees itself confronted with due to its (sometimes more implicit) adherence to an *a priori* geographical application of the ECHR. This conventional territorial thinking also came apparent in the *Ben El Mahi*¹⁰⁰ case, which is a rare example of a genuine internal act with external effects being challenged. In this case Mr. Ben El Mahi, residing in Morocco, filed a complaint against Denmark in the context of the caricaturist publications of the Prophet Muhammad in the Danish newspaper *Jyllands-Posten*. The publications, one of them showing Muhammed with a

⁹¹ E.g. CRC General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights, 17 April 2013, CRC/C/GC/16, section V.C. on children’s rights and global operations of business

⁹² *Bankovic and Others v. Belgium and 16 Other Contracting States*, App no 52207/99 (ECtHR [GC], Admissibility 12 December 2001), para 58; For the criticism, see Matthew Happold, ‘Bankovic v. Belgium and the Territorial Scope of the European Convention on Human Rights’ (2003) 3 Human Rights Law Review 77; Rick Lawson, ‘Life after Bankovic: On The Extraterritorial Application of the European Convention on Human Rights’ in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004); Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009), 169 - 179.

⁹³ *Bankovi’c and Others v. Belgium and 16 Other Contracting States*, App no 52207/99 (ECtHR [GC], Admissibility 12 December 2001), para 71.

⁹⁴ See generally ECtHR, *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004.

⁹⁵ See generally ECtHR, *Öcalan v Turkey*, no. 46221/99, ECHR 2005-IV.

⁹⁶ *Al-Skeini v United Kingdom* App, no 55721/07, ECtHR, 7 July 2011, para 153.

⁹⁷ *Bankovi’c and Others v. Belgium and 16 Other Contracting States*, App no 52207/99, ECtHR, Admissibility 12 December 2001, para 81.

⁹⁸ ECtHR, *Ilascu and Others v. Moldova and Russia*, no. 48787/99, ECHR2004-VII, para 333.

⁹⁹ Heijer and Lawson (n 73) 178.

¹⁰⁰ ECtHR, *Ben El Mahi v. Denmark* (dec.), no. 5853/06, ECHR 2006-XV.

bomb in his turban, were considered offensive to religious sensibilities and Demark to be in breach of the Convention by refraining from initiating criminal proceedings despite an intense outrage by the Muslim world. The ECtHR did not see any jurisdictional link and denied admissibility. Again, a strong emphasis was put on the requirement of effective control which the Court apparently only accepts in cases similar to its exemplary enumeration, i.e. occupation, military mission or when a person is found to be 'under a State's authority and control through its agents'.¹⁰¹

The shift away from the effective-control paradigm is thus only clearly traceable in cases in which the exertion of power occurred through the use of force which according to the Court suffices to bring the affected individual under the state's 'effective control'.¹⁰² Searching for consistency in the case law, it was suggested, that some kind of prerequisite (in the sense of an additional relationship) still plays a role for the ECtHR besides a mere factual connection which in cases of direct ad hoc exertion of power can be sufficed by a certain degree of control.¹⁰³

Summing up the survey of concepts of application across the different human rights instruments, some common traits become apparent. The applicability of all of the key human rights instruments is triggered either by territoriality or by (effective) control or influence – and in fact, irrespective of whether they contain an expressed provision on jurisdiction or not. Effective control thereby commonly includes control over territory or control over persons or property.¹⁰⁴ Furthermore, it is worth noting that effective control scenarios are treated as an exception to human rights jurisdiction linked to territory. As an exemption, it requires additional justification and thus practically shifts the burden of proof. In addition, one should be aware that also effective control is first of all understood as a territorial concept ('effective control of an area'¹⁰⁵) and that effective control solely over individual persons was accepted in cases of use of force and direct impact. For other cases than direct and isolated use of force, human rights applicability is even more difficult to justify. Hence, despite progressive interpretation by the UN Committees, which are non-binding, and by scholars, the territorial dichotomy dictates the structure of thinking about international human rights obligations.

International human rights obligations of the EU

The following section deals with the questions to what extent the aforementioned interpretations directly apply to the EU. This section will briefly summarize to what extent the EU is bound by international human rights obligations, on one hand in terms of international law and on the other in terms of EU law.

The latter would be the case, when the EU is party to an international human rights treaty which in turn would then form an integral part of the EU legal order according to Art. 216(2) TFEU and enjoy primacy over inconsistent secondary EU law.¹⁰⁶ Therefore, every international agreement the EU is a party to creates legal obligations under international law as well as under EU law. The only human rights treaty the EU has as of yet ratified is the UN Disability Convention of which the EU was a major driving force.¹⁰⁷ Furthermore, as foreseen in Art. 6(2) TEU the EU will potentially become a member to the ECHR. Although in light of Opinion 2/13 in which the Court pointed to numerous

¹⁰¹ ECtHR, *Ben El Mahi v. Denmark* (dec.), no. 5853/06, ECHR 2006-XV.

¹⁰² e.g. ECtHR, *Pad and Others v. Turkey* (dec.), no. 60167/00, ECHR 2007-VI, at paras 54–5.

¹⁰³ Heijer and Lawson (n 73) 180.

¹⁰⁴ Ibid 165.

¹⁰⁵ ECtHR, *Ben El Mahi v. Denmark* (dec.), no. 5853/06, ECHR 2006-XV.

¹⁰⁶ Case C-61/94, *Commission v. Germany* [1996] ECR-I 3989, para. 52; Joined Cases C-402/05P and C-415/05P *Kadi*, para 285.

¹⁰⁷ Gráinne de Búrca, 'The EU in the Negotiation of the UN Disability Convention' (2010) 35 *European Law Review* 174.

incompatibilities between the draft accession agreement and EU law, this process is not likely to be completed in the near future.¹⁰⁸

The EU could also be considered party to a human rights treaty by way of functional succession into the human rights obligations of the Member States. The ECJ previously accepted a functional succession in case of the General Agreement on Tariffs and Trade (GATT) because the Member States conferred all their trade powers to the EU and along with it their obligations.¹⁰⁹ Therefore, it was debated whether the EU also functionally succeeded into the human rights treaties ratified by the Member States and especially also into the UN Charter, either in full or to such an extent as the EU gained competence.¹¹⁰ However, in the *ATAA* case, the Court made clear that the Union only functionally succeeds in an international agreement of the Member States, when a full transfer of powers that fall under the agreement in question has taken place, meaning that the EU acquired exclusive competence in the field covered by that agreement.¹¹¹ Since the EU does not hold an exclusive external human rights competence¹¹² and a partial succession was ruled out, it is difficult to uphold the functional succession argument.¹¹³

At any rate, as an international organization and by virtue of its international legal personality (Art. 47 TEU) the EU is bound by customary international law. As a matter of EU law, Art. 21 and 3(5) TEU stress the EU's commitment to strict observance of international law including customary international law which turns its international obligations into EU law.¹¹⁴

What kind of human rights precisely form part of the international customary repertory is debated and in the flux. It has been suggested that most if not all rights enshrined in the UDHR are increasingly accepted as international customary law.¹¹⁵ Furthermore, one could argue that the EU understand the 27 core human, labor and environmental rights conventions to which it links the GSP+ system international customary law.¹¹⁶ This was at least the Commission's rationale when proposing the first

¹⁰⁸ For a comprehensive discussion, see the debate on [www.verfassungsblog.de](http://www.verfassungsblog.de/category/schwerpunkte/die-eu-als-mitglied-der-menschenrechts-konvention/): <http://www.verfassungsblog.de/category/schwerpunkte/die-eu-als-mitglied-der-menschenrechts-konvention/>

¹⁰⁹ Joined Cases 21-24/72 *International Fruit* [1972] ECR 1219, paras 14 – 15.

¹¹⁰ The General Court discussed in *Kadi* whether the EU succeeded into the UN Charter obligations of the MS in so far as the EU assumed the powers of the Member States and hence accepted a gradual approach of succession; General Court Case T-315/01, *Kadi* [2005] ECR II-3649, para. 203; Case T-306/01, *Yusuf* [2005] ECR II-3533, para. 253. However, this was left open by the ECJ in CJEU Joined Cases C-402/05 P and C-415/05 P, *Kadi* [2008] ECR I-6351, para. 308. For an overview of the debate on functional succession in general, see Robert Schütze, 'The "Succession Doctrine" and the European Union', *Foreign Affairs and the EU Constitution* (Cambridge University Press 2014).

¹¹¹ C-366/10 *ATAA* [2011] ECR I-13755, para 63. Critical of this high threshold, Jan Wouters et al., 'Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law', in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law* (Oxford: Hart Publishing, 2014), 255.

¹¹² Art. 3 (6) TEU as well as Art. 6(1) TEU and Art. 51(2) of the EU Charter illustrate that the linkage to human rights shall not extend the scope of competences beyond those explicitly conferred upon the EU by the Treaties.

¹¹³ Against functional succession into MS human rights treaties: Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2014) 25 *European Journal of International Law* 1071, 1079; In favour: Israel de Jesús Butler, 'The European Union and International Human Rights Law' (2011) Study for the UN High Commissioner for Human Rights 24.

¹¹⁴ In *Kadi*, the Court made clear that the Union generally must respect international law, see CJEU Joined Cases C-402/05 P and C-415/05 P, *Kadi* [2008] ECR I-6351, para. 291; In *ATAA*, the Court stressed the EU's obligation to adhere to international customary law, C-366/10 *ATAA* [2011] ECR I-13755 para. 101.

¹¹⁵ Olivier De Schutter, *International Human Rights Law* (Second Edition, Cambridge University Press 2014) 63. Oliver de Schutter and Margot Salomon also explicitly understand the EU as being bound to the UDHR, Oliver de Schutter and Margot Salomon, Legal Brief Prepared For The Special Committee Of The Hellenic Parliament On The Audit Of The Greek Debt (Debt Truth Committee), 15 June 2015, Economic Policy Conditionality, Socio-Economic Rights and International Legal Responsibility, The Case of Greece 2010 – 2015, 12.

¹¹⁶ Regulation (EU) No 978/2012 of the EP and the Council 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008.

16 of those core human rights conventions.¹¹⁷ The scope of this paper does not allow for an attempt to disentangle this controversial issue or to draw up a possible catalogue of customary human rights norms. For this paper's purpose, it suffices to state that the EU is certainly bound by the most fundamental human rights and *jus cogens* norms.

Additionally under EU law, the EU is obliged to not obstruct the MS in fulfilling their international obligations as long as they are compatible with EU law.¹¹⁸ Therefore, even those human rights that do not directly bind the EU through *de jure* or *de facto* accession or form not part of international customary law, nevertheless do oblige the EU to enable the MS to realize their human rights obligations.

All of these considerations made above indicate that EU fundamental rights and any EU law reference to human rights has to be interpreted (both under EU and international law) as to give widest possible effect to the human rights the EU is by itself bound to (either by treaty accession or by international customary law) and to those human rights conventions the Member States are a party to. At the very least, the interpretation of the respective EU norms should not fall behind the standard established by those human rights norms.

Extraterritorial obligation under the EU Charter of Fundamental Rights

As previously suggested, the meaning of the human rights objective in Art. 3(5) and 21 TEU becomes clearer when it is seen as part of an integral legal regime of human and fundamental rights protection of the EU. Another cornerstone of this regime is the EU Charter of Fundamental Rights. This section builds on the argument brought forward by Moreno-Lax and Costello, the only in depth commentary dedicated to the extraterritorial application of the EU Charter.¹¹⁹ Moreno-Lax and Costello convincingly argue that the EU Charter abandons some of the limitations of international human rights protection by deploying an autonomous concept of human rights responsibility.¹²⁰ Rehearsing and broadening Moreno-Lax and Costello's argument, this section's discussion brings in further aspects that substantiate the claim that the fundamental rights protection endorsed by the Charter is a concept that goes beyond the dogmatics of the international human rights regime while accommodating the specificities of the EU constitutional framework and constituting a continuation of the EU's mode of global governance. The human rights objective of Art 3(5) and 21 TEU can then be understood as a re-emphasis of this concept and a reassurance of its external application and its application to the policy making state (in contrast to the effective control doctrine).

Against the background of the common traits of international human rights law identified in the previous section, the following part will demonstrate by textual analyses and a brief survey of the case law in what way the EU Charter is establishing an autonomous concept of application that breaks with the territorial paradigm.

¹¹⁷ Proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period from 1 January 2006 to 31 December 2008, 4.

¹¹⁸ The ECJ confirmed the EU's duty to not impede with the international obligations of the Member States as a matter of EU law in Case 812/79, *Attorney General v Burgoa* [1980] ECR 2787, para 9. Besides also the principle of sincere cooperation places obligations on the EU, including in field of exclusive competence, cf. Christophe Hillion, *Mixity And Coherence in EU External Relations: The Significance of the Duty of Cooperation* CLEER Working Paper 2009/1, 27.

¹¹⁹ Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: a commentary* (Hart Publishing 2014).

¹²⁰ *Ibid.*

Scope of Article 51(1) of the EU Charter

First of all, there is no jurisdictional clause enshrined in the Charter which could signal any territorial linkage as the basic premise for applicability. Instead, Article 51(1) of the Charter links the application solely to the addressees of the obligations, i.e. all EU organs and the Member States “when they are implementing Union law”. Furthermore, there is not textual indication that a distinction will have to be made between internal and external competences.

For EU organs (including EU institutions, bodies, offices and agencies) this provision essentially means that they are always bound to the Charter since they are themselves a creation of EU Law. The discussion on the precise scope of the requirement of “implementing Union Law” only affects the Member States. This part of the application question turned into one of the most sensitive – at least from a Member States’ perspective – and most rigorously debated issues of the Charter.¹²¹ The Court finally made clear that it upholds the categorization it developed in context of fundamental rights as general principles.¹²² In essence, the ECJ sees the Charter and its jurisdiction to be applicable not only when Member States primarily and directly give effect to EU law. Instead, the national measure in question must only somehow be linked to a subject matter governed by EU Law, aside from the Charter (e.g. a partly connection to the interests of the EU sufficed in the seminal *Fransson* case). Nevertheless, the precise requirements for such a link will still need to be outlined by subsequent case-law.¹²³ Furthermore, it is still unclear how ‘scope of Union Law’ will be defined in the context of mixed agreements and their implementation.

In contrast to the lively debate about the application of the Charter to Member State action, there is only scarce academic inquiry into extraterritorial application.¹²⁴ Moreno-Lax and Costello, who advocate an understanding the application of the EU Charter as adopting an autonomous paradigm, aptly assert that the jurisdictional limitations of other human rights instruments and in particular of the ECHR are not a constraint because of Art. 52(3) of the Charter which clearly allows for more extensive protection.¹²⁵ The rights of the ECHR and the appertaining case-law are only determinative for the interpretation of the Charter provisions that correspond to those of the ECHR in order to not fall behind the substantive scope of protection guaranteed by the ECHR.¹²⁶ In so far as the Charter does not correspond to the ECHR, the Explanation to Article 52 as well as the ECJ put a strong emphasis on autonomous concepts of the EU legal order which have to be protected and which allow for legitimate divergences from the ECHR (provided that the level of protection is not undermined).¹²⁷ It follows that whereas the ECtHR jurisprudence informs the substantive scope of certain rights, the applicability of the Charter remains unaffected. For the latter the Union applies its own concept that constitutes a legitimate divergence since the protection is more extensive.

¹²¹ For a detailed discussion on the debate, see Nicole Lazzarini, ‘The Scope of the Protection of Fundamental Rights under the EU Charter’ (European University Institute 2013) 193 et. seq.

¹²² Case C-617/10 *Åkerberg Fransson* (Grand Chamber, Judgment 26 February 2013) paras 19 et. seq.

¹²³ Angela Ward, Article 51, in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1433 et. seq.

¹²⁴ Explicitly dealing with the extraterritorial application of the Charter are Jan Wouters, ‘The EU Charter of Fundamental Rights - Some Reflections on Its External Dimension’ (2001) 8 *Maastricht Journal of European and Comparative Law* 3; Moreno-Lax and Costello (n 119).

¹²⁵ Moreno-Lax and Costello (n 119) 1660.

¹²⁶ Cf. explanation to Article 52 that also lists the Charter rights that have the same meaning as ECHR rights and to what extent until that point in time.

¹²⁷ Steve Peers and Sascha Prechal, Article 52, in Peers and others (n 123) 1496 et seq.

Furthermore, some limitations of application are instead incorporated in the respective provision itself. For instance, several rights only apply for EU citizens and EU residents.¹²⁸ Other articles restrict the *ratione materiae* from the outset.¹²⁹ The Charter thus seems to apply what in the human rights discourse was termed a 'gradual application' by providing some flexibilities and nuances of application within the scope of protection of each right.¹³⁰ The fact, that there is a distinction made between Union citizen rights, EU residents and rights that apply to everyone supports the presumption that no limitations on applicability on a general level was intended. On the other hand, distinctions between rights that apply for nationals and for everyone are also known in nation state constitutions which are nevertheless conventionally understood as being primarily linked to territory.¹³¹

However, for nation states territory is a constituent element for their existence and the genuine source of power. Territory is key for establishing a state's jurisdiction. For the EU as a supranational organization this is not the case. Hence, as Moreno-Lax and Costello demonstrate, EU Law in general rarely deploys territorial concepts.¹³² Instead, as Moreno-Lax and Costello rightly point out, EU Law is structured along the lines of competence.¹³³ This language of competence likewise permeates the Charter and the EU's human rights responsibility as a whole.

This is not to say that extraterritoriality will not matter for the EU's fundamental rights responsibility. Instead, extraterritoriality might lead to adjustment of the scope of the right in question. Nevertheless, if one applies the "minimum core" approach, which the Fundamental Right Agency (FRA) endorses¹³⁴ and according to the ECJ case law on protecting the 'essence' of fundamental rights¹³⁵, such adjustment also has certain limits. Inviolable and non-derogable rights set further limitations to fundamental rights restrictions, leaving at this point aside which Charter rights could fall under these categories.¹³⁶

Another novel aspect is the focus on 'promotion'. Art. 51 of the Charter also mandates the Union and the Member States to promote the application of the Charter. The scope of obligations, if any, flowing from that mandate to promote is not yet defined by case law and there remains ample room for scholarly analysis. Nicole Lazzarini argues, that at the very least, the mandate to promote entails a prohibition of regression.¹³⁷ It would clearly be at odds with such an expressed commitment to promote to enact legislation that leads to the decrease of human rights standards internally as well as

¹²⁸ For instance, Article 42, 43, 44 EU Charter apply to EU Citizens and residents, Article 45 and 46 EU Charter only apply to EU Citizens, Article 47 – 50 apply to everyone.

¹²⁹ For instance, some rights Art. 35 (health care) is subject to the conditions established by national laws and practices. Or the distinction concerning justiciability between rights and principles, cf. Art 52(5) Charter.

¹³⁰ In contrast, to the 'all or nothing' approach, see section 3.2.2.

¹³¹ Cf. the Basic Rights in the German Constitution that only apply to German citizens and by interpretation to EU citizens, Art. 8, Art. 9, Art. 11, Art. 12 of the Basic Law (so called "Deutschengrundrechte").

¹³² Moreno-Lax and Costello (n 119) 1663 et seq.; Moreno-lax and Costello also argue that EU competence is sometimes construed very broadly (particular in the fields of commercial sanctions and climate change) encroaching on the principle of interference and the sovereignty of third states based on the principle of effectiveness under EU law. This in turn means that also fundamental rights applicability might expand over the limits of jurisdiction. From my point of view this argumentation cannot be easily generalized (both fields being very specific fields) and is furthermore superfluous for justifying human rights applicability. As discussed above (see section 3.2.2), human rights application even according to the conventional human rights doctrine is not limited by the boundaries of jurisdiction under international law.)

¹³³ Moreno-Lax and Costello (n 119).

¹³⁴ Cf. FRA on Fundamental rights of migrants in an irregular situation in the European Union, http://fra.europa.eu/sites/default/files/fra_uploads/1827-FRA_2011_Migrants_in_an_irregular_situation_EN.pdf, November 2011.

¹³⁵ E.g. Case C-292/97 *Karlsson* [2000] ECR I-2737, para 45, to which the Explanation to Article 52 refers.

¹³⁶ For discussion of the latter, see Steve Peers and Sascha Prechal, in Peers and others (n 123) 1469 et. seq.

¹³⁷ Lazzarini (n 121) 149.

externally.¹³⁸ Steve Peers draws on the Court's reasoning in the context of promotion of gender equality¹³⁹ according to which the obligation to promote may not place a duty of immediate action on the EU legislator, but whenever legislation is enacted (the timing then being subject to its discretion), a duty applies to do so in a coherent manner that is contributing to the achievement of the pursued objectives.¹⁴⁰ Jan Wouters points out that Art. 2(2) on the prohibition of the death penalty supports understanding the Charter as a base for outwards directed promotion of the rights enshrined therein since all of the Member States have abolished the death penalty and committed themselves to do so in international conventions.¹⁴¹

The extension of human rights responsibility to include its global promotion fits squarely into the EU's self-portrayal and mode of exerting influence on the international scene as global regulator, promoter of norms and developer of international law.¹⁴² By constitutionalizing its external policy agenda with regard to human rights promotion, and by doing so increasing the possibility of public scrutiny as well political and judicial accountability, the EU enhances its credibility and thus fosters its role as a global promoter of the rule-of-law.

Conclusively, the Charter embraces a concept of human rights responsibility that is based on competence not territory, includes a duty to promotion and encompasses all internal as well as external policy fields while stressing the need for consistency between policy fields and competences.

Case law on extraterritorial application of the EU Charter

A few cases serve to shed some light on the territorial dimension or rather on the absence of any territorial thinking by the Courts when applying the EU Charter.

In the *Pringle* case, in which the validity of the establishment of the European Stability Mechanism (ESM) by the Member States was challenged, the Court found the Charter to be inapplicable because the Treaties do not confer any competence to establish such a mechanism which makes the Member States' action fall outside of the scope of EU law.¹⁴³ This reasoning further supports that the crux of the matter (*in casu* in the reverse) is not whether a situation is located inside EU territory but only whether it is covered by the competence of the EU.

It is also worth mentioning the restrictive measures line of cases in which the Court repeatedly stressed that the EU Charter applies to all policy fields including CFSP.¹⁴⁴

The *Mugraby* case¹⁴⁵ is an interesting example of on one hand a possible substantial link between human rights clauses in an EU agreement and the EU Charter and on the other of the general acceptance of the EU Charter's applicability outside the EU's territory. In *Mugraby*, a Lebanese applicant claimed the failure of the EU to adopt appropriate measures, specifically to suspend aid programs, to be in violation of the human rights clause in the EU-Lebanon association agreement in

¹³⁸ *ibid* 152.

¹³⁹ Art. 19(1) and 8 TFEU, Art. 3(3) TEU.

¹⁴⁰ Steve Peers, 'The Rebirth of the EU's Charter of Fundamental Rights' [2010] Cambridge Yearbook of European Legal Studies 286, 306.

¹⁴¹ Wouters (n 120) 5.

¹⁴² For a discussion of the EU's mode of global governance as a rule-maker, see Joris Larik, 'Shaping the International Order as a Union Objective and the Dynamic Internationalisation of Constitutional Law' (Centre for the Law of EU External Relations 2011) Working Paper.

¹⁴³ Case C-370/12, *Thomas Pringle*, judgment of 27 November 2012 (Full Court), para. 105. Note, that AG Kokott assumes that the EU institutions even when acting outside the framework of EU law are nevertheless bound by the Charter, para. 176.

¹⁴⁴ E.g. Case C-130/10 *Parliament v Council (Al Qaeda)* [2012] ECR-nyr, para. 83; C-595/10 P *Kadi II* [2013].

¹⁴⁵ Case T-292/09 *Mugraby* [2011], ECR II-255; Case C-581/11 P *Mugraby* [2012] ECR I-nyr.

light of Lebanon's fundamental rights violations. Although the claim failed on many grounds, the fact that the alleged fundamental rights violations occurred extraterritorial was not discussed as a threshold. The Court did not generally rule out that an essential element clause can be the base for a failure to act claim by stating that 'that it follows from Article 17(1) TEU that the Commission, as guardian of the EU and FEU Treaties and of the agreements concluded under them, must ensure the correct implementation by a third State of the obligations which it has assumed under an agreement concluded with the European Union, using the means provided for by that agreement or by the decisions taken pursuant thereto'.¹⁴⁶ In the agreement at stake, however, the wording of the agreements as well as of the underlying regulation clearly indicated a non-obligatory nature. Further the Court, did not generally rule out that non-EU national can in principle invoke the right to effective judicial protection in the context of an extraterritorial human rights violation by stressing that 'this is a general principle of European Union law to which expression is now given by Article 47 of the Charter of Fundamental Rights of the European Union'.¹⁴⁷

The recent Case T-512/12 *Frente Polisario v Council* of 10 December 2015, in which the General Court annulled the Council's decision to conclude a trade agreement with Morocco that would have impacted on the territory and thus the well-being of the inhabitants of Western Sahara controlled by Morocco is worth mentioning in many regards.¹⁴⁸ First of all, the General Court makes an interesting argument as to the circumstances that trigger certain duties. The fact that an EU trade agreement may 'indirectly encourage' the violations of fundamental rights or that the EU 'benefits from them' triggers a duty to adapt preventive human rights protection measures (*in casu* conducting a proper assessment of the specific elements of the agreement and its impacts).¹⁴⁹ Secondly, the Court emphasizes the procedural duty of the Council to conduct a careful, impartial and individual impact assessment.¹⁵⁰ Establishing procedural duties renders extraterritorial human rights obligations justiciable and it shifts the burden of proof to the EU institutions. Thirdly, the application of the EU Charter to the people living in the Sahrawian territory is accepted without discussion. Moreover, the General Court lists a full catalogue of Charter rights which could potentially be infringed.¹⁵¹

Of particular interest to this paper's focus is the linkage the Court draws between Article 21 TEU and the Charter. The General Court repeats the principle that the institutions enjoy a wide margin of discretion within external relations with regard to Article 21 TEU and that the Court is limited to

¹⁴⁶ Case C-581/11 P *Mugraby* [2012] ECR I-nyr, para. 68.

¹⁴⁷ *Ibid*, para. 81.

¹⁴⁸ Case T-512/12 *Frente Polisario v Council* [2015], ECR I-nyp; For a discussion of the case, see Blogpost on Trade Agreements, EU Law, and Occupied Territories (2): The General Court Judgment in *Frente Polisario v Council* and the Protection of Fundamental Rights Abroad by Geraldo Vidigal, accessible via <http://www.ejiltalk.org/13901-2/>; Blogpost on The E.U. Must Consider Threats to Fundamental Rights of Non-EU Nationals by its Potential Trading Partners by Eyal Benvenisti, accessible via

<http://globaltrust.tau.ac.il/the-e-u-must-consider-threats-to-fundamental-rights-of-non-eu-nationals-by-its-potential-trading-partners/>.

¹⁴⁹ "[...]Jelle risque d'encourager indirectement de telles violations ou d'en profiter.", Case T-512/12 *Frente Polisario v Council*, para. 231.

¹⁵⁰ *Ibid*. para. 225.

¹⁵¹ "En particulier, s'agissant d'un accord tendant à faciliter, notamment, l'exportation vers l'Union de divers produits en provenance du territoire en question, le Conseil doit examiner, avec soin et impartialité, tous les éléments pertinents afin de s'assurer que les activités de production des produits destinés à l'exportation ne sont pas menées au détriment de la population du territoire en question ni n'impliquent de violations de ses droits fondamentaux dont, notamment, les droits à la dignité humaine, à la vie et à l'intégrité de la personne (articles 1er à 3 de la charte des droits fondamentaux), l'interdiction de l'esclavage et du travail forcé (article 5 de la charte des droits fondamentaux), la liberté professionnelle (article 15 de la charte des droits fondamentaux), la liberté d'entreprise (article 16 de la charte des droits fondamentaux), le droit de propriété (article 17 de la charte des droits fondamentaux), le droit à des conditions de travail justes et équitables, l'interdiction du travail des enfants et la protection des jeunes au travail (articles 31 et 32 de la charte des droits fondamentaux)." Case T-512/12 *Frente Polisario v Council* [2015], ECR I-nyp, para. 228.'

review whether there has been a manifest error of exercising such discretion, which it postpones to a later stage of the assessment.¹⁵² Subsequently, the General Court then finds a manifest error of appreciation by the Council in falling short of conducting a proper assessment regarding the possibility of fundamental rights violations, which are clearly spelled out.¹⁵³ Conclusively, the General Court considered it to be a violation of Article 21 TEU when the Charter rights at stake were not adequately taken into account and a potential violation not adequately assessed. The Court thus draws a link between the substantive content of Article 21 TEU and the Charter.

This brief overview of the few cases in which fundamental rights of individual outside EU's territory were at stake illustrates that the EU Charter's applicability does not follow the territory/extraterritorial dichotomy. The Court clearly focuses on the scope of Union law as the only requirement for fundamental rights applicability and does not question the extraterritorial application of the Charter per se. The need for an additional justification and the practical shift of burden of proof that the ECtHR applies seems to not to have spilled over. Furthermore, the 'effective control' – paradigm would rather seem misplaced in this line of reasoning based on the EU's benefits and encouragement.

Summing up the textual as well as the case law analysis, a concept of fundamental rights responsibility gains shape which transcends the logic of international human rights instruments. Rather, it falls in line with the constitutional structures of EU Law organized by competences and puts a stronger emphasis on pro-active duties at the policy and law making stage than on reactive and remedial duties (requiring a direct and physical control over territory or persons).

What does the human rights foreign policy objective add?

The general objective can be seen as a re-emphasis of the external application of this particular concept of human rights responsibility and its linkage to the policy making stage. In fact, many of the specific characteristics of the EU Charter are similarly found in the provisions stipulating the human rights objective.

As to promotion, Article 21(1) TEU states that the '[t]he Union's action [...] *seeks to advance* in the wider world [...] the universality and indivisibility of human rights and fundamental freedoms [...]' and that the EU '[...] *shall promote* multilateral solutions to common problems in particular in the framework of the United Nations. [...]' In a similar vein, Article 3(5) states that '[i]n its relations with the wider world, the Union shall uphold and *promote* its values [...]' (all emphasis added). Apart from the clear mandate to 'respect' such principles, values and objective in Article 21(3), these provisions contain a clear focus on the promotion of such and the development of international law to that end. To what an extent, this focus on promotion entails some kind of obligation, is open for discussion and exceeds the scope of this paper. It shall suffice at this stage to suggest that in light of similar characteristics between the Charter and the human rights objective, similar legal consequences may be deduced. Accordingly, the EU would be at a minimum obliged to act in a coherent manner that is in fact contributing to the aim envisaged and in no way regressive.

The specificity of EU external action and of the EU's mode of global governance has been described as mainly operating through legal instruments while clearly linking the EU's international relations to the rule of law. To put it boldly, the EU asserts itself by being on the fore front of designing an international regulatory order rather than through directly acting on the ground by military forces. Against this background, the clear link between human rights protection and promotion and policy making which is stressed by the human rights objective adequately addresses the core of the EU international influence as a law-maker and promoter of norms. Art. 21(2) (b) TEU states that 'the Union shall *define* and pursue common policies... in order to consolidate human rights' (emphasis

¹⁵² Case T-512/12 *Frente Polisario v Council*, para. 164, 166.

¹⁵³ *Ibid.* paras 124 – 125, 132.

added). This wording supports at a minimum a duty to put human rights on the agenda. The EU thus acknowledges that – in practice – its responsibility mainly operates on the policy and law-making level, where its ability to influence international relations and the situation in third countries is centered. In that regard, Mielle Bulterman's evaluation of the consequences brought about by the new structures of EU external action is worth mentioning. She notes that the Court's assertion in Case C-268/94 *Portugal v Council* that Treaty objectives require the EU to take account of respect for human rights when it adopts measure in the field of development cooperation will now apply to all policy fields.¹⁵⁴ One could argue, that compliance with such a duty to take human rights into account only becomes transparent when turned operative by a duty to conduct human rights impact assessments and to act accordingly.

That seems to be the view the EU Ombudsman endorses. In her recommendation that was prompted by a complaint of two NGOs in the context of an envisaged Free Trade Agreement (FTA) between the EU and Vietnam, she refers to Art. 21(1)(2) TEU and states that 'although [she] agrees with the Commission that there appears to be no express and specific legally binding requirement to carry out an human rights impact assessment (HRIA) concerning the FTA with Vietnam, she is of the view that it would be in the spirit of the legal provisions mentioned above to carry out an HRIA.¹⁵⁵ She concludes that the Commission's failure to carry out such a specific HRIA, in relation to Vietnam, constitutes maladministration and recommends that the Commission should immediately carry out such an assessment.¹⁵⁶ The Commission refused to follow the Ombudsman recommendation arguing that human rights protection is sufficiently guaranteed by other human rights instruments, such as provisions in the FTA itself as well as the human rights clause in the EU-Vietnam Partnership and Cooperation Agreement of June 2012 and through non-trade measures such as enhanced political dialogue, public statements, foreign policy *démarches* and interaction with civil society.¹⁵⁷ In her decision of March 2016, the Ombudsman strongly criticizes these arguments as not acceptable in view of Article 21 TEU. She reiterates that although Article 21 TEU 'does not provide for an express obligation to carry out a prior HRIA', the refusal of such goes against the spirit of that article.¹⁵⁸ She concludes that the instruments referred to by the Commission do not substitute a HRIA since they do not fulfil the same purpose of ensuring that 'the free trade agreement, when implemented, will not lead to any failure to comply with existing human rights obligations'. Further, the necessity to conduct A HRIA 'cannot be made subject to convenience'. While it is obviously true, that Article 21 TEU does not include any expressed reference to conducting a prior HRIA, it is remarkable that the Ombudsman is nevertheless convinced that concrete obligations can be drawn from Article 21 TEU. This linkage between Article 21 TEU and a procedural duty to conduct a human rights impact assessment was confirmed the General Court in *Frente Polisario* as explained above. Further, in *Frente Polisario* the General Court made the link between the limits of Article 21 TEU and an extraterritorial violations of the EU Charter rights. In a similar vein, the Commission uses the term 'human rights' in their impact assessments for trade-related policy initiatives as encompassing the fundamental rights enshrined in the Charter, due to the similar substance they refer to.¹⁵⁹

¹⁵⁴ Mielle Bulterman, 'The Contribution of the Agency to the External Policies of the European Union' in Philip Alston and Olivier De Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (1st edn, Bloomsbury Publishing 2005) 270; Case C-268/94 *Portugal v Council* [1996], ECR I-06177, para. 23.

¹⁵⁵ Draft recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission, para. 24.

¹⁵⁶ Draft recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission, para. 30 and conclusion.

¹⁵⁷ European Ombudsman's Decision on the failure of European Commission to conduct a prior human rights impact assessment of the EU Vietnam free trade agreement, 3 March 2016.

¹⁵⁸ *Ibid.*

¹⁵⁹ "The term 'fundamental rights' is used in the European Union (EU) to express the concept of human rights within a specific EU internal context including EU citizens' rights. Traditionally, the term 'fundamental rights' is used in a

The appropriateness of the methodology used for such human rights impact assessment is clearly something that is justiciable without encroaching on the discretion the Court usually accords to political decision making.¹⁶⁰ By requiring certain procedural standards that ought to be ensured at the policy and law making stage (such as conducting human rights impact assessment prior to concluding agreements, ensuring that systematic and rigorous monitoring mechanisms are in place, establishing accountability mechanisms) the human rights obligations flowing from Art. 21 and 3(5) TFEU become amenable to judicial oversight. In light of the general willingness of the Court to deduce and strictly apply procedural duties, it is likely that the human rights objective becomes enforceable through the same mechanism.¹⁶¹

The general justiciability and the constraining effects of the general objectives have already been acknowledged by the Court. In *Commission v Council (Philippines agreement)*, the Court as well as the Advocate General were not reluctant to question whether the measures envisaged in fact contribute to the Art. 21 TEU objectives.¹⁶² However, the Court contents itself with discovering a textual overlap of the agreement in questions and secondary legislation (and thus ultimately leaves the determination of what contributes to development to the political institutions.)¹⁶³ The Case *ATAA* is a further example of how the overarching policy objectives can play a role as a yardstick for validity.¹⁶⁴ In this case Art. 3(5) TEU was used as a door opener to let international customary law enter the EU legal order and hence to make it justiciable by the ECJ. The Court made it clear that the substantive requirements that follow from the ECJ's interpretation of international customary law have the potential 'to call into question the validity of an act of the European Union'. Yet, at the same time, it limited itself to a manifest errors of assessment review.¹⁶⁵ On the other hand, it became also evident in the *Kadi* saga¹⁶⁶ that the Court is willing to engage in substantial (and in principle full) review when fundamental rights are at stake and that political immunity on grounds of protecting sensitive international relations will not be accepted by the Courts (the preservation of sufficient discretion for negotiation as in the GATT/WTO-line of cases does not override fundamental rights). Furthermore, the Court made it clear that effective judicial protection as a fundamental right forms part of the Union's general principles and fundamental core and extends to the external sphere in that it is invocable by individuals who are neither EU citizens nor EU residents. It will be hard to reconcile the Court's emphasis on effective judicial protection with an *a priori* refusal of judicial review. As suggested above, such review can come into effect at the procedural level. The General Court asserted in *Frente Polisario* that the failure to conduct an human rights impact assessment can indeed amount to a manifest error calling into question the validity of an act.

(Contd.) _____

constitutional setting, whereas the term 'human rights' is used in international law. The two terms refer to similar substance, as can be seen when comparing the content of the CFR and the core UN conventions on human rights. To cover the external dimension of trade IAs and SIAs, the present guidelines will generally refer to the term 'human rights'. Nevertheless, the term should be understood as also encompassing the fundamental rights enshrined in the CFR", cf. Commission's 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives' as part of the Better Regulation agenda adopted by the Commission on 19 May 2015, 2,3)

¹⁶⁰ As pointed out, above the ECJ commonly reiterates that the EU institutions enjoy a 'wide margin of discretion in the management of the external relations of the European Union with respect to development in so far as that management involves complex political and economic assessments.' See for instance, Case C-581/11 P Mugarby, [2012] ECR I-nyr, para. 60.

¹⁶¹ Cf. Marise Cremona, Structural principles and their Role in EU External Relations Law, forthcoming, on the justiciability of structural organizational principles such as of the duty of cooperation, inter-institutional balance, the principle of conferral or transparency.

¹⁶² C-377/12 *Commission v Council (Philippines agreement)*; Advocate General Opinion paras. 48, 55 and 63.

¹⁶³ C-377/12 *Commission v Council (Philippines agreement)*, at paras 49 – 55.

¹⁶⁴ Case C-366/10 *Air Transport Association of America* [2011] ECR I-13755.

¹⁶⁵ *Ibid.*, para 101, 102.

¹⁶⁶ Joined Cases C-402/05 P and C-415/05 P *Kadi I* [2008] ECR I-06351; Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi II* [2013].

This section shows that in many respects the human rights objective can be understood as a re-emphasis of the all-encompassing fundamental rights responsibility that the Charter endorses and which reflects a continuation of the peculiarities of the EU's constitutional framework (i.e. policy objectives are defining the horizontal and vertical power division) and mode of global governance. This concept of human rights responsibility perfectly falls in line with the EU's preferred type of action on the international plane: regulation and norm promotion.¹⁶⁷ By constitutionalizing the corresponding concept of human rights responsibility, the EU recognizes the influence that the global reach of its legislative action has on the political, economic and social situation of individuals within third states, and the responsibility that follows from being a self-declared dominant force of global standard setting.

Conclusion

This paper demonstrated that the human rights objective of external action of Art. 21 and 3(5) TEU expands the 'can' and the 'must' with respect to EU external action and its human rights relevance. It expands the 'can' in that the transversal nature of the human rights objective, as a general objective overarching all fields of external action, liberates EU policies that pursue human rights protection from the fragmentation of external policies, as it was the case pre-Lisbon. Although the human rights objective does not provide for a substantive competence and hence a legal base in itself, its all-encompassing status makes clear that it is relevant for all fields of EU external policies and shall be pursued with all instruments the EU has at its disposal. It clarifies the 'must' in that the clear linkage of human rights protection to external policies emphasizes the EU's commitment to human rights responsibility beyond territorial confines and thereby continuing the concept of fundamental rights applicability that is envisaged in the Charter. Abandoning the *a priori* linkage of human rights responsibility to territory and effective control is not necessarily a unique concept (as only a few international human rights instruments explicitly limit their applicability to territory and jurisprudence developed more flexible approaches) but it is unique in its clear acknowledgment and in its non-discriminatory scope of protection. Besides, it falls in line with the EU's mode of governance on the international scene: 'actor-ness' through legal instruments and norm promotion. Thereby the human rights objective puts the EU as a self-declared shaper of international norms at the forefront of human rights advancement by upholding a progressive concept of human rights responsibility that is able to more effectively and adequately take into account the impact of global economic regulation on the human rights situations of individuals far from home.

¹⁶⁷ As indicated above, the EU's mode of global governance as a regulator and 'normative power' has been explored from many different angles by legal and political science scholarship. The common idea is that the EU exerts global power by exporting its legal institutions and standards to the international plane as well as to third countries' domestic legislations by offering incentives to varying degrees such as market access or enhanced economic and political cooperation.

