

# The EU's human rights obligations in relation to policies with extraterritorial effects

Lorand Bartels\*

*No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less ...*

*John Donne, Meditation XVII (1624)*

## Introduction

That states can be responsible for the effects of their economic policies in third countries is not controversial. Thanks to a network of international trade agreements, virtually all states are under obligations designed to protect the economic interests of the producers of imported goods and services. And yet the proposition that states should also be responsible for the human rights effects of such policy measures is not universally accepted. Thus, a subsidy that causes injury to the domestic industry of a WTO Member or a market access barrier that negatively affects conditions of competition for imported products can violate trade obligations. But even if those effects on the producers of those products are severe,<sup>1</sup> it is debatable whether they are capable of violating any given human rights obligations. In short, the extent to which human rights obligations apply to policies with extraterritorial effects is still very much an open question.

This article considers the extent to which EU law applies to such policies, which is to say EU policies with extraterritorial effects on persons outside of EU territory. Section A discusses the human rights aspects of Article 3(5) and Article 21 of the Treaty on European Union (TEU), which date from the 2009 Lisbon Treaty. Section B looks at the jurisprudence of the EU Court of Justice on EU fundamental rights as these exist as general principles of EU law and in the EU Charter of Fundamental Rights, as influenced by the European Convention on Human Rights (ECHR). Section C discusses the EU's obligation to comply with its international obligations, including with the human rights clauses found in all EU trade and cooperation agreements and with customary international law. Section D considers the enforceability of these obligations by the EU institutions and individuals. Section E summarises and concludes.

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<sup>1</sup> See, for example, 'The Ghana Chicken Case' and 'The Kenyan Farmers Case' in Fons Coomans and Rolf Künemann (eds), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Cambridge: Intersentia, 2012). The Kenyan government has been ordered to consult civil society on free trade agreement negotiations with the EU: *Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others* [2013] eKLR (High Court of Kenya, 31 Oct 2013).

A few words on the scope of this article are in order. In the first place, it does not consider the whether human rights obligations are capable of applying to extraterritorial conduct. Just because an obligation applies to extraterritorial conduct with extraterritorial effects does not mean that it also applies to domestic conduct with extraterritorial effects.<sup>2</sup> Second, this article does not look at two special situations in which domestic measures have extraterritorial effects, but which have not been considered extraterritorial (or controversial). The first of these is the obligation not to expose a person to risks of human rights violations taking place extraterritorially.<sup>3</sup> The other concerns obligations in relation to the domestic property (or similar economic interests) of persons located extraterritorially.<sup>4</sup> While the governing assumption that these situations raise no extraterritorial issues may be challenged, it is not necessary to do so for the more limited purposes of this article.

## A Articles 3(5) and 21 TEU

The Lisbon Treaty introduced into the Treaty on European Union (TEU) two provisions relevant to EU policies with extraterritorial effects. The first of these, Article 3(5) TEU, states:

In its relations with the wider world, the Union shall uphold and promote its values [as defined in Article 2 TEU] and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

This paragraph has three parts. It establishes EU objectives to ‘promote’ the EU’s values and interests abroad, and to ‘contribute to’ the other norms mentioned. It establishes an obligation to achieve these objectives.<sup>5</sup> And, according to the EU Court of Justice, it establishes an obligation to act consistently with the norms mentioned, including international law and, by extension, international human rights obligations.<sup>6</sup>

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<sup>2</sup> These two extraterritorial dimensions of human rights obligations are often conflated. See, eg, Principle 8(a) of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, contained in Olivier de Schutter et al, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights’ (2012) 34 HRQ 1084 at 1101, which states that ‘[f]or the purposes of these Principles, extraterritorial obligations encompass: ... obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State’s territory’.

<sup>3</sup> Eg *Soering* (ECtHR, Appl No 14038/88, 7 Jul 1989); discussed in *Banković* (ECtHR, Appl No 52207/99, 12 Dec 2001), para 70. For a ruling to this effect under the EU Charter, see Joined Cases C- 411/10 and C- 493/10, *NS v Secretary of State for the Home Department* [2011] ECR I-nyr (21 Dec 2011).

<sup>4</sup> Eg Joined Cases C-402/05 P and C-415/05 P, *Kadi I* [2008] ECR I-6351, para 371.

<sup>5</sup> According to Declaration No 41 TEU, this may be done, if necessary, by resort to Article 352 TFEU.

<sup>6</sup> Case C-366/10, *Air Transport Association of America* [2011] ECR I-nyr (21 Dec 2011), para 101. See further below at p [text to n 31].

The second relevant provision is Article 21 TEU, located in Chapter 1 of Title V, which covers all aspects of the EU's external action, including but not limited to its Common Foreign and Security Policy (CFSP).<sup>7</sup> Article 21(1) TEU states that:

The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

This provision is virtually identical to the obligation contained in Article 3(5) TEU. The difference is that Article 3(5) requires the EU to 'uphold' its values 'in its relations with the wider world' and to 'contribute' to a set of objectives, while Article 21(1) requires the EU to 'be guided by' a similar set of principles in its 'action on the international scene'. Both of these provisions can be seen as establishing objectives the pursuit of which is an EU obligation.

Next is Article 21(3)(1) TEU, which has arguably not gained the attention it deserves. This subparagraph states that:

The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

Importantly, this subparagraph does not simply refer to the paragraphs above, but rather to the principles in paragraph 1 and the objectives in paragraph 2. Beyond this, Article 21(3)(1) is significant in two ways.

First, it extends the scope of application of the EU's external human rights obligations. Article 3(5) refers to the 'EU's relations with the wider world', and Articles 21(1) to the EU's 'action on the international scene'. By contrast, Article 21(3)(1) refers not only to 'the development and implementation of the different areas of the Union's external action' but also – notably – to 'the development and implementation ... of the external aspects of [the EU's] other policies'. It is therefore clear that the principles set out in Article 21(3)(1) apply not just to EU policies, nor even only to EU external policies, but it applies also to the external aspects of the EU's *internal* policies. This is so, it might be added, even though Article 21 is located in a part of the EU Treaty devoted to external action. Second, Article 21(3)(1) is normatively stronger than Article 3(5) and Article 23(1). These require the EU to 'uphold', 'contribute to', and be 'guided by' the principles and objectives described therein. As the EU Court of Justice has affirmed, these phrases are not devoid of

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<sup>7</sup> Article 21 TEU also features in some of the EU's more specific external policies. Article 205 TFEU requires the EU's external action to 'be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union [ie Article 21 TEU]' and similar language is used in Articles 207 TFEU on the common commercial policy and Article 208 TFEU on development cooperation.

normative force.<sup>8</sup> But insofar as it requires the EU to ‘respect’ the principles previously described, Article 21(3)(1) puts this beyond doubt.

It must be acknowledged that the principles listed in Article 21(1) do not, strictly speaking, include the principle of respect for human rights itself. Relevantly, it refers rather to the principle of respect for the universality and indivisibility of human rights and fundamental freedoms. But it makes no sense to oblige the EU to respect this principle without also obliging it to respect the human rights on which it is based.<sup>9</sup> By necessary implication, then, it follows that the EU is obliged to respect human rights in its external and internal policies.

To say that the EU is required under EU law to ensure that its policies do not have negative effects on human rights in third countries is itself a significant result. But do these provisions go further, and encompass the two other panels of the human rights triptych: the obligation to ‘protect’ the human rights of persons from the activities of other actors, and the obligation to ‘fulfil’ the human rights of those persons? In fact, the answer to these questions is much more muted. As mentioned, Article 3(5) TEU requires the EU to ‘promote’ human rights in its relations with the wider world and ‘contribute to’ the ‘protection of human rights, in particular the rights of the child’. Article 21(2) TEU also states that the EU must act, unilaterally and in cooperation, in order to pursue the objectives of, *inter alia*, ‘consolidat[ing] and support[ing] democracy, the rule of law, human rights and the principles of international law’,<sup>10</sup> and this requirement is reinforced by Article 21(3)(1) TEU. Certainly, this means that the EU must act in some way to pursue these objectives and achieve these ends. But these provisions do not require the EU to do this in any particular way. Thus, to give some examples, it cannot be said that the EU is required to act positively to protect persons located extraterritorially from the acts of EU businesses operating in other countries, or to even to provide development aid to developing countries in order to fulfil their human rights.

## **B General Principles and the EU Charter (Articles 6(1) and 6(3) TEU)**

Beyond these newer provisions in the EU Treaty, there are other sources of human (or ‘fundamental’) rights obligations in the form of general principles of EU law and the EU Charter of Fundamental Rights.<sup>11</sup> Both of these sources of obligations now have

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<sup>8</sup> See above at n 6.

<sup>9</sup> This is indeed an even stronger implication than the implication on which the Court based its understanding of Article 3(5) TEU, discussed below at [text to n 31].

<sup>10</sup> The overlap between the objectives in Article 21(2) TEU and Article 3(5) TEU can cause difficulties. For example, a measure with the objective of international peace and security falls within the EU’s Common Foreign and Security Policy (CFSP), and therefore does not support a reference to Article 352 TEU. On the other hand, the pursuit of international peace and security is also one of the principles of the UN Charter referred to in Article 3(5) TEU, which does support a reference to Article 352 TFEU. This overlap should doubtless be resolved in favour of the CFSP. On the other hand, it is going too far to say that all of the objectives in Article 21(2)(a)-(c) TEU are CFSP objectives, as did AG Bot in Case C-130/10, *Parliament v Council (Al Qaeda)* (AG Opinion) [2012] ECR I-nyr, para 64. The Court did not express itself on the point: cf Case C-130/10, *Parliament v Council (Al Qaeda)* [2012] ECR I-nyr, para 62.

<sup>11</sup> See the different views of Valentina Bazzocchi, ‘The European Charter of Fundamental Rights and the Area of Freedom, Security and Justice in Giacomo di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer: Vienna, 2011) at 196 and

the rank of primary law, being enshrined in Article 6(1) and Article 6(3) EU respectively.<sup>12</sup> Neither contains any rule on their extraterritorial application, nor has the jurisprudence properly dealt with this issue (except for the case of EU-based property owned by foreigners abroad).<sup>13</sup> This means that it is not certain whether fundamental rights apply to policy measures with extraterritorial effect on non-EU nationals, especially when these effects are not associated with any other EU rights and obligations.

There have been some cases tangentially relevant to the issue. In the first place, the EU Court of Justice made a general statement in *Parliament v Council (Al Qaeda)* that ‘the duty to respect fundamental rights is imposed, in accordance with Article 51(1) of the Charter of Fundamental Rights of the European Union, on all the institutions and bodies of the Union.’<sup>14</sup> Strictly speaking, this does not shed much light on the issue. However, the Court said this in response to an objection by the European Parliament that a measure adopted under the EU Common Foreign and Security Policy (CFSP) would escape fundamental rights guarantees. It may therefore be that the Court had general CFSP measures in mind, and the statement can be taken as an acknowledgement that such measures are subject to EU fundamental rights. Furthermore, given the nature of CFSP measures, this could also be taken as an indication that fundamental rights have some extraterritorial application. Even so, however, it would not be certain whether this would be in respect of extraterritorial conduct or measures with extraterritorial effect, or both.

Another case is *Mugraby*, in which the applicant claimed damages from the EU in respect of injuries allegedly committed by Lebanon in breach of his human rights.<sup>15</sup> Mugraby argued that these injuries were the result of the EU Council and Commission not adopting ‘appropriate measures’ under the human rights clause in the EU-Lebanon association agreement.<sup>16</sup> The action failed on the merits,<sup>17</sup> but the Court did not question the assumption that the EU might be responsible for a violation of the applicant’s human rights by a third party in a third country. Similarly, in *Zaoui* the applicants sought compensation for the loss of a family member killed by a Hamas bomb in Israel.<sup>18</sup> The argument was that the EU was responsible because of its funding of education in the Palestinian territories, which in turn incited hatred and

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Valeria Bonavita, ‘The EU Charter of Fundamental Rights and the Social Dimension of International Trade’, in di Federico, *ibid*, at 260. See also Tamara Hervey, ‘The “Right to Health” in European Union Law’ in Tamara Hervey and Jeff Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (Oxford: Hart, 2003) at 212.

<sup>12</sup> For a discussion of the relationship between the EU Charter (under Article 6(1) TEU) and general principles of law (under Article 6(3) TEU) see Herwig Hofmann and Bucura Mihaescu, ‘The Relation between the Charter’s Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case’ (2013) 9 *European Constitutional Law Review* 73.

<sup>13</sup> Eg above at n 4.

<sup>14</sup> Case C-130/10, *Parliament v Council (Al Qaeda)* [2012] ECR I-nyr (19 July 2012), para 83.

<sup>15</sup> Another claim was for failure to act under Article 265 TFEU.

<sup>16</sup> Case T-292/09, *Mugraby* [2011] ECR II-255 (General Court, Order, 6 Sep 2011); Case C- 581/11 P, *Mugraby* [2012] ECR I-nyr (Grand Chamber, Order, 12 Jul 2012).

<sup>17</sup> The relevant EU institutions had not manifestly and gravely disregarded their discretion to adopt ‘appropriate measures’, which is a condition of an action for non-contractual damages: Case C-352/98 P *Bergaderm* [2000] ECR I-5291, paras 42-46.

<sup>18</sup> Case C-288/03 P *Zaoui* [2005] ECR I-nyr, paras 13-15.

terrorism and led to the attack. The applications failed to demonstrate that the EU's policies caused the damage, but again it was not questioned that the EU could be liable for non-contractual damage in another country. It is admittedly speculative to reason on the basis of unargued points that fundamental rights extend to policy measures with extraterritorial effects, but these cases indicate that at least there is no obvious bar to such actions.

In this respect, the positions adopted by some of the EU political institutions are relevant. In 2011, the Commission and the CFSP High Representative stated that:

EU external action has to comply with the rights contained in the EU Charter of Fundamental Rights which became binding EU law under the Lisbon Treaty, as well as with the rights guaranteed by the European Convention on Human Rights.<sup>19</sup>

Likewise, the European Parliament has said, in a Resolution on the establishment of the European External Action Service, that 'the EEAS must guarantee full application of the Charter of Fundamental Rights in all aspects of the Union's external action in accordance with the spirit and purpose of the Lisbon Treaty'.<sup>20</sup> These statements may be limited in their scope to extraterritorial conduct rather than policy measures with extraterritorial effects. However, a 2011 EU regulation goes further, considering that the EU's human rights obligations apply to measures with only extraterritorial effects:

The Member States should comply with the Union's general provisions on external action, such as consolidating democracy, respect for human rights and policy coherence for development, and the fight against climate change, when establishing, developing and implementing their national export credit systems and when carrying out their supervision of officially supported export credit activities.<sup>21</sup>

All of these statements are of political rather than legal value. Nonetheless, they may indicate that these institutions would not object to the extension of the Charter to such policy measures.

In this context, and especially given the lack of certainty on the point at issue, it is relevant to consider the position on this point of the European Convention on Human Rights (ECHR). While this Convention is no longer cited as often since the adoption of the EU Charter,<sup>22</sup> in formal terms it is still relevant to the determination of

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<sup>19</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy Communication on Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach, COM (2011) 886 final, 12 December 2011, at 7.

<sup>20</sup> European Parliament resolution on the institutional aspects of setting up the European External Action Service [2010] OJ C/265E, para 5.

<sup>21</sup> Regulation (EU) No 1233/2011 of the European Parliament and of the Council of 16 November 2011 on the application of certain guidelines in the field of officially supported export credits [2011] OJ L326/45, recital 4.

<sup>22</sup> Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: the Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 168, especially at 175. For the view that the Charter is now seen as hierarchically supreme, see Nikos Lavranos, 'The ECJ's Judgments in Melloni and Åkerberg Fransson: Une ménage à trois difficulté' (2013) 4 European Law Reporter 133.

fundamental rights in EU law. This is in two respects. First, it serves as a formal inspiration for the general principles of fundamental rights applicable under Article 6(3) TEU.<sup>23</sup> Second, it governs the EU Charter of Fundamental Rights (applicable under Article 6(1) TEU), at least insofar as the ‘meaning and scope’ of the two sets of rights is concerned.<sup>24</sup>

Looking to the ECHR, however, does little to clarify the issue. While there have in recent years been a number of cases on the application of the Convention to extraterritorial conduct,<sup>25</sup> there has been virtually none in relation to its application to policy measures with mere extraterritorial effects (other than cases involving property), and those that have been decided are in conflict.<sup>26</sup> One of the few cases on point is *Kovačič*, which concerned Slovenian legislative acts that prevented Croatian nationals from withdrawing funds from the Croatian branch of a Slovenian bank. The Court said that ‘the acts of the Slovenian authorities continue to produce effects, albeit outside Slovenian territory, such that Slovenia’s responsibility under the Convention could be engaged’.<sup>27</sup> In contrast, in *Ben El Mahi*, certain persons in Morocco challenged a decision by Denmark to permit the local publication of a cartoon, and the Court held that persons located extraterritorially who are merely affected by the conduct of a contracting party are not within the ‘jurisdiction’ of a contracting party.<sup>28</sup> How to reconcile these two cases is unclear.<sup>29</sup>

In any case, it may be doubted whether the EU Court of Justice would adopt the various solutions under the ECHR position or the ICESCR on the extraterritorial application of EU fundamental rights protections. It is more likely that the EU Court

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<sup>23</sup> See Case C-479/04, *Laserdisken* [2006] ECR I-8089, para 61.

<sup>24</sup> Article 52(3) of the EU Charter states that ‘[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’ This applies also to the case law of the European Court of Human Rights: C-400/10 *McB* [2010] ECR I-8992, para 53.

<sup>25</sup> Marko Milanović, *Extraterritorial Application of Human Rights Treaties* (Oxford: OUP, 2011) at 11-18; Samantha Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’ (2012) 25 *Leiden Journal of International Law* 857; Karen Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Leiden: Martinus Nijhoff, 2012), Ch 2.

<sup>26</sup> See Maarten den Heijer and Rick Lawson, ‘Extraterritorial Human Rights and the Concept of “Jurisdiction”’ in Malcolm Langford et al (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: CUP, 2013) at 185-6; Daniel Augenstein and David Kinley, ‘When Human Rights “Responsibilities” become “Duties”: The Extra-Territorial Obligations of States that Bind Corporations’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: CUP, 2014). An exception is the application of the ECHR to the property of non-residents, which is seemingly not controversial.

<sup>27</sup> *Kovačič* (ECtHR, Appl No 44574/98, admissibility, 9 Oct 2003). See den Heijer and Lawson, *ibid*, at 179. Note also *Tatar* (ECtHR, Appl No 67021/01, 27 Jan 2009, in French only), para 111, in which the Court said in an *obiter dictum* that states must prevent the transfer of environmentally damaging substances to neighbouring countries. See Augenstein and Kinley, *ibid*.

<sup>28</sup> *Ben El Mahi* (ECtHR, App No 5853/06) (11 Dec 2006).

<sup>29</sup> The notion of *espace juridique*, to the extent that this means anything, is not relevant. For discussion of its use and misuse, see Ralph Wilde, ‘The “Legal Space” or “*espace juridique*” of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?’ (2005) 10 *European Human Rights Law Review* 115.

of Justice would seek to carve out its own position, based on the particular context in which EU fundamental rights apply.

### C International obligations as EU obligations

In addition to the self-standing human rights obligations found in EU law, the EU is also required to respect international human rights obligations to the extent that these are binding on the EU under treaties or customary international law. This monist approach to international law is of long standing,<sup>30</sup> but it was placed on a new footing in *Air Transport Association of America*, when the EU Court of Justice said this:

Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union.<sup>31</sup>

The EU has only concluded one multilateral international human rights treaty, namely the Convention on the Rights of Persons with Disabilities.<sup>32</sup> Other than this, it is not formally bound by any multilateral or regional human rights treaty, including, prior to EU accession, the European Convention on Human Rights. It might be thought that some human rights treaties are binding on the EU under the doctrine of ‘functional succession’, but human rights are not an area of exclusive EU competence,<sup>33</sup> nor does the EU claim (and other parties do not therefore recognize) such a status.<sup>34</sup> Even as a matter of EU law, the EU is therefore not bound by any multilateral human rights instruments. Nonetheless, the EU is bound by the human rights norms included in the large number of trade and cooperation agreements that it has concluded with other states since the early 1990s.

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<sup>30</sup> Case 181/73, *Haegeman* [1974] ECR 449, para 5; Case C-286/90, *Poulsen* [1992] ECR I-6019, para 9. Treaties are binding as EU law under Article 216(2) TFEU.

<sup>31</sup> Case C-366/10, *ATAA*, above at n 6, para 101 and 123. Whether this was a good interpretation is debatable. A requirement to ‘contribute to the strict observance ... of international law’ is not the same as (nor does it necessarily imply) a requirement to ‘observe’ international law. Further, as Article 3(5) TEU is not addressed to the Member States, presumably the Court’s original jurisprudence will in any case continue to explain why they are also bound by customary international law when acting within the scope of EU law.

<sup>32</sup> Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L23/35.

<sup>33</sup> The doctrine of ‘functional succession’ was applied to the GATT in Joined Cases 21 to 24/72, *International Fruit* [1972] ECR 1219 and more recently (by the Court of First Instance) to the UN Charter in Cases C-402/05 and C-415/05, *Kadi I* [2005] ECR II-3649, para 200. Following Case C-308/06, *Intertanko* [2008] ECR I-4057, para 49, and Case C-366/10, *ATAA*, above at n 31, it is now clear that this requires the EU to have acquired exclusive legislative competence in an area. This means that, contrary to the Court of First Instance in *Kadi I*, the EU has not ‘functionally succeeded’ to the UN Charter. For a discussion, see Robert Schütze, ‘The ‘Succession Doctrine’ and the European Union’ in Anthony Arnall et al (eds), *A Constitutional Order of States?* (Oxford: Hart, 2011); Jan Wouters et al, ‘Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law’, Leuven Centre for Global Governance Studies, Working Paper No 96, August 2012.

<sup>34</sup> Joined Cases 21 to 24/72, *International Fruit*, observations of the Commission, *ibid* at 1225; Case C-366/10, *ATAA*, above at n 6 (AG Opinion), para 64, and Wouters et al, *ibid*, at 13.



## 1 EU human rights clauses

There are human rights clauses in treaties between the EU and over 120 other states. Their wording varies somewhat, but in their standard form they have two parts. The first is an ‘essential elements’ clause stating that:

Respect for democratic principles and human rights, as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments, as well as for the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement.<sup>35</sup>

The second is a ‘non-execution’ clause providing that either party may adopt ‘appropriate measures’ if the other fails to comply with its obligations under the agreement, which is taken (and sometimes stated) to include the essential elements of the agreement. There are also typically other provisions elaborating on such ‘appropriate measures’.

The legal effect of essential elements clauses is not entirely certain,<sup>36</sup> but the conventional view is that they contain obligations binding on the parties. The scope of these clauses is broad, applying both to the internal and international policies of the parties. Moreover, the reference to international policies implies that these clauses govern extraterritorial effects of at least ‘international’ policies. Given the difficulty of distinguishing between internal policies and international policies, there seems little merit in seeking to draw a distinction between the two. One can therefore conclude that, textually, these clauses apply to policies with extraterritorial effects.

This interpretation is also supported by practice. In 2002, the EU adopted ‘appropriate measures’ under the Cotonou Agreement in relation to Liberia for a variety of reasons, one of which was its assistance to the Front uni révolutionnaire (RUF) of Sierra Leone, which was accused of committing gross human rights violations in that country.<sup>37</sup> This followed a UN Security Council Resolution, and follow up activity, concerning Liberia’s material and financial support to the RUF in Sierra Leone.<sup>38</sup> The EU thus seems to have accepted that the essential elements clause covers policies with effects in other countries, independent of any extraterritorial conduct. For present purposes, this is an important result. The EU’s human rights clauses are bilateral, and therefore under these clauses the EU’s policies must also respect human rights in other states.

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<sup>35</sup> This example is taken from Article 2 of the EU-Iraq Partnership and Cooperation Agreement. For discussion of the variations and their legal significance see Lorand Bartels, *Human Rights Conditionality in the EU’s International Agreements* (Oxford: OUP, 2005), Ch 4.

<sup>36</sup> Bartels, *ibid*, 93-99.

<sup>37</sup> Letter annexed to Council Decision of 25 March 2002 concluding consultations with Liberia under Articles 96 and 97 of the ACP-EC Partnership Agreement [2002] OJ L96/23.

<sup>38</sup> See First Report of the Secretary-General Pursuant to Security Council Resolution 1343 (2001) regarding Liberia, UN Doc S/2001/424, 30 Apr 2001.

## 2 Customary international law

As noted above, by virtue of Article 3(5) TEU the EU's obligations under customary international law are also binding and potentially enforceable as EU obligations. There are several customary international law obligations relevant to state conduct with extraterritorial effects on human rights in third states.

### (a) Ancillary responsibility for involvement in violations by third states

In the first place, customary international law recognizes that states and, by extension, international organizations may be responsible for conduct ancillary to violations of international law by other actors. Rules to this effect may be found in primary obligations, for example the obligation to prevent genocide,<sup>39</sup> which can be triggered by a risk of genocide occurring anywhere in the world.<sup>40</sup> More generically, there are secondary obligations to this effect, which have been codified in the two sets of Articles on the international responsibility of states and international organizations.<sup>41</sup>

These rules prohibit states and international organizations from knowingly aiding and abetting another actor<sup>42</sup> in the commission of a wrongful act,<sup>43</sup> knowingly directing or controlling the commission of the wrongful act by another actor<sup>44</sup> and knowingly coercing another actor to commit a wrongful act.<sup>45</sup> There are also ancillary obligations triggered by serious breaches of peremptory norms of international law, such as apartheid, torture, slavery and genocide. These obligations are to cooperate to bring to an end through lawful means any serious breach [of peremptory norms] and '[not to] recognize as lawful a situation created by a serious breach [of peremptory norms], nor render aid or assistance in maintaining that situation'.<sup>46</sup>

These rules are potentially relevant to policy measures with extraterritorial effects. The UN Special Rapporteur for Food, Olivier de Schutter, has given a striking example. Citing Article 18 of the Articles on State Responsibility, he has advanced the proposition that:

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<sup>39</sup> In *Bosnian Genocide (Bosnia/Serbia)* [2007] ICJ Rep 595, paras 166-169, the ICJ determined that this was an obligation of states parties to the Genocide Convention. It expressly left open the question whether this was also an obligation under customary international law (at para 429).

<sup>40</sup> *Bosnian Genocide*, *ibid*, paras 429-431. See Marko Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 EJIL 669, at 684-8.

<sup>41</sup> Articles on the Responsibility of States (ARS), annexed to UNGA Res 56/83, UN Doc A/RES/56/83, 12 Dec 2001; Articles on the Responsibility of International Organizations (ARIO), annexed to UNGA Res 66/100, UN Doc A/Res/66/100, 27 Feb 2012.

<sup>42</sup> One would expect a four-way split with both states and international organizations bearing ancillary responsibility triggered by violations committed by states and international organizations. In fact, under the two sets of Articles this is only partial. States are not said to be responsible for ordinary violations by international organizations, and international organizations are not said to be responsible for violations of peremptory norms by states.

<sup>43</sup> Article 16 ARS; Article 14 ARIO.

<sup>44</sup> Article 17 ARS; Article 15 ARIO.

<sup>45</sup> Article 18 ARS; Article 16 ARIO.

<sup>46</sup> Article 41 ARS (states in relation to violations by states). Article 42 ARIO (states and international organizations in relation to violations by international organizations). See above at n 42.

where, using its economic leverage or other means of influence at its disposal, one State requires that another State accept the inclusion in a trade or investment agreement of a provision that will prohibit that State from complying with its human rights obligations towards its own population or that will impede such compliance, the former State may be seen as coercing the latter State, which engages its international responsibility.<sup>47</sup>

In principle, this is a possibility. However, as is clear from Article 18 itself (and the other ancillary obligations here mentioned), this would require that the state at issue know that the implementation of the obligation will cause human rights violations. This is a high standard, and it is doubtful that a party negotiating a trade agreement will ever know with the requisite degree of certainty that a given obligation will result in a violation of human rights obligations. On the other hand, the EU's ancillary obligations could be at stake in the event that it knowingly permitted the export of instruments of repression to another state knowing that they were to be used by that state for torture.<sup>48</sup>

**(b) The obligation not to allow territory to be used to harm other states**

A second rule relevant to the enjoyment of human rights in third countries is the obligation requiring States not to allow third parties in their territory to cause harm to other states. This obligation is usually dated to the 1941 *Trail Smelter* arbitration, in which it was said that 'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another'.<sup>49</sup> The principle was stated more broadly in the 1949 *Corfu Channel* case, which affirmed 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.<sup>50</sup> These cases have inspired one of the fundamental principles of international environmental law, endorsed by the ICJ in *Nuclear Weapons*, that 'states must ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.<sup>51</sup>

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<sup>47</sup> UN Human Rights Council, Report of the Special Rapporteur on the Right to Food, Olivier de Schutter, *Addendum – Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*, UN Doc A/HRC/19/59/Add.5 (19 Dec 2011), para 2.6.

<sup>48</sup> Art 2(2)(b) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment [2008] OJ L335/99 requires EU Member States to 'exercise special caution and vigilance in issuing licences ... to countries where serious violations of human rights have been established ...'.

<sup>49</sup> *Trail Smelter (US/Canada)* (1941) 3 RIAA 1905. For an intriguing analysis of this case, see John H Knox, 'The Flawed *Trail Smelter* Procedure: The Wrong Tribunal, the Wrong Parties, and the Wrong Law' in Rebecca M Bratspies and Russell A Miller (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge: CUP, 2006).

<sup>50</sup> *Corfu Channel (UK/Albania)* [1949] ICJ Rep 4, at 22. This case is usually cited for the proposition that states are responsible for damage caused by an act of which they know or 'ought to know'. The latter standard is an inference from a negative statement in the judgment that 'it cannot be concluded from the mere fact of the control exercised ... over its territory ... that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein' (at 18).

<sup>51</sup> *Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, para 29. The principle was reformulated in *Pulp Mills (Argentina/Uruguay)* [2010] ICJ Rep 14, para 101.

What is the relevance of this obligation to measures with extraterritorial effects on individuals? In a recent statement on this issue by a consortium of academics, it has been claimed, on the basis of *Trail Smelter*, that:

Customary international law prohibits a state from allowing its territory to be used to cause damage on the territory of another state. This results in a duty for the state to respect and protect human rights extraterritorially.<sup>52</sup>

This is however quite an overstatement. While the obligation to prevent harm encompasses personal injury, including non-physical injury,<sup>53</sup> this does not *ipso facto* mean that such injury can be described in terms of the human rights of the injured persons. That would be true only in two situations. The first is where the responsible state is subject to an obligation to respect the human rights of these persons. The second is where the responsible state owes the injured state an obligation to respect the human rights of its nationals. Such an obligation can certainly exist, as *Diallo* has made clear.<sup>54</sup> Thus, the ‘rights of states’ referred to in *Corfu Channel* includes the rights of states to have another state respect the human rights of its nationals. However, this is only the case to the extent that the responsible state is already obliged to respect the human rights of those nationals. So in both cases the obligation to prevent harm recognizes but does not add to the pre-existing human rights obligations of the responsible state.

There is also another limitation on the obligation to prevent harm, not always acknowledged,<sup>55</sup> which is that it only applies to harm caused by physical agents. That is to say, the obligation does not apply to harm caused by a mere policy decision (by a state or a private actor) taken within the territory of an allegedly responsible state. So, for example, the EU is obliged to prevent the export of products, such as poisoned food, that it knows, or should know, will cause personal injury in third countries. Such harm could also be described in terms of the human rights of those persons if the EU were subject to an international obligation to respect those human rights in the first place. Otherwise, however, this obligation has less application than has been claimed for it.

### (c) Conditions on countermeasures

Another relevant rule is that ‘[c]ountermeasures shall not affect ... obligations for the protection of fundamental human rights’.<sup>56</sup> It is unclear whether the relevant obligations are those of the entity imposing the countermeasures or those of the target entity.<sup>57</sup> In the former case, the provision would be declarative of the existing legal

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<sup>52</sup> de Schutter et al, above at n 2, at 1095-96 (Paragraph 9 of the Commentary to Principle 3).

<sup>53</sup> *Diallo*, Compensation [2012] ICJ Rep nyr (19 Jun 2012). The Court cited *Lusitania* (1923) 7 RIAA 32, at 40, which referred to ‘suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to credit and reputation’ (para 18).

<sup>54</sup> *Diallo*, Preliminary Objections [2007] ICJ Rep 582, para 39.

<sup>55</sup> Nicola Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Antwerp: Intersentia, 2002), at 172, cited with approval in de Schutter et al, above at n 2, at 1136 n 129.

<sup>56</sup> Article 50(1)(b) ARS and Article 53(1)(b) ARIO, above at n 41. An argument based on Article 50(1)(b) ARS was described as well founded in law in Ethiopia-Eritrea Claims Commission, *Prisoners of War – Eritrea’s Claim 17 (Eritrea/Ethiopia)*, Partial Award (2003) 26 RIAA 23, para 160.

<sup>57</sup> In favour of the view that it relates to the obligations of the target state: Hans Morten Haugen, *The Right to Food and the TRIPS Agreement* (Leiden: Martinus Nijhoff, 2007), at 365; in favour of the

situation. Thus, in a case involving an embargo on exports to Burundi, the African Commission warned an embargo could in principle violate states' obligations under the African Charter on Human and Peoples' Rights.<sup>58</sup> Should however the relevant obligations be those of the target entity, the rule would add to the obligations of the entity imposing the countermeasures.

The issue does not arise if the 'fundamental human rights' that are mentioned are equally applicable to the state imposing the sanctions and the target state, for example if they had *jus cogens* status. Whether they do is unclear. It has been argued that these rights cannot be limited to those with a *jus cogens* status, on the grounds that there is another rule, some paragraphs on, that prohibits countermeasures affecting 'other obligations under peremptory norms of general international law' and therefore such a reading would lead to redundancy.<sup>59</sup> On the other hand, the commentary to the Articles explains that the second rule is directed at future *jus cogens* norms.<sup>60</sup> In any case, this line of enquiry does not answer the question whether the obligations at issue are those of the state imposing countermeasures or those of the target state.

More relevant, perhaps, is that the two sources cited by the commentary in support of this rule are framed in terms of the obligations of the entity imposing the countermeasures. One is the rule of international humanitarian law requiring states to allow the free passage of consignments of medical and hospital stores intended for civilians; the other is General Comment No 8 of the Committee on the International Economic Social and Cultural Rights (CESCR), according to which in imposing economic sanctions 'the international community [must] do everything possible to protect at least the core content of the economic, social and cultural rights of the affected peoples of [the targeted] State.'<sup>61</sup> Based on this, it seems that the more conservative point of view is probably correct, and the rule is no more than a reminder of what they are in any case obliged to do.

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view that it relate to the obligations of the responsible state: Silvia Borelli and Simon Olleson, 'Obligations Relating to Human Rights and Humanitarian Law' in James Crawford et al (eds), *The Law of International Responsibility* (Oxford: OUP, 2010), at 1187-8.

<sup>58</sup> Communication 157/96, *Association pour la sauvegarde de la paix au Burundi v Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC), Zambia*, African Commission on Human and Peoples' Rights, 15-29 May 2003, para 75. For discussion, see Takele Soboka Bulto, 'Patching the "Legal Black Hole": The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' (2011) 27 *South African Journal on Human Rights* 249, at 261-3.

<sup>59</sup> Article 50(1)(d) ARS and Article 53(1)(d) ARIO. See Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 *BYIL* 264, at 328-9 and Antonios Tzanakopoulos, *Disobeying the Security Council. Countermeasures against Wrongful Sanctions* (Oxford: OUP, 2011) at 80.

<sup>60</sup> See International Law Commission (ILC), Commentary to Article 50, (2001) II(2) *YILC* 26 at 132, para 9, making a cross-reference to the commentary on Article 40, which considers the possibility of such future *jus cogens* norms.

<sup>61</sup> CESCR, General Comment No 8 on the relationship between economic sanctions and respect for economic, social and cultural rights (1997), para 7, reprinted in United Nations, *Human Rights Instruments, Volume I – Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies – Note by the Secretariat*, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008). Borelli and Olleson, above at n 57, at 1187, question whether the sentiment in General Comment No 8 can be extended to human rights treaties with a jurisdiction clause, which is lacking in the ICESCR.

(d) **Customary international law based on multilateral human rights treaties**

Most international human rights treaties contain a clause limiting their scope to persons within, under or subject to the ‘jurisdiction’ of a state party.<sup>62</sup> Some, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), do not contain a general jurisdiction clause, although some specific obligations and all of their mechanisms for individual petitions are limited in this way.<sup>63</sup> There is also no jurisdictional limitation for Article 55 of the Charter of the United Nations, which also imposes direct human rights obligations on UN members.<sup>64</sup>

It is clear from the judgments of the International Court of Justice<sup>65</sup> and from the practice of the relevant UN committees administering these treaties<sup>66</sup> that the presence of a jurisdiction clause is no bar to the application of the treaty to the first category of measures identified above, namely acts that take place extraterritorially. It does however appear to prevent the application of the treaty to measures with mere effects on persons abroad<sup>67</sup> except for measures affecting property or other rights with a close link to the state.<sup>68</sup>

The lead on this issue has been taken by the Committee on Economic, Social and Cultural Rights (CESCR), which administers the ICESCR. This began with the Committee’s General Comment No 12 on the right to adequate food (1999), where it said that:

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<sup>62</sup> There are general jurisdiction clauses in the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC) and the Convention Against Torture (CAT). For discussion, see Milanović, above at n 25, at 11-18.

<sup>63</sup> There are no general jurisdiction clauses in the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of Persons with Disabilities (CRPD). There are specific jurisdiction clauses in Article 14 ICESCR; Articles 3 and 5 CERD and in the provisions and protocols on individual petition in ICESCR, CERD, CEDAW, and CRPD. See Milanović, *ibid*.

<sup>64</sup> *Namibia*, Advisory Opinion [1971] ICJ Rep 16, para 131.

<sup>65</sup> *Namibia*, *ibid*, para 131 (Article 55 of the UN Charter); *Wall*, Advisory Opinion [2004] ICJ 136, paras 111, 112 and 113 (ICCPR, ICESCR and CRC); *Armed Activities (DRC/Uganda)* [2005] ICJ Rep 168, para 219 (ICCPR and CRC); *CERD (Georgia/Russia)*, Provisional Measures [2008] ICJ Rep 353, paras 109 and 149 (CERD).

<sup>66</sup> Eg *Lopez Burgos* (Human Rights Committee (HRC), Comm No 52/1979, UN Doc CCPR/C/13/D/52/1979, para 12.3 (1981)).

<sup>67</sup> Cf the reference to ‘control’ in HRC General Comment No 31 on the nature of the general legal obligation imposed on states parties to the Covenant (2004), para 10, reprinted in United Nations, *Human Rights Instruments, Volume I*, above at n 61. In its Concluding Observations on Iran, UN Doc CCPR/C/79/Add.25 (1993), the HRC condemned Iran for issuing a fatwa against Salman Rushdie, to be executed outside of Iran. This is unlikely to be an example of conduct with mere effects abroad as suggested by Martin Scheinin, ‘Just Another Word? Jurisdiction in the Roadmaps of State Responsibility’ in Langford et al, above at n 26, at 225-6. More likely, it was assumed that any execution of the fatwa would be attributable to Iran, and so the case is better seen as one concerning extraterritorial conduct.

<sup>68</sup> *Gueye* (HRC, Comm No 196/1983, UN Doc CCPR/C/35/D/196/1985, at para 9.4 (1989) (army pension rights of non-nationals), *Loubna El Ghar* (HRC, Comm No 1107/2002, UN Doc CCPR/C/82/D/1107/2002 (2004) (refusal to issue passport to national resident abroad).

[S]tates parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end.<sup>69</sup>

It will be noted that in this passage the Committee uses the modal verb ‘should’, which stands in contrast to its use of the verb ‘must’ in relation to other obligations. Many commentators ignore this distinction, usually on the (circular) grounds that the Committee is known to use imprecise language.<sup>70</sup> An alternative view would be that the Committee is aware of the controversial nature of these issues, and its ambiguity might be motivated by a desire to develop rather than to codify the law. Such a view would be supported by the fact that the Committee uses the verb ‘should’ in controversial case, and ‘must’ (or equivalent obligatory language) in less controversial cases.

Relevantly, and as an illustration of this proposition, the Committee has used the verb ‘must’ in relation to the obligation to ‘respect’ the rights to health (2000),<sup>71</sup> water (2002)<sup>72</sup> and social security (2007).<sup>73</sup> It also used this language for the obligation to ‘protect’ the right to health (2000). However, it has not used this stronger language in relation to the obligation to ‘protect’ any other rights, where the language remains non-obligatory.<sup>74</sup> Moreover, in a 2011 Statement on state obligations regarding the corporate sector, the Committee used the word ‘should’ in relation to state obligations to protect the rights to water and social security, while omitting any reference to the right to protect health.<sup>75</sup> The Committee has also refrained from using obligatory language in its statements on the taking of unilateral measures to ‘fulfil’ rights in third countries.

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<sup>69</sup> CESCR General Comment No 12 on the right to adequate food (1999), para 36, reprinted in United Nations, *Human Rights Instruments, Volume I*, above at n 61.

<sup>70</sup> The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights’ in de Schutter, above at n 52, are typical in this regard. More cautiously, with a focus on issues of complicity: Jochen von Bernstorff, ‘Extraterritoriale menschenrechtliche Staatenpflichten und Corporate Social Responsibility’ (2011) 49 *Archiv des Völkerrechts* 34, at 53.

<sup>71</sup> CESCR General Comment No 14 on the right to health, (2000), para 39 reprinted in United Nations, *Human Rights Instruments, Volume I*, above at n 61.

<sup>72</sup> CESCR General Comment No 15 on the right to water (2002), paras 31-2, reprinted in United Nations, *Human Rights Instruments, Volume I*, above at n 61.

<sup>73</sup> CESCR General Comment No 19 on the right to social security (2007), paras 53-4, reprinted in United Nations, *Human Rights Instruments, Volume I*, above at n 61.

<sup>74</sup> CESCR General Comment No 14, above at n 71, para 39.

<sup>75</sup> CESCR Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, UN Doc E/C.12/2011/1 (12 July 2011), paras 5-7. Overall, this statement aligns neatly with the earlier assessment of the UN Special Rapporteur on Business and Human Rights that ‘[w]hat is difficult to derive from the treaties or the treaty bodies is any general obligation on States to exercise extraterritorial jurisdiction over violations by business enterprises abroad.’ See John Ruggie, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries*, UN Doc A/HRC/4/35/Add.1 (13 Feb 2007), para 84.

On the other hand, the Committee has taken a firmer line on international cooperation, saying that ‘international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States’.<sup>76</sup> At least in relation to the rights protected under the ICESCR, this would seem to supersede Article 56 of the UN Charter, which requires UN members ‘to take joint and separate action in cooperation with the [UN] for the achievement of the purposes set forth in Article 55’<sup>77</sup> and the attendant debate as to whether there is any obligation to cooperate outside of the UN framework.<sup>78</sup> What such an obligation might entail is however unclear. At the time of its drafting, it seems unlikely that there was any obligation on the part of developed countries to finance developing countries.<sup>79</sup> Whether anything has changed is debatable, especially in light of the frequent objections on the part of developed countries to any such suggestions.<sup>80</sup> On the other hand, an obligation to cooperate may require a state party not to interfere with the ability of another state party to comply with its own human rights obligations.

To summarize, if one takes the Committee at its word (reading ‘should’ as ‘should’ rather than ‘must’) then it would seem states are under obligations in relation to third countries to respect rights to health, water and social security and to protect the right to health. If one reads the word ‘should’ as ‘must’, then one can add obligations to respect, protect, and fulfil these and other rights as well. In any case, this assumes the legal value of the Committee’s statements. While, like the Human Rights Committee, the Committee’s statements are doubtless to be accorded ‘great weight’,<sup>81</sup> formally they are not authoritative, nor do they qualify as subsequent practice.<sup>82</sup> Nor have states been uniformly supportive of even the most basic of these obligations, namely of an obligation to respect economic, social and cultural rights in situations of mere

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<sup>76</sup> See also CESCR General Comment No 3 on the nature of states’ parties obligations (1990), para 14, reprinted in United Nations, *Human Rights Instruments, Volume I*, above at n 61.

<sup>77</sup> The purposes in Article 55 of the UN Charter include the ‘promotion of universal respect for and observance of human rights and fundamental freedoms for all’.

<sup>78</sup> The drafting history and origins of the resulting compromise is recounted in Hans Kelsen, *The Law of the United Nations* (London: Stevens & Sons, 1951) at 99-101, n 9. Kelsen himself considered the provision to be ‘[l]egally ... meaningless and redundant’ (at 100). For a recent sceptical view see P Gandhi, ‘The Universal Declaration of Human Rights at Fifty Years: Its Origins, Significance and Impact’ (1998) 41 *German Yearbook of International Law* 206, 225.

<sup>79</sup> See Philip Alston and Gerard Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly* 156, at 191, who say ‘on the basis of the preparatory work it is difficult, if not impossible, to sustain the argument that the commitment to international cooperation contained in the Covenant can accurately be characterized as a legally binding obligation upon any particular state to provide any particular form of assistance’.

<sup>80</sup> See, for example, the statements by United Kingdom, the Czech Republic, Canada, France, and Portugal in the Commission on Human Rights, Report of the Open-ended Working Group established with a view to considering options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc E/CN.4/2005/52 (10 Feb 2005), para 76.

<sup>81</sup> Cf *Diallo (Guinea/DRC)*, Merits [2010] ICJ Rep 639, para 66, with reference to the HRC, which is established by and supervises the ICCPR. The CESCR was established by resolution of the UN Economic and Social Council, rather than by the IESCR, but this should make no difference. For more on the status of the statements of the UN human rights committees see James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford: Hart, 2007), 133-6.

<sup>82</sup> Georg Nolte, ‘Third Report for the ILC Study Group on Treaties over Time’ in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford: OUP, 2013) at 384.



economic effect.<sup>83</sup> Some have even been categorically negative.<sup>84</sup> It is therefore difficult to come to a clear conclusion on the application of the ICESCR to measures with extraterritorial effects, other than in relation to economic sanctions. But this itself is a relevant result, because it means that there is no consistent and uniform practice supported by *opinio juris* that would be needed to establish a relevant rule of customary international law. Hence the ICESCR is not additional source of human rights obligations under EU law.

## D Enforcement

Even if the EU is subject to various obligations under EU law, this by no means leads to the conclusion that these will be enforced. For different reasons, affected individuals are essentially excluded from most actions, and the EU institutions and Member States will have little interest in commencing legal action, even when they could.

As far as enforcement by individual persons is concerned, there are various obstacles. One is to do with the legal nature of the human rights obligations being enforced. It is generally accepted that EU acts can *ipso facto* be challenged on the grounds they violate general principles of EU law, the source of most fundamental rights to date. However, it is not clear that the same assumption applies to human rights obligations found elsewhere in the EU Treaty, including, possibly, those found in the EU Charter.<sup>85</sup> In particular, and of most relevance to the analysis in this article, it is likely that, as with other provisions of the EU Treaties, the extraterritorial human obligations in Article 3(5) and 21(3)(1) TEU are only enforceable by individuals if they are clear, precise and unconditional. The same is true of human rights obligations found in international treaties (such as the EU's human rights clause), which must amount to 'a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'.<sup>86</sup> Customary international law is difficult to enforce, for a different reason. Individuals may rely on customary international law obligations, providing these are properly established. However, they will only succeed if the EU institutions have made 'manifest errors of assessment concerning the conditions for applying those principles'.<sup>87</sup>

Further obstacles relate to the nature of the challenged EU act (or omission), and, what is more, regardless of whether the challenge is directly before the EU Court of

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<sup>83</sup> Matthew Craven, 'The Violence of Dispossession: Extra-Territoriality and Economic, Social, and Cultural Rights' in Mashood Baderin and Robert McCorquodale (eds), *Economic, Social, and Cultural Rights in Action* (Oxford: OUP, 2007), 77.

<sup>84</sup> Commission on Human Rights, Fifty-Ninth Session, Summary Record of the 56<sup>th</sup> Meeting, E/CN.4/2003/SR.56, para 49 (Canada, denying a 'right' to water in response to General Comment No 15); Commission on Human Rights, Sixtieth Session, Summary Record of the 51<sup>st</sup> Meeting, E/CN.4/2004/SR.51, para 84 (USA, denying that there is any international obligation in relation to a right to food), the latter referred to in Craven, *ibid*.

<sup>85</sup> On the reviewability of insufficiently precise 'umbrella' rights, see Hofmann and Mihaescu, above at n 12, at 79.

<sup>86</sup> Case C-366/10, *ATAA*, above at n 6, para 55. It may be assumed that, unlike the WTO agreements, the EU's agreements containing the human rights clause are not incapable of generating directly effective individual rights.

<sup>87</sup> Case C-366/10, *ATAA*, above at n 6, para 110.

Justice<sup>88</sup> or indirectly before a national court of an EU Member State.<sup>89</sup> It is well known that applicants are limited to challenging acts (or omissions) that affect their legal position, but it also appears to be the case that this means their legal position under EU law. In *Commune de Champagne*, this was one of the reasons that the EU Court of First Instance (now the General Court) decided that Swiss applicants were unable to challenge an EU international agreement before the General Court on the grounds that it violated EU law because their legal position in Switzerland was not affected by the agreement.<sup>90</sup> This chimes with the statement of the EU Court of Justice in *ATAA*, in a preliminary ruling, that an individual may only challenge an EU act on the basis that it conflicts with customary international law ‘the act in question is liable to affect rights which the individual derives from European Union law or to create obligations under European Union law in his regard.’<sup>91</sup> In the case of direct actions, this condition is mirrored by the rule limiting standing to applicants who are ‘directly concerned’ by an EU act, which again seems to mean applicants whose legal position under EU law has been affected by the act at issue.<sup>92</sup>

Putting these cases together, the conclusion seems to be that both for international agreements, and for customary international law, and both for direct actions before the EU Court of Justice and actions before national courts, an individual applicant is only able to challenge an EU act to the extent that this act affects its rights and obligations under EU law. This naturally presents a difficulty for many non-national non-resident individuals who are affected by EU policies. Aside from individuals with property or other legal interests in the EU (such as importers), most of these individuals do not enjoy rights and obligations under EU law.<sup>93</sup> For such persons, both direct and indirect actions challenging EU measures are essentially foreclosed.<sup>94</sup>

There is another option. Individuals may also bring an action before the EU Court of Justice for compensation for non-contractual damage caused by an EU institution.<sup>95</sup> This is a more promising cause of action, though one that is difficult to make out, as

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<sup>88</sup> Article 263 (direct actions challenging EU acts) and Article 265 TFEU (direct actions challenging omissions).

<sup>89</sup> National courts refer such questions to the EU Court of Justice for a preliminary ruling under Article 267 TFEU.

<sup>90</sup> Case T-212/02, *Commune de Champagne* [2007] ECR II-2023, paras 86-95 (interpreting Article 263(1) TFEU).

<sup>91</sup> Case C-366/10, *ATAA*, above at n 6, para 107.

<sup>92</sup> Case C-486/01P, *Front National* [2004] ECR I-6289. However, in Case C-583/11 P, *Inuit* [2013] ECR I-nyr (AG Opinion, 17 Jan 2013), para 71, Advocate General Kokott considered that a measure could also be of direct concern even if it only affected the factual position of the individual. The Court did not address this issue.

<sup>93</sup> This is true even in cases involving EU development aid, which is typically administered by third country public authorities. Kirsten Schmalenbach, ‘Accountability: Who is judging the European Development Cooperation?’ (2008) *Europarecht*, Beiheft 2, 162 at 180-83. Cf Case C-182/91, *Forafrique Burkinabe SA* [1993] ECR I-2184, paras 23-24. An exception would be persons living in EU administered territory, as occurred in Mostar.

<sup>94</sup> In addition, under Article 230(4) TFEU the applicant would have to be ‘individually concerned’, and not simply a member of a class of affected persons, unless the challenged measure is merely a ‘regulatory act’ not requiring further implementation.

<sup>95</sup> This is under Article 340(2) TFEU. On non-contractual damage caused by violating fundamental rights, see Herwig Hofmann, Gerard Rowe and Alexander Türk, *Administrative Law and Policy of the European Union* (Oxford: OUP, 2011) at 883, with further references.

*Mugraby* and *Zaoui* demonstrate.<sup>96</sup> The difficulty is that the respective EU institutions will only be liable if they have ‘manifestly and gravely disregarded’ their discretion to act. While not unimaginable, there will not be many EU policies that can be said to have violated human rights obligations to quite this degree.

Different issues arise in relation to legal actions brought by an EU institution or an EU Member State, again challenging an act or omission of an EU’s institution. In terms of standing, these ‘privileged applicants’ are unfettered by conditions of ‘direct concern’ and ‘individual concern’. It may even be that their ability to rely on international treaties (and hence the human rights clause) is less restricted than it is for individuals.<sup>97</sup> The problems here are rather political in nature. It is difficult to imagine an EU institution<sup>98</sup> challenging an EU act (or failure to act) on the grounds that such action (or institutional inaction) violates the human rights of persons in third countries.<sup>99</sup> Conceivably, a Member State disgruntled at having lost a qualified majority vote on an EU measure might seek to redeem the situation by means of legal action. But this is also difficult to imagine.

## **E Conclusion**

The theoretical results of the foregoing analysis are potentially significant; the practical results perhaps less so.

It has been argued that the EU is bound by unusually broad human rights obligations governing the extraterritorial effects of its policy measures (this being distinct from the question whether these obligations also cover extraterritorial conduct). In particular, Article 3(5) and especially Article 21(3)(1) TEU require the EU to ‘respect’ human rights in respect of its external policies and internal policies with external effects. These include, for example, EU trade policies with negative effects on individuals in other countries. The EU is also subject to treaty obligations, contained in its many bilateral human rights clauses, to ‘respect’ human rights in both its internal and international policies.

On the other hand, it is much less likely that these norms require the EU also to ‘protect’ human rights extraterritorially or to ‘fulfil’ human rights other than in general terms. It is also uncertain whether fundamental rights as contained in the EU Charter or general principles of EU law apply to the extraterritorial effects of EU policy measures. And while some customary international law obligations, binding as EU law, are related to relevant extraterritorial human rights obligations, they do not add to these obligations.

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<sup>96</sup> See above at [text to n 17].

<sup>97</sup> See C-377/98, *Netherlands v Parliament and Council* [2001] ECR I-7079, para 54, where the EU Court of Justice said that ‘[e]ven if, as the Council maintains, the CBD contains provisions which do not have direct effect, in the sense that they do not create rights which individuals can rely on directly before the courts, that fact does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement’.

<sup>98</sup> Cf J H H Weiler, ‘Editorial: Dispatch from the Euro Titanic: And the Orchestra Played On’ (2010) 21 EJIL 805 at 809 in relation to the European Parliament’s enhanced involvement in the EU’s international agreements.

<sup>99</sup> Article 263 TFEU.

Furthermore, the EU's extraterritorial human rights obligations are, in practice, likely to remain unenforced. Individuals are prevented from challenging EU policies that conflict with these obligations in a number of ways, including restrictive conditions on the types of legal acts that can be challenged, restrictive standing rules and difficulties in identifying precise and therefore enforceable human rights obligations (except in the unlikely event that these are in the form of fundamental rights). Individuals might, perhaps, claim compensation for non-contractual damage by the EU institutions. There is also the possibility of legal action by the EU institutions or EU Member States, which are for various reasons less hampered by these conditions. But other legal and practical obstacles stand in the way of success on these grounds.

The end result, then, is that while the EU's human rights obligations should have a significant impact on EU policies with extraterritorial effects, this impact is unlikely to result from judicial enforcement.