
The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects

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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)

Abstract

In principle, there are two ways in which states and international organizations can violate the human rights of persons outside their territorial jurisdiction. The first is by extraterritorial conduct; the second is by domestic conduct, in the form of policies with extraterritorial effect. This article considers the second of these scenarios, taking as its case study the EU's obligations under EU law. To this end, it analyses Articles 3(5) and 21(3)(1) of the EU Treaty, EU fundamental rights, and the EU's international obligations, which are also binding under EU law. It concludes by looking at the enforcement of any such obligations by individuals, the EU institutions, and EU Member States.

1 Introduction

It is clear that, at least to some degree, customary international law and human rights treaties protect persons from the extraterritorial conduct of states.¹ A quite different question is whether these persons are also protected from the mere effects of conduct that is not extraterritorial.² This is a question of particular importance for persons

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¹ E.g., M. Milanović, *Extraterritorial Application of Human Rights Treaties* (2011); Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To', 25 *Leiden J Int'l L* (2012) 857; K. Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (2012).

² These two extraterritorial dimensions of human rights obligations are sometimes conflated. See, e.g., Principle 8(a) of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, contained in de Schutter *et al.*, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights',

who are affected by the economic policies of states, and in particular their trade policies.³ On this point, as will be elaborated below, the situation under customary international law, and even under the main international human rights treaties, is at best fragmented between particular human rights and types of state conduct.⁴ This means that, perhaps counter-intuitively, individuals are in some respects less effectively protected from the extraterritorial effects of state conduct under international human rights law than they are under international trade law, which has no difficulty with the proposition that, in principle, states may be responsible for the extraterritorial effects of their economic policies. Perhaps most obviously, WTO members may not adopt subsidies that injure the producers of other WTO members, and this is the case regardless of whether the injury occurs in the market of the subsidizing member, the market of the affected producers, or even the market of a third country.⁵ More generally, the value of WTO obligations is assessed in terms of the economic benefits that individual operators are entitled to expect in the markets of other WTO members.⁶

Against this background, it is notable that states are also not, as a rule, subject to constitutional obligations to take account of the extraterritorial effects of non-extraterritorial conduct. And so it is of some interest that, in the Lisbon Treaty, the EU Member States elaborated a set of obligations that apparently require the EU to respect the human rights of persons beyond EU territorial jurisdiction, not only in relation to the extraterritorial conduct of the EU, but also in relation to the extraterritorial effects of EU policies. The purpose of this article is to explore the extent of these obligations, and, in the course of doing so, to compare them with the *status quo* under general international law.⁷

The structure of this article is as follows. Section 2 discusses Articles 3(5) and 21 of the Treaty on European Union (TEU), which contain express references to the extraterritorial effects of EU conduct. Section 3 looks at the extent to which EU fundamental rights, and in this context the European Convention on Human Rights (ECHR),

34 *Hmn Rts Q* (2012) 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'.

³ For some concrete examples see, e.g., 'The Ghana Chicken Case' and 'The Kenyan Farmers Case', in F. Coomans and R. Künnemann (eds), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (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).

⁴ See, e.g., Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', 107 *AJIL* (2013) 295.

⁵ Arts 5 and 6(3) of the WTO Agreement on Subsidies and Countervailing Measures.

⁶ Art. 22(4) of the WTO Dispute Settlement Understanding.

⁷ This article does not look at two special situations in which domestic measures have extraterritorial effects but which are not usually considered extraterritorial. One concerns the exposure of a person to risks of human rights violations taking place extraterritorially: e.g., App. No. 14038/88, *Soering* (ECtHR, 7 Jul. 1989); discussed in App. No. 52207/99, *Banković* (ECtHR, 12 Dec. 2001), at para. 70. For a ruling to this effect under the EU Charter see Joined Cases C-411/10 & C-493/10, *NS v. Secretary of State for the Home Department* [2011] ECR I-13905. The other concerns conduct affecting local property of persons located abroad: e.g., Joined Cases C-402/05 P & C-415/05 P, *Kadi I* [2008] ECR I-6351, at para. 371.

impose upon the EU obligations with respect to the extraterritorial effects of EU conduct. Section 4 discusses the EU's obligations under EU law to comply with its international obligations, which includes the human rights clauses found in all EU trade and cooperation agreements and customary international law. Section 5 considers the practical implications of the foregoing discussion in terms of the enforceability of these obligations by the EU individuals and institutions. Section 6 summarizes and concludes.

2 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.⁸ And, according to the CJEU, it also establishes an obligation to act consistently with the norms mentioned, including international law and, by extension, international human rights obligations.⁹

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).¹⁰ Article 21(1) TEU states:

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 similar 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'.

⁸ According to Declaration No. 41 TEU, this may be done, if necessary, by resort to Art. 352 TFEU.

⁹ Case C-366/10, *Air Transport Association of America* [2011] ECR I-13755, at para. 101. See further below at page 1078.

¹⁰ Art. 21 TEU also features in some of the EU's more specific external policies. Art. 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 [i.e., Art. 21 TEU]', and similar language is used in Arts 207 TFEU on the common commercial policy and 208 TFEU on development cooperation.

Both of these provisions impose constraints on EU external policies, albeit a softer constraint in the case of Article 21(1) TEU.

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

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 (discussed further below). 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 Article 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'. The principles set out in Article 21(3)(1) therefore apply not just to EU policies, nor even only to EU external policies, but 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. Secondly, 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 CJEU has affirmed, these phrases are not devoid of normative force.¹¹ 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, this provision 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.¹² 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 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'.

¹¹ See *supra* note 9.

¹² This is indeed an even stronger implication than the implication on which the Court based its understanding of Art. 3(5) TEU, discussed below at page 1078.

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',¹³ 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.

3 General Principles and the EU Charter (Article 6(1) and (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.¹⁴ Both of these sources of obligations now have the rank of primary law, being enshrined in Article 6(1) and (3) EU respectively.¹⁵ Neither contains any rule on its extraterritorial application, nor has the jurisprudence properly dealt with this issue (except for the case of EU-based property owned by foreigners abroad).¹⁶ This means that it is not certain whether fundamental rights apply to policy measures with extraterritorial effects, 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 CJEU 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

¹³ The overlap between the objectives in Art. 21(2) TEU and Art. 3(5) TEU can cause difficulties. E.g., 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 Art. 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 Art. 3(5) TEU, which does support a reference to Art. 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 Art. 21(2)(a)–(c) TEU are CFSP objectives, as did Bot AG in Case C-130/10, *Parliament v. Council (Al Qaeda)* (AG's Opinion), not yet reported, at para. 64. The Court did not express itself on the point: cf its judgment, at para. 62.

¹⁴ See the different views of Bazzocchi, 'The European Charter of Fundamental Rights and the Area of Freedom, Security and Justice', in G. di Federico (ed.), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (2011), at 196 and Bonavita, 'The EU Charter of Fundamental Rights and the Social Dimension of International Trade', in *ibid.*, at 260. See also Hervey, 'The "Right to Health" in European Union Law', in T. Hervey and J. Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (2003), at 212.

¹⁵ For a discussion of the relationship between the EU Charter (under Art. 6(1) TEU) and general principles of law (under Art. 6(3) TEU) see Hofmann and Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case', 9 *European Constitutional L Rev* (2013) 73.

¹⁶ E.g., *supra* at note 8.

Charter of Fundamental Rights of the European Union, on all the institutions and bodies of the Union'.¹⁷ 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.¹⁸ 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.¹⁹ The action failed on the merits,²⁰ 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.²¹ The argument was that the EU was responsible because of its funding of education in the Palestinian territories, which in turn incited hatred and 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.²²

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

¹⁷ *Parliament v. Council (Al Qaeda)*, *supra* note 13, at para. 83.

¹⁸ Another claim was for failure to act under Art. 265 TFEU.

¹⁹ Case T–292/09, *Mugraby* [2011] ECR II–255 (Gen. Ct. Order, 6 Sept. 2011); Case C–581/11 P, *Mugraby*, not yet reported (Grand Chamber, Order, 12 July 2012).

²⁰ 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, at paras 42–46.

²¹ Case C–288/03 P, *Zaoui*, not yet published, at paras 13–15.

²² 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 Dec. 2011, at 7.

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'.²³ These statements may be limited 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.²⁴

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 of the European Convention on Human Rights (ECHR) on this issue. While this Convention is no longer so often cited since the adoption of the EU Charter,²⁵ in formal terms it is still relevant to the determination of 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.²⁶ Secondly, 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.²⁷

But looking to the ECHR 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,²⁸ there has been virtually none in relation to its application to policy measures with mere extraterritorial effects, and those that have been decided are in conflict.²⁹ One of the few cases on point is *Kovačič*, which concerned Slovenian legislative

²³ European Parliament resolution on the institutional aspects of setting up the European External Action Service, OJ (2010) C265E, at para. 5.

²⁴ Reg. (EU) No. 1233/2011 of the European Parliament and of the Council of 16 Nov. 2011 on the application of certain guidelines in the field of officially supported export credits: OJ (2011) L326/45, recital 4.

²⁵ De Búrca, 'After the EU Charter of Fundamental Rights: the Court of Justice as a Human Rights Adjudicator?', 20 *Maastricht J European and Comp L* (2013) 168, especially at 175. For the view that the Charter is now seen as hierarchically supreme see Lavranos, 'The ECJ's Judgments in Melloni and Åkerberg Fransson: Une ménage à trois difficulté', 4 *European L Reporter* (2013) 133.

²⁶ See Case C-479/04, *Laserdisken* [2006] ECR I-8089, at para. 61.

²⁷ Art. 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 ECtHR: Case C-400/10, *McB* [2010] ECR I-8992, at para. 53.

²⁸ For discussion see, e.g., Milanović, *supra* note 1, at 11–18, Besson, *supra* note 1, and Da Costa, *supra* note 1, at ch. 2.

²⁹ See den Heijer and Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"', in M. Langford et al. (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (2013), at 185–186; Augenstein and Kinley, 'When Human Rights "Responsibilities" become "Duties": The Extra-Territorial Obligations of States that Bind Corporations', in S. Deva and D. Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013). An exception is the application of the ECHR to the property of non-residents, which is seemingly not controversial.

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’.³⁰ 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.³¹ How to reconcile these two cases is unclear.³²

In any case, it may be doubted whether the CJEU would adopt the ECHR position on the extraterritorial application of EU fundamental rights protections. It is more likely that the CJEU would seek to carve out its own position, based on the particular context in which EU fundamental rights apply.

4 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,³³ but it was placed on a new footing in *Air Transport Association of America*, when the CJEU 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.³⁴

The EU has concluded only one multilateral international human rights treaty, namely the Convention on the Rights of Persons with Disabilities.³⁵ 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

³⁰ App. No. 44574/98, *Kovačič* (ECtHR, admissibility, 9 Oct. 2003). See den Heijer and Lawson, *supra* note 29, at 179. Note also App. No. 67021/01, *Tatar* (ECtHR, 27 Jan. 2009, in French only), at 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, *supra* note 29.

³¹ App. No. 5853/06, *Ben El Mahi* (ECtHR, 11 Dec. 2006).

³² The notion of *espace juridique*, to the extent that this means anything, is not relevant. For discussion of its use and misuse see Wilde, ‘The “Legal Space” or “*espace juridique*” of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?’, 10 *European Hmn Rts L Rev* (2005) 115.

³³ Case 181/73, *Haegeman* [1974] ECR 449, at para. 5; Case C-286/90, *Poulsen* [1992] ECR I-6019, at para. 9. Treaties are binding as EU law under Art. 216(2) TFEU. This monism is subject to consistency with EU fundamental rights: *Kadi I*, *supra* note 7.

³⁴ *ATAA*, *supra* note 9, at paras 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 Art. 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.

³⁵ Council Dec. of 26 Nov. 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ (2010) L23/35.

thought that some human rights treaties are binding on the EU under the doctrine of 'functional succession', but this is not the case. Human rights are not an area of exclusive EU competence,³⁶ nor does the EU claim (and other parties do not therefore recognize) that the Convention is binding on this basis.³⁷ Even as a matter of EU law, the EU is therefore not bound by any multilateral human rights instruments. By contrast, 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.

A 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.³⁸

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. These 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,³⁹ but the conventional view is that they contain obligations binding on the parties. The scope of these clauses is broad, applying to both 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.

³⁶ The doctrine of 'functional succession' was applied to the GATT in Joined Cases 21–24/72, *International Fruit* [1972] ECR 1219, and more recently (by the CFI) to the UN Charter in Case T-315/01, *Kadi I* [2005] ECR II–3649, at para. 200. Following Case C-308/06, *Intertanko* [2008] ECR I-4057, at para. 49, and *ATAA*, *supra* note 9, it is now clear that this requires the EU to have acquired exclusive legislative competence in an area. This means that, contrary to the CFI in *Kadi I*, the EU has not 'functionally succeeded' to the UN Charter. For a discussion see Schütze, 'The "Succession Doctrine" and the European Union', in A. Arnulf *et al.* (eds), *A Constitutional Order of States?* (2011); 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, *The European Court of Justice and External Relations Law* (2014).

³⁷ *International Fruit*, *supra* note 36, observations of the Commission, at 1225; *ATAA*, *supra* note 9 (AG's Opinion), at para. 64, and Wouters *et al.*, *supra* note 36, at 13.

³⁸ This example is taken from Art. 2 of the EU–Iraq Partnership and Cooperation Agreement. For discussion of the variations and their legal significance see L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (2005), at ch. 4.

³⁹ *Ibid.*, at 93–99.

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.⁴⁰ This followed a UN Security Council Resolution, and follow up activity, concerning Liberia’s material and financial support to the RUF in Sierra Leone.⁴¹ The EU thus seems to have accepted that the essential elements clause covers policies with effects in other countries, independently 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.

B 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.

1 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 that is ancillary to conduct by other actors that violates international law. Rules to this effect may be found in primary obligations, for example the obligation to prevent genocide,⁴² which can be triggered by a risk of genocide occurring anywhere in the world.⁴³ 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.⁴⁴

These rules prohibit states and international organizations from knowingly aiding and abetting another actor⁴⁵ in the commission of a wrongful act,⁴⁶ knowingly

⁴⁰ Letter annexed to Council Dec. of 25 Mar. 2002 concluding consultations with Liberia under Arts 96 and 97 of the ACP–EC Partnership Agreement. OJ (2002) L96/23.

⁴¹ See First Report of the Secretary-General Pursuant to SC Res. 1343 (2001) regarding Liberia, UN Doc S/2001/424, 30 Apr. 2001.

⁴² In *Bosnian Genocide (Bosnia/Serbia)* [2007] ICJ Rep 595, at 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).

⁴³ *Ibid.*, at paras 429–431. See Milanović, ‘State Responsibility for Genocide: A Follow-Up’, 18 *EJIL* (2007) 669, at 684–688.

⁴⁴ 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.

⁴⁵ 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.

⁴⁶ Art. 16 ARS; Art. 14 ARIO, both *supra* note 44.

directing or controlling the commission of the wrongful act by another actor,⁴⁷ and knowingly coercing another actor to commit a wrongful act.⁴⁸ 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'.⁴⁹

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:

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.⁵⁰

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.⁵¹

2 *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'.⁵² The principle was stated more broadly in the 1949 *Corfu Channel* case, which affirmed

⁴⁷ Art. 17 ARS; Art. 15 ARIIO, both *supra* note 44.

⁴⁸ Art. 18 ARS; Art. 16 ARIIO, both *supra* note 44.

⁴⁹ Art. 41 ARS (states in relation to violations by states). Art. 42 ARIIO (states and international organizations in relation to violations by international organizations), both *supra* note 44.

⁵⁰ 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), at para. 2.6.

⁵¹ Art. 2(2)(b) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, OJ (2008) 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'.

⁵² *Trail Smelter (US/Canada)* (1941) 3 RIAA 1905. For an intriguing analysis of this case see Knox, 'The Flawed *Trail Smelter* Procedure: The Wrong Tribunal, the Wrong Parties, and the Wrong Law', in R.M. Bratspies and R.A. Miller (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (2006).

‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’.⁵³ 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’.⁵⁴

But what is the relevance of this obligation to measures with extraterritorial effects on individuals? In a recent statement, a consortium of academics has 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.⁵⁵

This is, however, something of an overstatement. While the obligation to prevent harm encompasses personal injury, including non-physical injury,⁵⁶ 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 in only 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.⁵⁷ Thus, the ‘rights of states’ referred to in *Corfu Channel* includes the right that other states respect the human rights of their nationals. However, this is the case only to the extent that those states are 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,⁵⁸ which is that it applies only 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 might be obliged to prevent the export of products, such as poisoned food, that it knows, or should know, will cause personal injury in third

⁵³ *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).

⁵⁴ *Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep. 226, at para. 29. The principle was reformulated in *Pulp Mills (Argentina/Uruguay)* [2010] ICJ Rep. 14, at para. 101.

⁵⁵ De Schutter *et al.*, *supra* note 2, at 1095–1096 (Para. 9 of the Commentary to Principle 3).

⁵⁶ *Diallo*, Compensation, [2012] ICJ Rep. 324. The Court cited *Lusitania* 7 RIAA (1923) 32, at 40, which referred to ‘suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to credit and reputation’ (at para. 18).

⁵⁷ *Diallo*, Preliminary Objections [2007] ICJ Rep. 582, at para. 39.

⁵⁸ N. Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (2002), at 172, cited with approval in de Schutter *et al.*, *supra* note 2, at 1136 n. 129.

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.

3 Conditions on countermeasures

Another relevant rule is that '[c]ountermeasures shall not affect ... obligations for the protection of fundamental human rights'.⁵⁹ It is unclear whether the relevant obligations are those of the entity imposing the countermeasures or those of the target entity.⁶⁰ In the former case, the provision would be declarative of the existing legal situation. Thus, in a case involving an embargo on exports to Burundi, the African Commission warned that an embargo could in principle violate states' obligations under the African Charter on Human and Peoples' Rights.⁶¹ 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 these rights had *jus cogens* status. 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 that prohibits countermeasures affecting 'other obligations under peremptory norms of general international law' and therefore a *jus cogens* limitation would lead to redundancy.⁶² On the other hand, the commentary to the Articles explains that the second rule is directed at future *jus cogens* norms.⁶³ So the status of these rights remains uncertain, and this line of inquiry does not so far do much to clarify the question at issue.

⁵⁹ Art. 50(1)(b) ARS and Art. 53(1)(b) ARIO, both *supra* note 44. An argument based on Art. 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, at para. 160.

⁶⁰ In favour of the view that it relates to the obligations of the target state: H.M. Haugen, *The Right to Food and the TRIPS Agreement* (2007), at 365; in favour of the view that it relates to the obligations of the responsible state: Borelli and Olleson, 'Obligations Relating to Human Rights and Humanitarian Law', in J. Crawford *et al.* (eds), *The Law of International Responsibility* (2010), at 1187–1188.

⁶¹ 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, at para. 75. For discussion see Bulto, 'Patching the "Legal Black Hole": The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System', 27 *SA J Hmn Rts* (2011) 249, at 261–263.

⁶² Art. 50(1)(d) ARS and Art. 53(1)(d) ARIO, both *supra* note 44. See Paparinskis, 'Investment Arbitration and the Law of Countermeasures', 79 *British Yrbk Int'l L* (2008) 264, at 328–329 and A. Tzanakopoulos, *Disobeying the Security Council. Countermeasures against Wrongful Sanctions* (2011), at 80.

⁶³ See International Law Commission (ILC), Commentary to Art. 50, (2001) II(2) Yrbk ILC 26, at 132, para. 9, making a cross-reference to the commentary on Art. 40, which considers the possibility of such future *jus cogens* norms.

More helpful, perhaps, is the fact 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’.⁶⁴ 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 states imposing sanctions are in any case obliged to do.

4 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.⁶⁵ 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.⁶⁶ 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.⁶⁷

It is clear from the judgments of the International Court of Justice⁶⁸ and from the practice of the relevant UN committees administering these treaties⁶⁹ 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

⁶⁴ CESCR, General Comment No. 8 on the relationship between economic sanctions and respect for economic, social, and cultural rights (1997), at para. 7, reprinted in UN, *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, *supra* note 60, 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.

⁶⁵ 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, *supra* note 1, at 11–18.

⁶⁶ There are no general jurisdiction clauses in the 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 Art. 14 ICESCR; Arts 3 and 5 CERD, and in the provisions and protocols on individual petition in ICESCR, CERD, CEDAW, and CRPD. See Milanović, *supra* note 1, at 11–18.

⁶⁷ *Namibia*, Advisory Opinion [1971] ICJ Rep. 16, at para. 131.

⁶⁸ *Ibid.*, at para. 131 (Art. 55 of the UN Charter); *Wall*, Advisory Opinion [2004] ICJ Rep. 136, at paras 111, 112, and 113 (ICCPR, ICESCR, and CRC); *Armed Activities (DRC/Uganda)* [2005] ICJ Rep. 168, at para. 219 (ICCPR and CRC); *CERD (Georgia/Russia)*, Provisional Measures [2008] ICJ Rep. 353, at paras 109 and 149 (CERD).

⁶⁹ E.g., *Lopez Burgos* (Human Rights Committee (HRC), Comm. No. 52/1979, UN Doc. CCPR/C/13/D/52/1979, at para. 12.3 (1981)).

effects on persons abroad,⁷⁰ except for measures affecting property or other rights with a close link to the state.⁷¹

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

[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.⁷²

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) ground that the Committee is known to use imprecise language.⁷³ 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 cases, 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),⁷⁴ water (2002),⁷⁵ and social security (2007).⁷⁶ 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

⁷⁰ 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), at para. 10, reprinted in UN, *supra* note 64. 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 Iran. This may be an example of conduct with mere effects abroad as suggested by Scheinin, 'Just Another Word? Jurisdiction in the Roadmaps of State Responsibility', in Langford *et al.*, *supra* note 29, at 225–226. Alternatively, as seems more likely, it might have been assumed that any execution of the fatwa would be attributable to Iran, such that the case is better seen as one concerning extraterritorial conduct.

⁷¹ *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).

⁷² CESCR General Comment No. 12 on the right to adequate food (1999), at para. 36, reprinted in UN, *supra* note 64.

⁷³ The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' in de Schutter, *supra* note 2, are typical in this regard. More cautiously, with a focus on issues of complicity: von Bernstorff, 'Extraterritoriale Menschenrechtliche Staatenpflichten und Corporate Social Responsibility', 49 *Archiv des Völkerrechts* (2011) 34, at 53.

⁷⁴ CESCR General Comment No. 14 on the right to health (2000), at para. 39, reprinted in UN, *supra* note 64.

⁷⁵ CESCR General Comment No. 15 on the right to water (2002), at paras 31–32, reprinted in UN, *supra* note 64.

⁷⁶ CESCR General Comment No. 19 on the right to social security (2007), at paras 53–54, reprinted in UN, *supra* note 64.

non-obligatory.⁷⁷ 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.⁷⁸ The Committee has also refrained from using obligatory language in its statements on the taking of unilateral measures to ‘fulfil’ rights in third countries.

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’.⁷⁹ 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 co-operation with the [UN] for the achievement of the purposes set forth in Article 55’⁸⁰ and the attendant debate as to whether there is any obligation to cooperate outside the UN framework.⁸¹ 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.⁸² Whether anything has changed is debatable, especially in light of the frequent objections on the part of developed countries to any such suggestions.⁸³ 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.

⁷⁷ CESCR General Comment No. 14, *supra* note 74, at para. 39.

⁷⁸ 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), at 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 J. 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), at para. 84.

⁷⁹ See also CESCR General Comment No. 3 on the nature of states’ parties obligations (1990), at para. 14, reprinted in UN, *supra* note 64.

⁸⁰ The purposes in Art. 55 of the UN Charter include the ‘promotion of universal respect for and observance of human rights and fundamental freedoms for all’.

⁸¹ The drafting history and origins of the resulting compromise is recounted in H. Kelsen, *The Law of the United Nations* (1951), at 99–101, note 9. Kelsen himself considered the provision to be ‘[l]egally ... meaningless and redundant’ (at 100). For a recent sceptical view see Gandhi, ‘The Universal Declaration of Human Rights at Fifty Years: Its Origins, Significance and Impact’, 41 *German Yrbk Int’lL* (1998) 206, at 225.

⁸² See Alston and Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’, 9 *Hmn Rts Q* (1987) 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’.

⁸³ See, e.g., the statements by UK, 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 ICESCR, UN Doc. E/CN.4/2005/52 (10 Feb. 2005), at para. 76.

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 those of the Human Rights Committee, the Committee's statements are doubtless to be accorded 'great weight',⁸⁴ formally they are not authoritative, nor do they qualify as subsequent practice.⁸⁵ 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 economic effect.⁸⁶ Some have even been categorically negative.⁸⁷ 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 for present purposes 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 an additional source of human rights obligations under EU law.

5 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.

In the first place, any direct action under Article 263 TFEU is subject to the strictures of the requirement of individual concern, except to the extent that the act is not legislative in nature. But this aside, individual applicants may in any case be precluded from directly challenging EU acts in respect of their extraterritorial effects. In *Commune de Champagne*, applicants from Switzerland sought to challenge an EU decision implementing an EU international agreement in respect of its effects in Switzerland. Article 263(1) TFEU states that this is only possible for legal acts that are

⁸⁴ Cf. *Diallo (Guinea/DRC)*, Merits [2010] ICJ Rep. 639, at 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 J. Harrison, *The Human Rights Impact of the World Trade Organisation* (2007), at 133–136.

⁸⁵ Nolte, 'Third Report for the ILC Study Group on Treaties over Time', in G. Nolte (ed.), *Treaties and Subsequent Practice* (2013), at 384.

⁸⁶ Craven, 'The Violence of Dispossession: Extra-Territoriality and Economic, Social, and Cultural Rights', in M. Baderin and R. McCorquodale (eds), *Economic, Social, and Cultural Rights in Action* (2007), at 77.

⁸⁷ Commission on Human Rights, Fifty-Ninth Session, Summary Record of the 56th Meeting, E/CN.4/2003/SR.56, at 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 51st Meeting, E/CN.4/2004/SR.51, at para. 84 (USA, denying that there is any international obligation in relation to a right to food), the latter referred to in Craven, *supra* note 86.

intended to produce legal effects *vis-à-vis* the applicants. The Court of First Instance said that EU rights and obligations were limited to the territory of the EU Member States. This was for two main reasons. First, ‘the principle of sovereign equality enshrined in Article 2(1) of the United Nations Charter means that it is, as a rule, a matter for each State to legislate in its own territory and, accordingly, that generally a State may unilaterally impose binding rules only in its own territory’. And second, as Article 299 of the EC Treaty (now Article 355 TFEU) provided that the EC Treaty (now the TFEU) only applied to the territory of the Member States, ‘an act of an institution adopted pursuant to the Treaty, as a unilateral act of the Community, cannot create rights and obligations outside the territory thus defined.’⁸⁸ The applicants were consequently not able to challenge the relevant aspects of the EU implementing decision.⁸⁹

There are certain problems with this reasoning. First of all, and most obviously, the principle of sovereign equality does not have the effect ascribed to it by the Court. There may be a presumption that domestic legislation does not apply outside of the territory of a state, but there is no invariable rule to this effect, and the presumption is often overridden. States routinely, and legally, exercise jurisdiction over their nationals in third countries. More interesting, though, is the Court’s interpretation of the territorial scope of the EU treaties. If taken at face value, this could be taken to mean that EU law does not recognize any rights in third countries, even human rights.⁹⁰ It is also not uncontested. In *Salemink* Advocate General Cruz Villalón took the contrary view that ‘for EU purposes, the “territory” of the Member States is the area (not necessarily territorial, in the spatial or geographical sense) of exercise of the competences of the Union’.⁹¹ The Court limited itself to saying that ‘territory’ includes areas under sovereign control such as, in the case at hand, the continental shelf.⁹² How this will develop is unclear.

The answer to the question whether EU law is territorially limited also has implications for the ability of individuals to enforce the EU’s customary international law obligations, both under Article 263 and in actions before national courts. This is because challenges to the validity of EU’s legal acts on the basis that they violate customary international law are limited to acts that ‘[are] liable to affect rights which the

⁸⁸ Case T-212/02, *Commune de Champagne* [2007] ECR II-2023, at paras 89–90; followed in Joined Cases T-108/07 and T-354/08, *Spira* (Gen. Ct, Jdg, 11 Jul. 2013), not yet reported, at para. 123.

⁸⁹ This ruling also has wider implications. The Article 263(4) TFEU requirement that an applicant can only challenge an act that is of ‘direct concern’ is likewise limited to acts affecting EU legal rights and obligations: Case C-486/01 P, *Front National* [2004] ECR I-6289. It would follow from *Commune de Champagne* that the ‘direct concern’ requirement is also limited to acts regulating conduct or things within EU territory. On the other hand, in Case C-583/11 P, *Inuit*, not yet reported (AG’s Opinion, 17 Jan. 2013), at para. 71, Kokott AG 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.

⁹⁰ Schmalenbach, ‘Accountability: Who is Judging the European Development Cooperation?’ *Europarecht*, Beiheft 2 (2008), 162, at 181. Referring to *Commune de Champagne*, P. Eeckhout, *EU External Relations Law*, 2nd edn (2011), at 292, states that ‘it would shake the very foundations of the EU’ if the EU were able to adopt a provision in an international agreement permitting another state to commit acts of torture.

⁹¹ Case C-347/10, *Salemink*, not yet reported (AG’s Opinion, 8 Sept. 2011), at paras 54–57.

⁹² *Ibid.*, (Grand Chamber, Jdg, 17 Jan. 2012), at para. 35.

individual derives from European Union law or to create obligations under European Union law in his regard.⁹³ How these conflicting cases are to be resolved is unclear.

Beyond the question of extraterritoriality, individuals seeking to enforce the EU's human rights obligations face other obstacles. In relation to the EU Charter, while it seems that the rights in that document are enforceable by individuals, the same does not appear to be true of the 'principles' in that document; furthermore, it is not entirely clear which provisions of the Charter contain rights and which contain principles.⁹⁴ Direct effect is expressly denied to the provisions of post-2008 EU free trade agreements,⁹⁵ which includes their human rights clauses, and other human rights clauses are only enforceable to the extent that they are directly effective.⁹⁶ The same is probably true of the human rights contained in Article 23 TEU.

Different obstacles lie in the way of actions for compensation for non-contractual damage caused by an EU institution. Such actions can only succeed if the institution has 'manifestly and gravely disregarded' its discretion to act and its act or omission has caused the damage in question.⁹⁷ A similar condition applies to the enforcement of customary international law, where applicants can succeed only if the EU institutions have made 'manifest errors of assessment concerning the conditions for applying those principles'.⁹⁸ *Mugraby* and *Zaoui* show how difficult it can be to demonstrate that these conditions are met.⁹⁹

In summary, direct actions challenging the validity of an EU legal act in relation to its extraterritorial effects may be precluded *ipso facto* on the grounds of its extraterritoriality. But even if they are permitted, and in indirect actions before national courts, such legal acts will only be challengeable if they violate concrete rights under the EU Charter, or otherwise if they violate a directly effective obligation in a human rights clause in a pre-2008 free trade agreement, or (most likely) in Article 23 TFEU. For their part, actions based on customary international law and for non-contractual damages require that an EU institution have acted in a manner that is not only wrong, but 'manifestly' wrong. These are all significant obstacles in the way of individual enforcement of the EU's obligations.

Different issues arise in relation to challenges brought by EU institutions or EU Member States. 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

⁹³ *Ibid.*, at para. 107.

⁹⁴ Case C-176/12, *AMS*, not yet reported (15 Jan. 2014), at para. 45; Robin-Olivier 'The Evolution of Direct Effect in the EU: Stocktaking, Problems, Projections', 12 *I-CON* (2014) 165; cf also Hofmann and Mihaescu, *supra* note 15, at 79.

⁹⁵ Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements', 51 *CML Rev* (2014) 1125.

⁹⁶ *ATAA*, *supra* note 9, at para. 55.

⁹⁷ Art. 340(2) TFEU. On non-contractual damage caused by violating fundamental rights see H. Hofmann, G. Rowe, and A. Türk, *Administrative Law and Policy of the European Union* (2011), at 883, with further references.

⁹⁸ *Ibid.*, at para. 110.

⁹⁹ See above at page 1076.

restricted than it is for individuals.¹⁰⁰ The problems here are rather political in nature. It is difficult to imagine an EU institution challenging an EU act or omission on the ground that such act or omission violates the human rights of persons in third countries.¹⁰¹ 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.

6 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.

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. These include 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

¹⁰⁰ See C-377/98, *Netherlands v. Parliament and Council* [2001] ECR I-7079, at para. 54, where the 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’.

¹⁰¹ Cf. Weiler, ‘Editorial: Dispatch from the Euro Titanic: And the Orchestra Played On’, 21 *EJIL* (2010) 805, at 809, in relation to the European Parliament’s enhanced involvement in the EU’s international agreements.

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.