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With trade comes responsibility: the external reach of the EU's fundamental rights obligations

Chiara Macchi*

ABSTRACT
Based on International Human Rights Law and EU law, this article endorses a 'functional' paradigm of EU's fundamental rights obligations, exploring whether such obligations extend beyond the EU's external borders and which positive obligations, if any, they entail. The article argues that the EU's fundamental rights obligations are founded in a non-territorial standard, as they attach to all 'functions' exercised by EU institutions, regardless of their internal or external scope. The paper then addresses the implications of such paradigm for the EU's human rights obligations in the context of its Common Commercial Policy, focusing in particular on trade agreements, investment protection agreements and on the EU's duty to regulate corporate actors.

KEYWORDS European union; common commercial policy; fundamental rights; extraterritoriality; due diligence

1. Introduction

The EU's Common Commercial Policy (CCP) is placed within the broader European external action and is required to be consistent with the objectives of peace, respect for human rights and sustainable development.[1] Moreover, '[i]n its relations with the wider world' the EU is required 'to uphold and promote its values', contributing to free and fair trade, as well as to human rights.[2] There are also grounds to argue that the EU, as a subject of international law, is bound by at least some international human rights law norms of a conventional nature (ie, the UN Convention on Persons with Disabilities) and of a customary nature, in addition to being bound by the EU Charter of Fundamental Rights. Hence, as also recommended

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[1] *Consolidated Version of the Treaty on European Union,* 7 June 2016, OJ C 202/1, Article 21 [TEU]; *Consolidated Version of the Treaty on the Functioning of the European Union* 7 June 2016, OJ C 202/1, Article 207 [TFEU].

[2] *Ibid* TEU, Article 3(5).

by the UN Guiding Principles on Business and Human Rights (UNGPs), the EU must ensure horizontal coherence between its trade policy and its own human rights obligations.[3] The question to be addressed is whether such obligations extend beyond the EU's external borders and which positive obligations, if any, they entail.

Answering such questions firstly requires an analysis of the legal foundations of the EU's 'diagonal' human rights obligations. This paper evaluates them both from an International Human Rights Law (IHRL) and from an EU law perspective, finding that EU's obligations are best explained through a function-based paradigm of fundamental rights jurisdiction (sections 2–3). The paper then addresses the implications of such paradigm for the EU's fundamental rights obligations under its CCP, focusing in particular on trade agreements, investment protection agreements and on the EU's duty to regulate corporate actors. The concluding paragraph sums up and discusses the paper's findings.

2. Extraterritorial human rights obligations: a useful framework?

The EU, as an international organisation, is bound by at least some obligations under IHRL. Indeed, although it is party to just one human rights treaty,[4] the EU must arguably respect those human rights norms that have acquired the status of customary international law.[5] As concerns the

[3] United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011), online: www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf, Guiding Principle 8.

[4] Apart from the International Convention on the Rights of People with Disabilities, the EU is not a party to human rights treaties. EU accession to the European Convention on Human Rights, required by Article 6(2) TEU, was blocked in 2014 by Opinion 2/13 of the ECJ due to incompatibility of several aspects of the Draft Accession Agreement with the EU Treaties.

[5] Tawhida Ahmed and Israel de Jesús Butler, 'The European Union and Human Rights: an International Law Perspective' (2006) 17 *EJIL* 771, 781; Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2015) 25(4) *EJIL* 1072, 1078; Case C–366/10, *Air Transport Association of America v Secretary of State for Energy and Climate Change* [2011] ECR I-13755, para 101; Maria Rosaria Mauro, 'The Protection of Non-economic Values and the Evolution of International Economic Organizations - The Case of the World Bank' in Roberto Virzo and Ivan Ingravallo (eds), *Evolutions in the Law of International Organizations* (Brill Nijhoff, 2015) 244, 247; Ludovica Poli, 'The Duty of Care as a Corollary of International Organizations' Human Rights Obligations' in Andrea de Guttry et al (eds), *The Duty of Care of International Organizations Towards Their Civilian Personnel - Legal Obligations and Implementation Challenges* (TMC Asser Press 2018) 409, 416; Smita Narula, 'The Right to Food: Holding Global Actors Accountable Under International Law' (2006) 44 *Columbia Journal of Transnational Law* 691, 741; Guillaume Le Floch, 'Responsibility for Human Rights Violations by International Organizations' in Roberto Virzo and Ivan Ingravallo (eds), *Evolutions in the Law of International Organizations* (Brill Nijhoff, 2015) 381, 391. According to De Schutter, 'there is indeed a growing consensus in legal doctrine that most, if not all, of the rights enumerated in the Universal Declaration on Human Rights have acquired the status of legally binding norms'. Olivier De Schutter, 'Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility' (2010) CRIDHO Working Paper 2010/4, online: https://sites.uclouvain.be/cridho/documents/Working.Papers/CRIDHO-WP-2010-4-ODeSchutter-IO-HRD.pdf, 8.

extraterritorial dimension of human rights obligations, however, the developments that have taken place in the jurisprudence of human rights treaty bodies are scarcely relevant to the EU. Indeed, apart from a few narrow exceptions,[6] a clear definition of the extraterritorial dimension of human rights obligations has not yet consolidated under customary international law.

Nevertheless, it is worth noting, that extraterritorial obligations (ETOs) jurisprudence has undergone interesting *developments* that point to an expansion beyond the settled paradigms of effective spatial or personal control.[7] The European Court of Human Rights (ECtHR), for instance, has recognised jurisdiction to be triggered by either the exercise of a lawful competence, or by the commission of an unlawful act by the state outside its own territory, even in the absence of the element of effective control or authority.[8] The relevant cases, however, typically concerned a state's extraterritorial acts in the context of military operations and are scarcely relevant to the context of a state stipulating a trade agreement that produces human rights impacts in the territory of another country. In this respect, a more pertinent scenario is that of the case *Kovaĉić et al*., concerning Slovenian banking legislation that allowed the Croatian branches of a Slovenian bank to prevent Croatian clients from withdrawing their savings in their home country. The Court, in declaring the complaint admissible, stressed that 'the responsibility of the High Contracting Parties may be engaged by acts of their authorities that produce effects outside their own territory'.[9] *Kovaĉić* illustrates a situation in which the state's factual power to affect the human rights of individuals extraterritorially is derived from a legislative act (the Slovenian banking legislation), which did not constitute an

[6] Exceptions include the situation of effective territorial control and violations of peremptory norms of international law. See 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 *Human Rights Quarterly* 1084, 1096.

[7] Cedric De Koker, 'Extra-territorial Jurisdiction & Flexible Human Rights Obligations: The Case of Jaloud v. the Netherlands', (*Strasbourg Observers*, 8 December 2014), online: https://strasbourgobservers.com/2014/12/08/extra-territorial-jurisdiction-flexible-human-rights-obligations-the-case-of-jaloud-v-the-netherlands/; Aurel Sari, 'Jaloud v Netherlands: New Directions in Extra-Territorial Military Operations', (*EJILTalk!*, 24 November 2014), online: www.ejiltalk.org/jaloud-v-netherlands-new-directions-in-extra-territorialmilitary-operations/; Marko Milanovic, 'The Bottom Line of Jaloud', (*EJILTalk!*, 26 November 2014), online: www.ejiltalk.org/the-bottomline-of-jaloud/.

[8] Hugh King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9(4) *Human Rights Law Review* 521, 522; Eleni Kannis, 'Pulling (apart) the triggers of extraterritorial jurisdiction' (2015) 40 *University of Western Australia Law Review* 221, 225. For an example of the first trigger, see: *Jaloud v Netherlands* App no 47708/08 (ECtHR - GC, 20 November 2014). For an example of the second trigger, see: *Pad et al v Turkey* App no 60167/00 (ECtHR, 28 June 2007).

[9] *Kovačić et al v Slovenia* App nos 44574/98, 45133/98 and 48316/99 (ECtHR - GC, 1 April 2004), paras 4 (c), 5(c) [*Kovačić*]. See also the Human Rights Committee's case: Human Rights Committee, *Gueye et al v France* (3 April 1989) Comm No 196/1985, CCPR/C/35/D/196/1985, in which the Senegalese applicants complain about French legislation that determined a discriminatory pension treatment for soldiers of Senegalese nationality who had served in the French Army prior to Senegal's independence. The Committee found 'the authors are not generally subject to French jurisdiction, except that they rely on French legislation in relation to the amount of their pension rights' (para 9.4).

extraterritorial act *per se* (albeit having extraterritorial implications),[10] nor implied any form of control over the foreign territory or the affected individuals. The act rather constituted an exercise of a state's lawful competence,[11] which in turn produced an extraterritorial impact. An analogy can be drawn with the state's lawful competence and factual ability to affect the human rights of its own nationals abroad (eg, by refusing the issuing of a passport), which the Human Rights Committee found sufficient to bring those individuals within the state's human rights jurisdiction in relation to the specific right(s) affected.[12]

The UN Committee for Economic, Social and Cultural Rights (CESCR), albeit omitting to rigorously spell out the legal reasoning behind its position,[13] adopted an expansive approach to ETOs, founding the state's extraterritorial duty to protect human rights in its lawful competence and factual ability to influence 'by legal and political means' the conduct of corporations domiciled in their jurisdiction.[14] It held that the state's due diligence obligations under the Covenant include preventing third parties within their scope of influence from impeding the enjoyment of human rights in other countries.[15] This reading allows for the argument that states have a duty to use the regulatory and policy instruments at their disposal – including trade policies and human rights due diligence laws – to influence the extraterritorial conduct of business actors they are capable of influencing.[16]

The evolution of jurisprudence in the field of ETOs is not uniform nor consistent, but it does indicate that a state's human rights jurisdiction may

[10] For a discussion on the difference between direct exercise of extraterritorial jurisdiction and domestic measures with extraterritorial implications, see: John Ruggie, 'Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework', UN doc.A/HRC/14/27 (2010), Chapter E.

[11] Lawful under public international law. See King (n 8) 522).

[12] Human Rights Committee, *Montero v Uruguay* (31 March 1983) Comm No 106/81, CCPR/C/18/D/106/1981; Human Rights Committee, *Lichtensztejn v Uruguay* (31 March 1983) Comm No 77/1980, CCPR/C/18/D/77/1980. See also: *X v United Kingdom* (1977) 12 DR 73. The nationals will fall under the State's jurisdiction not for the whole range of human rights, but only 'in certain respects' (*X v Federal Republic of Germany* (1965) 17 CD 42, para 47).

[13] The Committee seems to link its reading to the principle of international cooperation as articulated both in the Covenant and in the UN Charter (Narula (n 5) 735 37). However, also in the light of the contested status of such principle under international law, a structured argumentation would help strengthen the authority of the Committee's interpretation of ETOs.

[14] CESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health*, 11 August 2000, E/C.12/2000/4, online: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx, para 39. See also: CESCR, *General Comment 15: The Right to Water*, 20 January 2003, E/C12/2002/11, online: www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf, para 33.

[15] *Ibid*.

[16] The Human Rights Committee seems to have embraced a similar view in its more recent Concluding Observations, e.g.: CCPR, *Concluding Observations: Germany*, 25 May 2012, CCPR/C/DEU/6, para 16; *Concluding Observations: Canada*, 13 August 2015, CCPR/C/CAN/CO/6, para 6. This position also resonates with the Maastricht Principles, which arguably go even further than CESCR, extending ETOs to all those situations in which the State, 'whether through its executive, legislative or judicial branches, is in a position to exercise *decisive influence* or to take measures to realize' ESC rights (*Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, 28 November 2011, Principle 9, emphasis added).

be triggered by its legal competence and factual ability to affect human rights abroad through its territorial acts with extraterritorial effects.[17] The EU, however, is not party to any but one of the existing international human rights treaties, nor does EU membership entail the transfer of the member states' own conventional human rights obligations to the EU.[18] In addition, the Court of Justice of the EU (CJEU) is largely unreceptive to international human rights standards other than the European Convention of Human Rights to interpret the scope of fundamental rights as general principles of EU law.[19]

IHRL, therefore, remains relevant to the extent that it binds individual EU member states, and prompts them to act within the EU to ensure that its policies are compatible with their own human rights obligations.[20] However, as regards the distinct obligations of the EU as an international organisation, the ETOs paradigm that is developing under IHRL is of little usefulness at present. As section 3 below shows, the diagonal obligations[21] of the EU can be better discerned by looking at EU law itself, rather than at its elusive obligations under IHRL.

3. The non-territorial basis of the EU's 'diagonal' obligations

The fact that there is currently little guidance on the extraterritorial applicability of the EU Charter of Fundamental Rights (CFR)[22] constitutes no obstacle to the claim that the EU should shape its CCP – a policy which has an 'external' reach by definition – in a way that is consistent with the Charter's standards. Two reasons can be put forward to support this

[17] As convincingly argued by King, the extent of the state's legal competence directly affects the extent of its positive human rights obligations, which clearly cannot exceed what the state is permitted to do under public international law. King (n 8) 556. For a related reflection on international organisations' positive obligations, see also Chiara Macchi, 'The Transnational Dimension of International Organizations' Duty of Care Towards Their Civilian Personnel: Lessons from the Case Law on States' Extraterritorial Human Rights Obligations' in de Guttry et al (eds) (n 5) 433, 449 *et seq*.

[18] De Schutter (n 5) 12-13; Le Floch (n 5) 389; Poli (n 5) 415-16.

[19] OHCHR, *The European Union and International Human Rights Law* (2011), online: https://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf, 11.

[20] It must be recalled that EU membership does not absolve member states from their obligations under the ECHR and other international human rights treaties in the areas covered by the transfer of powers. (e.g. see Ahmed and Butler (n 5) 782-783; De Schutter (n 5) 27-28; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* App no 45036/98 (ECtHR - GC, 30 June 2005); CESCR, *Concluding Observations: United Kingdom*, 5 June 2002, E/C.12/1/Add.79, para 26).

[21] This paper prefers to use the expression 'diagonal' instead of 'extraterritorial' obligations in relation to the EU, in light of the fact that, as explained in section 3, the notion of territory does not define the EU (and the scope of its obligations) in the same way that it defines a sovereign state. The chosen expression is borrowed from Joseph, who uses it to address the state's obligations to people in other states under international human rights law. See Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (OUP, 2011) Chapter 8.

[22] Cedric Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations' (2018) 20 *Intl Community L Rev* 374, 380; Charter of fundamental rights of the European Union [2012] OJ C 326/391 (originally: OJ 2000 C 364/01, subsequently reenacted: OJ 2007 C 303/1). The CFR, unlike some international human rights treaties, does not contain a jurisdictional clause.

claim: the first one is that EU actions performed in the framework of the CCP, such as the stipulation of trade, investment or fisheries agreements,[23] are fundamentally territorial acts, even though they produce effects in third countries.[24] This, as Ryngaert underlines, defuses the need for complex elaborations on the 'extraterritorial' applicability of the CFR.[25] The second reason, convincingly argued by Moreno-Lax and Costello, is the 'foundational and pervasive character of human rights in EU law', which determines the Charter's applicability to all instances in which EU law applies.[26] In this paradigm, the role of 'territory' as a founding and limiting factor for the EU's fundamental rights obligations is set aside in favour of a function-based[27] standard that is neither territorial, nor extraterritorial: it is, arguably, non-territorial. Indeed, it can be observed that neither the EU's ability to lawfully exercise certain powers nor its duty to respect fundamental rights, even *within* its own borders, have their basis in the territorial factor.

This is not to claim that the geographical extension of the EU space is irrelevant to its competences, but that control over territory does not define EU powers in the same way it constitutes sovereignty for the nation-state.[28] This is not only because it is disputable, from a public international law (PIL) perspective, that the EU exercises the form of exclusive territorial control that is commonly considered as one of the founding elements of statehood,[29] but also because, from a EU law perspective, territory as such does not emerge

[23] Relevant actions can also include the adoption of trade regulations that produce effects outside the EU, as would be the case for human rights due diligence rules influencing the operations of EU-based companies in third countries.

[24] Ryngaert (n 22) 377.

[25] *Ibid.*

[26] Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers et al (eds), *Commentary on the EU Charter of Fundamental Rights* (Hart Publishing, 2014) 1657, 1661.

[27] Ryngaert (n 22) 380 ('[…] a mere competence-based standard prevails: where the EU exercises its powers, it owes human rights obligations to persons affected by such exercise of power, irrespective of the location of those persons').

[28] For the classic definition of the essential elements of statehood, see Anthony Aust, *Handbook of International Law* (CUP, 2nd ed 2010), 15–16.

[29] Christina Eckes and Ramses A Wessel, 'The European Union from an International Perspective: Sovereignty, Statehood, and Special Treatment' (2017) Amsterdam Law School Research Paper No. 2017–33, 19 ('[…] the EU is established on the joint territory of the Member States, who have no intention to surrender this territory to the EU. […]'); Anton Pelinka, 'The European Union as an Alternative to the Nation-State', (2011) 24(1/2) *International Journal of Politics, Culture, and Society* 21, 23 ('The Union has taken away some of the elements traditionally associated with the state: an undisputed control over a clearly defined people and a clearly defined territory'); Ramses A Wessel, 'Revisiting the International Legal Status of the EU' (2000) 5 *European Foreign Affairs Review* 507, 523 ('Since the qualification of the Union as a 'state' is obviously implausible – as the criteria for statehood set by international law are not met – we are left with a reference to the Union in terms of an international organisation or a legal person sui generis'). Under international law, the issue of the existence of a 'territory' of international organisation is unsettled. Eckes and Wessel (n 29) 19. See: ILC, *Yearbook of the International Law Commission* (1982) A/CN.4/SER.A/1982/Add.l (Part 2), Draft articles on the law of treaties between States and international organisations or between international organisations, Commentary to Article 29 ('Despite the somewhat loose references which are occasionally made to the 'territory' of an international organisation, we cannot speak in this case of 'territory' in the strict sense of the word').

as a defining element from its founding treaty.[30] As pointed out by Moreno-Lax and Costello, references to 'territory' in the treaty, with one sole exception,[31] always concern the territory of member states, and not of the EU as such.[32] The EU's powers and obligations are rather grounded in the functions that EU law assigns to it.[33]

It is important to recall that the EU, under its Treaties, is not assigned any general power to protect and promote human rights within the EU,[34] and the Treaties do not expressly require the EU to mainstream human rights protection and promotion across its internal policies.[35] The powers of the EU in the field of human rights are limited by the fact that it 'cannot intervene in fundamental rights issues in areas over which it has no competence'.[36] Although proposed in the past by the European Commission, currently the EU does not have in place a mechanism allowing it to permanently monitor fundamental rights within its member states and identify areas where EU action might be required.[37] Moreover, the existing ECJ's jurisprudence on the EU's positive obligations in the realm of fundamental rights is not as rich as the one developed by the European Court of Human Rights on the positive obligations of states, and has so far mostly concerned the EU's procedural obligations under the Charter.[38]

However, thanks in part to the strengthened status that the Lisbon Treaty has conferred to human rights within the EU legal order,[39] the EU can take actions to protect and promote human rights within the boundaries of the exclusive, shared and complementary competences it enjoys under different Treaties.[40] Examples of such actions include the impact assessments that the European Commission performs to check the compatibility of legislative proposals with fundamental rights, or the infringement procedures under Article 258 TFEU,[41] through which it can call into question the compatibility with the CFR of member states' acts implementing

[30] Moreno-Lax and Costello (n 26) 1663–1664.
[31] The only exception is represented by Article 153(g) TFEU, referring to conditions of employment for third-country nationals legally residing in 'Union territory'.
[32] Moreno-Lax and Costello (n 26) 1663–1664. See also the authors' discussion on the use of terms such as 'area' and 'border'. *Ibid*, 1676–8.
[33] Needless to say, the EU's powers also find an upper limit under PIL.
[34] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (OUP, 5th ed 2011) 391–2; Tamara Lewis et al., 'EU and Member State competences in human rights' (FRAME, 31 October 2015), 12.
[35] Craig and de Búrca (n 34) 393.
[36] EU Info Center, 'Fundamental Rights', online: http://eeas.europa.eu/archives/delegations/iceland/evropustofa/en/find-out-more/key-issues/fundamental-rights.html. The CFR itself specifies that it 'does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties'. CFR (n 22) Article 51(2).
[37] Olivier De Schutter, 'The Charter of Fundamental Rights as a Social Rights Charter', CRIDHO Working Paper 2018/4 (2018), online: https://sites.uclouvain.be/cridho/documents/Working.Papers/CRIDHO-WP-2018-4-EUCFR-Social%20rights-3.pdf, 20–23.
[38] See section 3.2 below.
[39] Craig and de Búrca (n 34) 391.
[40] *Ibid* 391–2; Lewis et al (n 34) 12.
[41] TFEU (n 1) Article 258.

EU law.[42] These actions have their basis in the competences defined by the Treaties and are limited by the principle of conferral.[43] The CFR does not have the effect of expanding such competences,[44] but, as explained further below, it binds EU institutions in all their functions.

Human rights are listed in Article 2 TEU among the Union's founding values,[45] and permeate the system as general principles of EU law.[46] The same values are affirmed even more strongly in connection with the EU's external relations,[47] particularly in Article 3(5), which posits, in an obligatory language, the EU's duty to contribute to the protection of human rights in its relations with the wider world, while reaffirming the 'strict observance' of international law and of the UN Charter.[48] This provision has been interpreted by the ECJ as implying that when the EU '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'.[49] An important general provision on the EU external action is contained in Article 21 TEU, which does not refer to 'values to be upheld', as Article 3(5), but rather to the 'principles' by which the EU's external action 'shall be guided'.[50] However this difference in language may be interpreted,[51] Article 21(3) clarifies that the EU has a duty to respect the listed

[42] Communication from the Commission, 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union', COM (2010) 573, 2010, 10; Lewis et al (n 34) 15. See also: Olivier De Schutter, 'Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union' (Open Society Foundations, 2017), online: www.opensocietyfoundations.org/publications/infringement-proceedings-tool-enforcement-fundamental-rights-european-union.

[43] Steven Greer, Janneke Gerards, and Rose Slowe, *Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges* (CUP, 2018) 295.

[44] CFR (n 22) Article 51(2).

[45] TEU (n 1) Article 2 ('The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities […]). For a critical perspective on 'the narrative of a "Europe of fundamental rights"' as 'a carefully constructed political myth of the EU', see Samantha Velluti, 'The Promotion and Integration of Human Rights in EU External Trade Relations' (2016) 32(83) *Utrecht Journal of International and European Law* 41, 43–44.

[46] TEU (n 1) Article 6.

[47] Craig and de Búrca recall that the 'difference between the emphasis on human rights in external and internal policies has led to criticisms of a double standard in the EU's approach to human rights'. Craig and de Búrca (n 34) 393.

[48] TEU (n 1) Article 3(5) ('In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights […]').

[49] CJEU, *Air Transport Association of America* (n 5), para 101.

[50] TUE (n 1) Article 21 ('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 […]').

[51] Bartels notes that Article 21(1) would appear to indicate a 'softer constraint' on EU external policies (see Bartels (n 5) 1073–4), but he then underlines, in contrast, the sharpness of Article 21(3) (see *Ibid*, 1074). Vianello warns that it is not certain whether the drafters intended to introduce a theoretical distinction between 'values' and 'principles', but nevertheless finds that the former possess a lesser degree of determinacy, while the latter, as 'legal principles', have a more defined structure that

principles, including human rights, in the development and implementation not only of all areas of the Union's external action (the CCP among them), but also of the external aspects of its other policies.[52] Human rights, therefore, form part of those common principles and objectives that should cement policy coherence among different areas of the EU's external action.[53] As concerns the CCP specifically, Article 207 TFEU confirms that it 'shall be conducted in the context of the principles and objectives of the Union's external action',[54] ie, peace, respect for human rights and the commitment to sustainable development, among others.[55]

Importantly, none of the TEU articles mentioned above are endowed with a jurisdictional clause.[56] They rather link principles and values to the related EU actions, whether these have an internal or external reach. Again, central is the notion of 'function', not of territory. The same is true for the fundamental rights obligations contained in the CFR, to which the Lisbon Treaty has granted legally binding status.[57] The CFR's 'field of application' is not put in relation to notions of territory or jurisdiction, nor limited by reference to 'internal acts'.[58] The Charter's provisions attach to all EU functions, as well as to the member states' functions aimed at the implementation of EU law.[59] While the existing jurisprudence does not provide conclusive answers as to the extraterritorial reach of the CFR, it does not exclude it,

'makes them more suitable to the creation of legal rules'. Ilaria Vianello, 'The Rule of Law as a Relational Principle Structuring the Union's Action Towards its External Partners' in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing, 2018) 225, 227. See also Nakanishi's review of values, principles and objectives: Yumiko Nakanishi, 'Mechanisms to Protect Human Rights in the EU's External Relations' in Yumiko Nakanishi (ed), *Contemporary Issues in Human Rights Law* (Springer, 2018) 6.

[52] TEU (n 1) Article 21(3) 'The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies'. See also: Bartels (n 5) 1073–4; Vianello (n 51) 227.

[53] *Ibid*; European Commission, 'Vademecum on Working Relations with the European External Action Service (EEAS)', SEC (2011) 1636, 2011, online: https://ec.europa.eu/transparency/regdoc/rep/2/2011/EN/2-2011-1636-EN-1-1.Pdf, 4.

[54] TFUE (n 1) Article 207 (1).

[55] TUE (n 1) Article 21 and TFEU (n 1) Article 207. See also Stephen Woolcock, 'The EU Approach to international investment policy after Lisbon Treaty' (European Parliament, 2010) online: www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO-INTA_ET(2010)433854.

[56] Moreno-Lax and Costello (n 26) 1662; Velluti (n 45) 44.

[57] TEU (n 1) Article 6.

[58] CFR (n 22) Article 51(1) reads: 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers […]'. The CFR binds all EU institutional bodies, offices and agencies, which, as Kube put it, 'are themselves a creation of EU Law'. Vivian Kube, 'The European Union's External Human Rights Commitment: What is the Legal Value of Article 21 TEU?' (2016) EUI Working Papers, LAW 2016/10, 22. According to Fischer-Lescano, '[EU] institutions are bound by the CFR quite irrespective of the specific context'. Andreas Fischer-Lescano, 'Human Rights in Times of Austerity Policy: The EU institutions and the conclusion of Memoranda of Understanding', Legal opinion commissioned by the Chamber of Labour, Vienna (2014) 9; Moreno-Lax and Costello (n 26) 1679.

[59] CFR (n 22) Article 51(1).

either.[60] As highlighted by Ryngaert,[61] the General Court, in what is now a vacated judgment in the *Front Polisario* case, seemed to uphold this function-based standard –independent of any form of territorial control—by affirming that the Council, before approving the Liberalization Agreement with Morocco, had a duty to ensure that this would not entail the infringement of the fundamental rights of the Saharawi population of Western Sahara.[62]

3.1. A functionalist paradigm: grounding jurisdiction in power

If the analysis above is correct, the EU's fundamental rights obligations attach to its functions. A parallel can be drawn with IHRL to the extent that, as argued by King, a state's exercise of a lawful competence to act extraterritorially under PIL triggers its human rights jurisdiction in the relevant respects.[63] In the case of occupation,[64] for instance, such legal competence is vast, and the occupying state might be obliged to ensure to the population of the occupied territory all the applicable human rights.[65] In the case of lawful detention of an individual by agents of a foreign state, the competence and the related human rights obligations will be narrower.[66] As shown in section 2, a state's lawful competence to affect the rights of its own citizens abroad or to affect human rights in foreign countries through its legislative acts has sometimes been read by the courts as triggering human rights jurisdiction in certain respects. What counts in all these cases is that the exercise of a lawful competence to act under PIL establishes a *de facto* power relationship between the state and the individual(s) concerned that, in turn, triggers human rights jurisdiction.[67] It emerges, therefore, that territory (in the form

[60] See Bartels' account of the cases *Parliament v. Council (Al Qaeda)*; *Mugraby*, and *Zaoui*: Bartels (n 5) 1075–6. See also Antal Berkes, 'The extraterritorial human rights obligations of the EU in its external trade and investment policies' (2018) 2(1) *Europe and the World: A Law Review* 5, 5.

[61] Ryngaert (n 22) 380–1.

[62] Case T-512/12, *Front Polisario v Council of the European Union* (GC, 10 December 2015) paras 227–228 [*Front Polisario*].

[63] King (n 8) 522.

[64] Importantly, the occupying power's lawful competence to ensure the human rights of the population in the occupied territory does not depend on whether occupation was established through lawful or unlawful means. Olivier De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' (2005) Working Paper no. 2005/04, CRIDHO, 7; *Loizidou v. Turkey* (Preliminary Objections) App no 15318/89 (ECtHR, 23 March 1995) para 62; US Military Tribunals at Nuremberg, *USA v. Wilhelm List et al., 1950*, Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. 11, 1247. See also: ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion (21 June 1971) I.C.J. Rep. 1971, 16, para 118).

[65] King (n 8) 543–4. 'The extent of legal competence then informs the level of human rights obligations owed'.

[66] *Ibid*, 540.

[67] Daniel Augenstein and David Kinley, 'When human rights "responsibilities" become "duties": The extraterritorial obligations of states that bind corporations', in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business – Beyond the Corporate Responsibility to Respect?* (CUP, 2013) 271, 281.

of effective territorial control) under IHRL is only one, albeit admittedly the least controversial, among several factors that could ground a function-based human rights jurisdiction. 'Competence', both under IHRL and under EU law, is the 'permissive' element: in IHRL, competence is the 'upper limit' to state action determined by PIL,[68] whereas in EU law it refers to the areas covered by the transfer of powers that member states have consented to.[69] In both cases, the exercise of a lawful competence to act under the relevant legal system gives rise to the factual power relationship that constitutes the real basis for human rights or fundamental rights jurisdiction (prescriptive element).

Whereas this function-based model is structurally entrenched in EU law, under IHRL, as shown above in section 2, the only consolidated criterion remains that of 'effective control', in either its spatial or personal form. The analysis presented in the paragraph above, however, constitutes a useful conceptual paradigm to imagine future developments in the definition of states' ETOs, a paradigm that already finds some support in existing human rights jurisprudence.

Importantly, the exercise of a lawful competence is only one of the possible factors triggering jurisdiction, because, as clarified by King, a state's unlawful extraterritorial act (ie, an act conducted in violation of PIL) that affects human rights gives rise to human rights jurisdiction.[70] Indeed, the factual power relationship is generated, in this case, by the unlawful rights-violating act itself.[71] To argue the contrary would allow a subject of international law to elude any human rights obligations simply by acting in excess of its lawful competence under PIL.[72] A similar 'safety valve' arguably also exists under EU law, as the latter's protection of fundamental rights does not cease when EU institutions act beyond their EU law competence. This is true notwithstanding the barriers that individuals face in practice when trying to access the CJEU to claim a violation of their rights.[73] As noted above, the CFR binds EU institutions in all their functions, but nothing in the text of Article. 51(1) CFR or in its 'Explanations' indicates

[68] King (n 8) 544.
[69] Of course, PIL jurisdiction also constitutes an upper limit to EU action, as 'the EU often exercises competences that draw on established PIL Jurisdiction of the Member States, and respect for PIL is a general pre-requisite for EU external action'. Moreno-Lax and Costello (n 26) 1659. See, for instance: Case C-355/10 *Parliament v Council* (5 September 2012) 76; Opinion of AG Mengozzi in Case C-355/10 *Parliament v Council* (17 April 2012) 63. EU's fundamental rights jurisdiction will never be broader than its competence in each specific area, and will sometimes overlap with that of its member states.
[70] King (n 8) 538.
[71] *Pad et al v Turkey* (n 8); *Isaak et al v Turkey* App no 44587/98 (ECtHR, 28 September 2006).
[72] King (n 8) 538; Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7(1) *Law & Ethics of Human Rights* 47, 56. See also: Samantha Besson, 'The Extraterritoriality of the European Convention of Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *Leiden Journal of International Law* 857, 865.
[73] Bartels (n 5) 1089; Berkes (n 60) 16–20.

that such functions are limited to the lawful exercise of the competences assigned to them by EU law.[74] Indeed, whereas the Charter binds member states 'only when they are implementing Union law', no such limitation is specified for EU institutions and bodies, to which the CFR primarily applies.[75] Several authors have addressed the scope of Article 51(1) in relation to the European Stability Mechanism (ESM), which implies the participation of EU institutions in an agreement stipulated outside the EU legal framework,[76] and have concluded that EU institutions are bound by the Charter also when acting outside the scope of EU law.[77] Salomon observes that, unlike member states, EU institutions are bound by the CFR 'whether they are implementing EU law or not'.[78] Fischer-Lescano notes that 'Article 51 CFR applies to the EU institutions always and at all times',[79] and that '[e]ven ultra vires acts by the institutions must take account of the Charter'.[80] This view was confirmed by the 2016 ECJ judgment in the *Ledra* case, concerning the legal duties of 'borrowed' EU institutions under the ESM, in which the Court stated that the CFR is addressed to the EU institutions also 'when they act outside the EU legal framework'.[81]

It is here argued, therefore, that the most coherent paradigm for a comprehensive theory of human rights jurisdiction, accounting in a principled manner for all the standards reviewed above, is functionalism.[82] 'Function' constitutes a conceptualisation of 'power', and signifies, in this context, the

[74] Fundamental Rights Agency, Article 51, Explanations, online: https://fra.europa.eu/en/eu-charter/article/51-field-application.

[75] *Ibid*; CFR (n 22) Article 51(1).

[76] Paul Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) 9(2) *European Constitutional Law Review,* 263, 281–282; Steve Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework' (2013) 9(1) *European Constitutional Law Review,* 37, 51–52.

[77] Peers (n 76) 51–52; Margot E Salomon, 'Of Austerity, Human Rights and International Institutions' (2015), LSE Law, Society and Economy Working Papers 2/2015, 14, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2550773.

[78] Salomon (n 77) 14. See also: Committee on Constitutional Affairs, Opinion (2014) 2013/2277(INI), para 11. The issue was left open by the *Pringle* judgment of the ECJ (Case C-370/12 *Pringle v. Government of Ireland, Ireland and the Attorney General*, 27 November 2012).

[79] Fischer-Lescano (n 58) 9 ('Fundamental and human rights obligations cannot be circumvented on the pretext of delegation of functions').

[80] *Ibid*.

[81] Case C-8/15 P *Ledra Advertising v. Commission and ECB* (20 September 2016) para 67.

[82] *Al-Skeini et al v United Kingdom* App no 55721/07 (ECtHR - GC, 7 July 2011), Concurring Opinion of Judge Bonello, para 11 (discussing 'functional' jurisdiction in relation to the ECHR: '[…] a State has jurisdiction for the purposes of Article 1 whenever the observance or the breach of any of these functions is within its authority and control […] In relation to Convention obligations, jurisdiction is neither territorial nor extraterritorial: it ought to be functional'). See also: Enzo Cannizzaro, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels' (2015) 25(4) *European Journal of International Law,* 1093, 1095 ('Initially conceived of in strict territorial terms, referring to the sphere where states' functions are exercised with a certain degree of stability, it [jurisdiction] is gradually losing that territorial connotation and it is more and more characterized in functional terms, as a notion which links the scope of human rights to the exercise of a state's public authority, be it lawful or unlawful, permanent or occasional'); Shany (n 72).

state's lawful and/or factual ability to affect human rights.[83] Judge Bonello, in his concurring opinion for the *Al Skeini* judgment, held that human rights jurisdiction attaches to all state 'functions' that concern the protection of human rights. Such functions include both the 'non-violation' of human rights through its acts – which, it can be inferred, implies the state's non-exercised power to infringe upon them – and their active protection.[84] In this perspective, which Bonello grounds in the universality principle,[85] no human rights-impacting state actions, whether lawful or unlawful under PIL, remain unchecked under IHRL. A functionalist approach is consistent with the pervasiveness of the fundamental rights obligations that bind the EU whenever it exercises its functions, both internally and externally.[86] This paradigm, however, is not uncontroversial, as it raises questions concerning the potentially boundless expansion of positive obligations.[87] The next section addresses this issue by looking at the EU's fundamental rights obligations in the framework of its CCP.

3.2. Boundless obligations?

The previous paragraph has argued that CFR obligations apply to all EU functions, regardless of where such actions take place or deploy their effects. This also holds true for the EU's fundamental rights obligations in the framework of its CCP. In addition to the negative obligation not to infringe on rights, these include positive obligations. An obvious question to be addressed is whether the function-based paradigm illustrated above implies a boundless expansion of such positive obligations and of the related transaction costs.[88] It is here maintained that legal and factual elements confine that expansion. This section argues, first of all, that the EU bear positive obligations under the CFR. Then it assesses the scope and limiting factors of such obligations both in the case of a

[83] Shany (n 72) 66. As put by Moreno-Lax and Costello, 'the EU has human rights obligations, arising merely out of its competence and its capacity to realise them' (Moreno-Lax and Costello (n 26) 1683).

[84] Bonello articulates 5 functions: 'States ensure the observance of human rights in five primordial ways: firstly, by not violating (through their agents) human rights; secondly, by having in place systems which prevent breaches of human rights; thirdly, by investigating complaints of human rights abuses; fourthly, by scourging those of their agents who infringe human rights; and, finally, by compensating the victims of breaches of human rights. […] A 'functional' test would see a State effectively exercising 'jurisdiction' whenever it falls within its power to perform, or not to perform, any of these five functions.' (*Al Skeini* (n 82) Concurring Opinion of Judge Bonello, para 10).

[85] *Ibid,* para 9.

[86] Moreno-Lax and Costello (n 26) 1682.

[87] Shany (n 72) 68.

[88] Ryngaert recognizes that 'also when the EU's human rights obligations vis-à-vis distant others are based on the territorial application of the CFR, such an approach expands the scope of the EU's human rights obligations, and creates additional transaction costs for the negotiation, conclusion, and implementation of EU trade agreements'. Ryngaert (n 22) 377–8. Although, as noted earlier, the present paper does not consider the CFR's application to be territory-based, but function-based, the challenges to be accounted for are analogous.

lawful exercise of EU competences and in the case of *ultra vires* actions by the EU.

Firstly, although the EU does not enjoy a generalised competence to realise human rights,[89] the ECJ has confirmed on several occasions that the CFR can give rise to positive obligations binding on EU institutions. So far, these have essentially concerned procedural obligations, namely, due diligence steps required by the EU to ensure respect of fundamental rights in the exercise of its competences.[90] In *Schrems*,[91] the ECJ annulled the European Commission's Safe Harbour Decision, which allowed member states to transfer the data of EU citizens to the US authorities.[92] The Court found that the US did not provide an adequate level of protection of personal data, exposing the fundamental rights of EU citizens, particularly under Arts 7 and 8 of the CFR, to violations. Following a transfer of data, US authorities would be allowed to interfere with EU citizens' fundamental rights on grounds of national security, but no clear limitations to such power of interference were detailed in the assessment performed by the Commission in the impugned decision, while it emerged that the affected persons would enjoy no opportunities to access remedies.[93] The Court indicated that the Commission was bound to exercise a higher standard of due diligence in assessing the level of protection afforded by a third country, thoroughly looking at the law and practice of the concerned state and periodically re-assessing its findings.[94] The EU, therefore, is under a positive obligation to actively assess and monitor the level of protection of privacy and personal data in a third country before and after the conclusion of an agreement on the transfer of personal data.[95] Positive obligations of a procedural nature have also been developed in a series of judgments related to the UN sanctions regime. The ECJ found that the rights of defence of the appellants had been breached by the Council's failure to inform them of the reasons for their inclusion in the list of persons and entities associated with Usama bin

[89] See Section 3 above.
[90] Malu Beijer, *Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations* (Intersentia, 2016) 267; Greer et al (n 43) 320–1.
[91] Case C-362/14, *Schrems v Data Protection Commissioner* (6 October 2015).
[92] European Commission, Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C (2000) 2441), 2000/520/EC.
[93] *Schrems* (n 91) paras 23, 88–90, 96.
[94] *Ibid*, paras 75–76.
[95] Malu Beijer, 'Positive obligations to protect fundamental rights – any role to be played by the European Court of Justice?' (*Strasbourg Observers*, 10 October 2016), online: https://strasbourgobservers.com/2016/10/10/blog-seminar-on-positive-obligations-3-positive-obligations-to-protect-fundamental-rights-any-role-to-be-played-by-the-european-court-of-justice/. The EU-US Shield Decision seems to have responded to the due diligence requirements spelled out by the ECJ. European Commission, 'EU-US data transfers How personal data transferred between the EU and US is protected' (2016), online: https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/eu-us-data-transfers_en.

Laden, the Al-Qaeda network and the Taliban, a negligence that had also deprived them of their right to an effective legal remedy.[96] Other examples can be found in the *LTTE*[97] and *Polisario*[98] judgments.

Secondly, as to the scope of the EU's positive obligations, it must be recalled that the CFR provisions do not have the effect of extending the powers defined by the Treaties.[99] Therefore, when EU institutions act within the limits of their EU law competences, their positive obligations are only as broad as those competences.[100] As convincingly illustrated by King in relation to IHRL, to found human rights jurisdiction solely on factual elements – ie, on the 'capacity' to realise human rights in foreign countries – would give rise to an expansion of positive obligations that would not only be untenable, but ultimately clash with PIL principles.[101] PIL, therefore, constitutes the upper limit to a state's extraterritorial positive obligations.[102] In the same way, the EU is not required under the CFR to take actions that would be unlawful or *ultra vires* under EU law solely based on the fact that it has the 'capacity' to contribute to the realisation of fundamental rights in third countries. Factual considerations alone are not a coherent justification for the EU's diagonal obligations, although they do bear relevance in shaping the precise due diligence obligations in each specific situation.[103] As noted above, it is the EU's exercise of a lawful competence that, by establishing a *de facto* power relationship with the affected individuals, triggers the applicability of the CFR. The breadth of the corresponding positive obligations is, in turn, influenced by both the extent of such competence and by the specific factual circumstances of each case.[104]

An 'all or nothing' approach to human rights (or fundamental rights) jurisdiction is rejected here. It is worth recalling that, as far as IHRL is concerned, the jurisprudence of the ECtHR itself has evolved beyond this

[96] Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, (3 September 2008) paras 336–337, 346–349. See also: Case T-187/11, *Trabelsi and Others v Council* (28 May 2013) para 66.

[97] Case T-208/11, *LTTE v. Council* (16 October 2014) paras 138–139 ('the Council must, before acting on the basis of a decision of an authority of a third State, carefully verify that the relevant legislation of that State ensures protection of the rights of defence and a right to effective judicial protection equivalent to that guaranteed at EU level').

[98] This case is addressed below, at Section 4.

[99] CFR (n 22) Article 51(2).

[100] Schutter (n 37) 18.

[101] King (n 8) 538 (' … except where a state has legal competence to act, it should rarely owe positive duties. Yet a purely factual theory of 'jurisdiction' based on the cause-and-effect idea would potentially trigger the human rights obligations of states that possess the factual power to secure the rights of non-citizens in foreign territories. Placing positive duties on states in such circumstances, though, would be highly unorthodox and would violate the norm of nonintervention.').

[102] *Ibid*, 544.

[103] As noted by King, a state might have the lawful competence to secure certain human rights, but not the ability to do so. Such limited capacity, in turn, delimits the related positive obligations (see King (n 8) 546–7). Similarly, the EU cannot hold positive obligations that go beyond what it is factually able to do in the specific circumstances of a case.

[104] King (n 8) 545–7.

notion that it had embraced in *Bankovic*,[105] accepting that the Convention's rights can be 'divided and tailored' according to the specific circumstances of the extraterritorial act at issue.[106] In *Al Skeini*, a case of control and authority exercised over individuals, the Grand Chamber recognised that the State has an obligation to secure the rights 'that are relevant to the situation of that individual',[107] accepting that a State's positive human rights obligations might vary according to the nature of the power relationship it has with the individual.[108] In a situation of occupation, the occupying power has a broad competence to affect the human rights of the individuals that find themselves in the occupied territory, a competence that is limited by the relevant rules of International Humanitarian Law.[109] There, the state is under an obligation to ensure a wide range of human rights to the concerned individuals, in line with this broad competence and with its broad capacity to affect those rights.[110] In the example of a state's consular relationships with its citizens residing abroad, both the state's lawful competence and its ability to affect the rights of those individuals are significantly narrower than in the case of occupation, and so are its positive obligations. For instance, the state might have a duty to ensure the right of its national residing abroad to leave any country, therefore having an obligation to issue a passport (something that falls both within its lawful competence and its factual ability),[111] but it could not be said to hold an obligation to realise that citizen's right to housing in the foreign country. In an analogous manner, the EU's positive fundamental rights obligations towards distant others will be tailored to the extent of the EU's lawful competence to act under EU law and to its factual ability to affect the rights of those individuals.

Finally, positive obligations might also arise when EU institutions act beyond the boundaries of their EU law competences affecting the rights of distant individuals, thereby establishing a *de facto* power relationship. It is here submitted that, even in such cases, the scope of positive obligations will be defined and limited by several elements, namely: CFR norms—which

[105] *Bankovic et al v Belgium et al* App no 52207/99 (ECtHR - GC, 12 December 2001), para 75.
[106] *Al-Skeini et al* (n 82) para 137 ('In this sense, therefore, the Convention rights can be "divided and tailored"').
[107] *Ibid*. See also: *Hirsi Jamaa et al v Italy* App no 27765/09 (ECtHR – GC, 23 February 2012) para 74.
[108] Macchi (n 17) 444.
[109] For instance, the occupying power only has limited entitlement to modify the local legal system. Jean Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Conventions relative to the Protection of Civilians in Time of War* (ICRC, 1958) 336; ICRC, 'Occupation and Other Forms of Administration of Foreign Territory' (2012), 57 www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf.
[110] King (n 8) 543–544. See: *Cyprus v Turkey* App no 25781/94 (ECtHR - GC, 10 May 2001), para 77 ('[…] in terms of Article 1 of the Convention, Turkey's 'jurisdiction' must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey').
[111] The example is based on: Human Rights Committee, *Lichtensztejn v. Uruguay* (31 March 1983) Comm. 77/1980, CCPR/C/OP/2 at 102.

should be interpreted in light of customary international law; the limits imposed by PIL; and the factual circumstances of each case. In the absence of effective control over individuals or territory, most positive human rights obligations (in particular, the duty 'to fulfil' human rights) will arguably not be justified under international law, nor factually possible to comply with.[112] However, in a hypothetical scenario in which EU agents unlawfully deprive someone of their life in a third country, a positive obligation for the EU would stand, both under Article 2 CFR and under customary IHRL, to investigate the EU agents who carried out the rights-violating act.[113] To affirm that positive obligations might stem from acts that are unlawful under EU law does not contradict the earlier statement that the CFR cannot require EU institutions to act *ultra vires*.[114] It rather means that *once* EU institutions have exercised a function in breach of their EU competences, causing a human rights impact on distant others, the individuals affected by the unlawful act enjoy the protection of the CFR in the relevant respects.[115]

4. Due diligence obligations in the context of the CCP

The CCP is one of the oldest and most developed policy areas of the EU, which has the power to negotiate and enforce trade agreements with third countries. The Treaty of Lisbon enlarged the area of exclusive competence of the EU under the CCP by adding services, intellectual property, and foreign direct investment to its scope. As discussed in section 3, CFR obligations inform the whole range of EU functions, regardless of their internal or external scope, and therefore also attach to actions undertaken in the framework of its CCP. These fundamental rights obligations should not be read as distorting the nature and aims of the CCP, assigning to it the pursuit of political objectives that, as Cannizzaro points out, fall within the primary competence of the CFSP.[116] Rather, they imply that any action conducted within the competence and objectives of the CCP through the instruments assigned to it by the treaty must not contradict the EU's obligations under the CFR. Fundamental rights, in this respect, are a measure of coherence of the EU system.

[112] Sandra Hummelbrunner, 'Beyond extraterritoriality: towards an EU obligation to ensure human rights abroad? Reflections in light of the Front Polisario saga' (2019) *CLEER Papers* 2019/2, online: www.asser.nl/media/679407/cleer_19-02_web.pdf , 27.
[113] *Ibid*, *Front Polisario* (n 62).
[114] CFR (n 22) Article 51, indeed, mandates that EU institutions and Member States respect and promote the rights 'in accordance with their respective powers'.
[115] Hummelbrunner (n 112) 25 ('the scope of application of the EUChFR would be defined by "personal relations" between EU actors/Member States, as the duty bearers under the EUChFR, and one or more individuals, as the beneficiaries under the EUChFR, that are established via the exercise of powers or official functions').
[116] Cannizzaro (n 82) 1098–9.

In this case, the EU competence under the CCP constitutes both the basis and the upper limit of its positive obligations. EU law confers upon the EU an exclusive competence to manage trade and investment relations with non-EU countries.[117] The ensuing actions, by their nature, are essentially shaped as internal acts with external implications, carried out in the absence of any control exercised over territory or individuals in third countries. These include actions such as the negotiation and conclusion of trade and investment agreements, as well as the adoption of reporting and due diligence requirements binding on corporations that import in the EU market.[118] The EU has a duty to prevent its actions from causing or compounding human rights violations to the detriment of individuals and communities wherever the latter are located. An obligation of conduct to prevent harm is entrenched in the international law and IHRL definitions of due diligence.[119]

The EU General Court, in its judgment in the *Front Polisario* case, interpreted the EU's duty of conduct as including the performance of what can be referred to as a human rights impact assessment (HRIA).[120] The court affirmed that, before concluding a trade agreement facilitating the export of products to the EU, the Council had a duty to 'examine, carefully and impartially, all the relevant facts in order to ensure that the production of goods for export is not conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights'.[121] This conclusion can be read in the light of De Schutter's statement *à propos* the state's 'duty to identify any potential inconsistency between pre-existing human rights treaties and subsequent trade or investment agreements, and to refrain from entering into such agreements where such inconsistencies are found to exist'.[122] It is also in line with the Ombudsman's opinion concerning the EU-Vietnam free-trade agreement[123] and with

[117] Exclusive competence over foreign investment was attributed to the EU by the Lisbon Treaty. The CJEU has clarified that the exclusive competence only concerns foreign direct investment, and not indirect investment. *Opinion 2/15 of the Court,* (16 May 2017), ECLI:EU:C:2017:376, online: http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3014.

[118] See, for instance, the EU Regulation on Conflict Minerals [2017] OJ L 130.

[119] Berkes (n 60) 12; ILA Study Group on Due Diligence in International Law, First Report (2014) 14 *et seq*, online: https://olympereseauinternational.files.wordpress.com/2015/07/due_diligence_-_first_report_2014.pdf.

[120] For simplicity, this paper uses this widely employed definition, although in the case of the EU the more correct expression would be 'fundamental rights impact assessment'. This choice also reflects the author's view that such assessments should increasingly incorporate references to international human rights law standards. See more on this point below, Section 4.

[121] *Front Polisario* (n 62) para 228.

[122] Human Rights Council, *Guiding principles on human rights impact assessments of trade and investment agreements*, A/HRC/19/59/Add.5, 2011, online: www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf, para 1.1.

[123] 'I agree with the Commission that EU law, as it stands now, does not provide for an *express obligation* to carry out a prior human rights impact assessment. However, in my view, the Commission's refusal to carry out the human rights impact assessment in the context of the negotiations of the EU-

several voluntary commitments undertaken by EU institutions in recent years.[124] The Committee on the Rights of the Child, in its General Comment 16, stressed that international organisations 'should have standards and procedures to assess the risk of harm to children in conjunction with new projects and to take measures to mitigate risks of such harm'[125]

Positing the existence of a duty to conduct HRIAs (or analogous steps), besides being consistent with the EU's competence under the CCP, is also compatible with the upper limit imposed by PIL, in that HRIAs are part of a policy-making process by EU institutions that does not *per se* entail any interference with the sovereignty of third states.[126] In the *Polisario* judgment quoted above, the General Court reasoned on what rendered an HRIA mandatory in the case at issue. It is interesting to note that the court started by underlining the wide discretion that the EU enjoys in the field of external economic relations, particularly when it comes to the decision to conclude agreements with non-member states which will be applied on a disputed territory. The court found that there is no absolute prohibition on the conclusion of such agreements,[127] and that in fact, in the case *de quo*, the Council enjoyed ample discretion.[128] Precisely because the relevant decision (whether or not to conclude the agreement) rested with the Council, the latter had a duty to perform a careful and impartial assessment of all the relevant facts beforehand, as it was its responsibility to ensure that the agreement would not be detrimental to the fundamental rights of the concerned people.[129] Such reasoning, although set aside by the subsequent CJEU's judgment,[130] seems to confirm that when EU institutions exercise a lawful competence to act, they also hold a duty of conduct aimed at preventing fundamental rights infringements connected to their acts.

Vietnam Free Trade Agreement goes against the spirit of the provisions in Article 21 of the Lisbon Treaty.' 'European Ombudsmańs Decision on the failure of European Commission to conduct a prior human rights impact assessment of the EU Vietnam free trade agreement' (3 March 2016) online: www.ombudsman.europa.eu/en/speech/en/64453.

[124] Council of the EU, EU Strategic Framework and Action Plan on Human Rights and Democracy, 11855/12, 2012; Joint Communication from the Commission to the European Parliament and the Council, 'Capacity building in support of security and development - Enabling partners to prevent and manage crises', JOIN/2015/0017 final, 2015, 11–12.

[125] CRC, *General Comment 16 - State obligations regarding the impact of business on children's rights,* (2013) UN Doc. CRC/C/GC/16, para 48.

[126] Ryngaert (n 22) 388.

[127] *Front Polisario* (n 62) paras 222–228.

[128] *Ibid*, paras 146, 164, 223.

[129] *Ibid*, para 225. The GC rejected the idea put forward by the Council that the responsibility to make sure that no exploitation of natural resources would take place rested uniquely with the Kingdom of Morocco (*Ibid*, para 241).

[130] The point was not discussed by the CJEU because the latter reached the conclusion that, in the light of Article 29 VCLT, the right to self-determination and the *pacta tertiis* principle, the GC had erred in law by interpreting the Liberalization Agreement as also applying to the territory of Western Sahara (Case C-104/16 P, *Council of the European Union v Front Polisario* (GC, 21 December 2016) paras 94–100).

Truthfully, the General Court's conclusion in *Polisario* was reached in relation to the specific case of the Western Sahara and of the human rights risks involved in the context of a non-self-governing territory, a scenario in which a non-EU state administered that territory without an international mandate.[131] Clearly the court, in finding that a HRIA was required, attributed weight to the specific risk profile of that context and to the public allegations—that 'could not be ignored by the Council'—concerning the exploitation of local resources solely to the benefit of foreign non-native enterprises.[132] However, it does not seem that the court intended to circumscribe the HRIA requirement to cases of 'disputed' territories[133] when it affirmed:

> [I]f the European Union allows the export to its Member States of products originating in that other country which have been produced or obtained in conditions which do not respect the fundamental rights of the population of the territory from which they originate, it may indirectly encourage such infringements or profit from them.[134]

Although the consideration, in the court's words, 'is all the more important' in the context of the Western Sahara,[135] it appears to have a more general applicability.[136] Should future jurisprudence pick up this reasoning, questions remain as to how the court will interpret the HRIA requirement, whether as a process whose scope and depth must be tailored to the human rights risks at issue and whose appropriateness will be examined in the merits, or whether as a formalistic exercise that could be exhausted, as Ryngaert puts it, in a 'window-dressing strategy'.[137] Looking at HRIAs through the lens of human rights law, there is little scope to argue that a box-ticking exercise would be sufficient to fulfil the EU's due diligence obligations. While human rights due diligence is, by definition, an open-ended standard,[138] it 'must be undertaken with some result in mind and the

[131] *Front Polisario* (n 62) paras 232–235.
[132] *Ibid*, paras 243–245.
[133] Kassoti explains why defining Western Sahara a 'disputed' territory is not correct under international law: Eva Kassoti, 'The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)' (2017) 2 *European Papers* 339, online: www.europeanpapers.eu/en/europeanforum/the-front-polisario-v-council-case-general-court-and-volkerrechtsfreundlichkeit 352–3.
[134] *Front Polisario* (n 62) para 231.
[135] *Ibid*, para 232.
[136] Ryngaert posits that a 'restriction of the human rights verification test should be rejected … on the ground that it renders the inhabitants of a 'disputed' territory better off than the inhabitants of a non-disputed territory, who may be equally adversely affected by an EU trade agreement' Ryngaert (n 22) 392.
[137] *Ibid*, 390.
[138] ILA Study Group on Due Diligence in International Law, Second Report (2016) 3, online: https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1427&StorageFileGuid=ed229726-4796-47f2-b891-8cafa221685f accessed 28 April 2019.

results will be key to the determination of a violation'.[139] In the progressive realisation of economic, social and cultural rights, the steps taken must also be concrete and targeted towards the full realisation of the right.[140] The international human rights law definition of due diligence, therefore, would call for a judicial review that looks at the adequacy of both the procedural and substantive aspects of the preventative steps taken, including the HRIA, in light of the outcomes.

It must be noted that the CJEU's review of the compatibility of the Commission's legislative proposals with the CFR increasingly focuses on procedural aspects, assigning particular weight to whether EU institutions have exercised due diligence in assessing the potential fundamental rights impacts of their choices; whether all the relevant interests have been considered in the policy-making process; and whether there has been a concrete effort to reconcile conflicting interests.[141] As De Schutter warns, EU institutions can lower the risk of judicial veto by 'strengthening the steps through which the compatibility of a piece of legislation with fundamental rights is assessed prior to its adoption.'[142] This should hold true also in the case of agreements concluded under the CCP, and prompt the EU to conduct HRIA processes that are truly cognisant of the rights and interests of persons and communities in concerned third countries.

Regarding the substantive content of HRIAs, as a crucial device in the EU's fulfilment of its due diligence obligations under the CFR, it is here contended that their scope should not be limited to certain categories of rights, but include the CFR in its entirety. This was the approach taken by the General Court in the *Polisario* case, albeit opposed by the Advocate General.[143] It is also consistent with the function-based paradigm of fundamental rights jurisdiction presented earlier, in which all fundamental rights obligations are in principle relevant to the exercise of EU competences, although positive obligations will arise only in certain cases and in relevant respects. Moreover, the assessments should arguably also make reference to international human rights instruments, contributing to an evolution of EU law that is consistent with international standards.[144]

[139] ILA Study Group on Due Diligence in International Law, First Report (2014) 17, online: https://olympereseauinternational.files.wordpress.com/2015/07/due_diligence_-_first_report_2014.pdf.

[140] CESCR, *General Comment 3 - The nature of States parties obligations* (1990) E/1991/23, para 2, online: www.refworld.org/pdfid/4538838e10.pdf.

[141] Olivier De Schutter, 'The implementation of the Charter by the institutions of the European Union' in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014) 1627, 1644–5.

[142] *Ibid*, 1645.

[143] *Front Polisario* (n 62) para 228. The AG argued that the scope of the assessment should be limited to violations of *jus cogens* or *erga omnes* norms: Opinion of Advocate General Mathelet, Case C-104/16 P (13 September 2016) paras 259, 276.

[144] See De Schutter (n 141) para 58.45.

Although the HRIA is only one among the many actions that the EU can undertake to fulfil its obligations under the CFR, it can hardly be dispensed with, as it is key in identifying further necessary measures or deciding not to enter into a certain agreement.[145] It should not be a one-off exercise, but include regular ex-post monitoring to take account of changing circumstances that might link the EU to human rights violations that were not occurring or were not identified at the moment of the stipulation.[146] The steps to be taken in addition to the HRIA vary in each case and the EU enjoys a wide discretion in their choice, a discretion that is as large as its competence under EU law. Like HRIAs, most of the possible actions will not be problematic under PIL, being shaped either as procedural devices in the decision-making process (eg, consultation with potentially affected communities and indigenous groups) or treaty clauses agreed upon with the third state (eg, the negotiation and inclusion of human rights clauses in trade agreements).[147] In addition, said measures do not escalate the EU's negotiation costs unreasonably, having, on the contrary, the potential to pre-empt the financial and political costs of subsequent controversies.

4.1. Avoiding contribution to human rights violations in global supply chains: due diligence rules for corporate actors

The agreements concluded under the CCP aim at facilitating trade to and from the EU, and sometimes also include chapters protecting the interests of investors. Unsurprisingly, they are, therefore, often perceived as compounding the harmful conduct of certain economic actors. They might indeed be facilitating export-oriented production that is, in turn, linked to issues such as labour exploitation, pollution and deforestation, abuses of indigenous peoples' rights, etc. If we accept the functional reading of fundamental rights jurisdiction discussed in the previous sections, the 'function' of trade facilitation and investment protection, which falls within the EU's

[145] By analogy, the UN Guiding Principles on Business and Human Rights, referring to the duties of businesses, identify 'human rights risk' assessment as the first fundamental prong of human rights due diligence, based in which subsequent steps must be tailored. UN Guiding Principles on Business and Human Rights (UNGPs), UN doc.A/HRC/17/31 (2011), GPs 17–18. They also present the termination of a business relationship as an option where the human rights risk identified cannot be averted or mitigated by the exercise of leverage over the other party involved or by other due diligence steps *Ibid*, GP 19, *Commentary*.

[146] In an analogous manner, according to the UNGPs, the human rights due diligence conducted by businesses '[s]hould be ongoing, recognising that the human rights risks may change over time as the business enterprise's operations and operating context evolve'. UNGP (n 3) GP 17(c). Although Pillar II of the UNGPs concerns the responsibilities of enterprises, the EU arguable acts as a commercial actor under the CCP, and therefore human rights due diligence as a risk-management process should also apply to it.

[147] For a critical analysis of human rights clauses in new-generation Free Trade Agreements, see Anna Micara, 'Human rights protection in new generation's free trade agreements of the European Union' (2019) 23(9) *International Journal of Human Rights* 1447.

exclusive competence, is followed by fundamental rights obligations. As argued above, the EU has first of all a duty to 'know' the human rights risks associated to its trade and investment agreements before concluding them, as well as during their implementation. However, to argue that the performance of an HRIA exhausts the EU's positive obligations would be illogical: if human rights risks are identified and the agreement stipulation and implementation goes ahead, then it is arguably part of the EU's due diligence obligations to take mitigating measures.

In some contexts and industries, the human rights and labour rights risks associated to global supply chains are particularly well-documented, and trade liberalisation without human rights due diligence risks linking EU imports to these phenomena. Notorious examples, among others, are the garment, minerals and electronics supply chains. Since the EU is in this respect acting as a global commercial actor, we may use the categories of corporate 'complicity' set out by the UN Guiding Principles on Business and Human Rights to argue that it risks contributing to, or at the very least being linked to, such violations by its trade agreements.[148] The EU is then required to take steps and mitigate such risk, but it must do so within the boundaries of its EU law competence, namely in the context of the promotion and regulation of trade that pertains to the ambit of the CCP, through the dedicated normative instruments and respecting the principle of proportionality.[149] As noted by NYU-HEC in relation to the garment industry, 'Article 207 authorises the EU to manage its trade and investment relationships with third countries, and therefore to ensure that garment and textile products imported into the EU do not contribute to human rights abuses in global supply chains.'[150] It has here been argued that acting upon such 'authorization' (or competence) implies fundamental rights obligations. Legislation adopted on the basis of Article 207 TFEU constitutes one of the due diligence steps through which the EU can prevent the exercise of its competence under the CCP from facilitating human rights violations. Examples already exist, in particular the EU

[148] UNGPs (n 3), GP 13. The OHCHR has clarified (in the context of banks' responsibilities) the UNGPs standards by stating that 'being linked to' and/or 'contributing to' a violation are placed on a continuum. An entity linked to human rights violations committed by third parties, when failing over time to conduct effective human rights due diligence, risks shifting to contribution. On the applicability of UNGPs' Pillar II standards to subjects other than corporations, see, for instance, Domenico Carolei and Nadia Bernaz, 'Accountability for Human Rights: Applying Business and Human Rights Instruments to Non-Governmental Organizations' (2019) Presentation, currently under review for publication.

[149] Angelica Dziedzic et al., 'Towards EU legislation on human rights due diligence - Case study of the garment and textile sector' (2017) HEC Paris Research Paper No. LAW-2017-1207, 16, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2976330. The principle of proportionality is enshrined in Article 5 TEU, which states: 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'.

[150] *Ibid*, 4.

Regulation on Conflict Minerals, aimed at curbing the link between trade in certain minerals and conflict dynamics.[151]

Two considerations are needed in this respect. First, as pointed out in the HEC-NYU study on the garment sector, Article 207 as a basis for legislation, particularly in import-intensive sectors, is likely to work better through a sector-specific approach, which allows to address the specific characteristics of the industry's supply chains and makes it easier to fulfil the proportionality requirement.[152]

Second, at a time in which the European Commission is considering options for a EU-wide human rights and environmental due diligence legislation,[153] it is worth underlining that the duty to regulate imports into the EU under the CCP does not exclude the adoption of other, more ambitious human rights due diligence norms. Indeed, Article 207 is not the most appropriate legal basis for EU-wide horizontal legislation requiring companies to perform human rights due diligence (beyond disclosure requirements) throughout their operations. Yet, as underlined by EU Commissioner Reeynders,[154] the EU Parliament, civil society, and even some businesses,[155] such legislative effort is needed and is now being addressed in the framework of other EU competences.[156] In terms of prioritisation, the EU should conduct risk assessment to identify those sectors that present higher risks and call for more urgent intervention based on the CCP competence. Regarding the internal market, there is evidence of increasing regulatory fragmentation in the field of mandatory human rights due diligence.[157] At the same time,

[151] For critical views on the effectiveness of the specific design of the regulation, see: Daniel Iglesias Márquez, 'The EU Conflict Minerals Regulation: Challenges for Achieving Mineral Supply Chain Due Diligence' (*Doing Business Right Blog*, 27 November 2017), online: www.asser.nl/DoingBusinessRight/Blog/post/the-eu-conflict-minerals-regulation-challenges-for-achieving-mineral-supply-chain-due-diligence-by-daniel-iglesias-marquez#_ednref11; Chiara Macchi, 'The Draft EU Regulation on Conflict Minerals: "Smart Mix" or Missed Opportunity?' (*Rights As Usual*, 27 October 2016), online: http://rightsasusual.com/?p=1106.

[152] Dziedzic et al (n 149) 10–11, 17.

[153] Benjamin Fox, 'New human rights laws in 2021, promises EU justice chief' (*Euractiv*, 30 April 2020), online: www.euractiv.com/section/global-europe/news/new-human-rights-laws-in-2021-promises-eu-justice-chief/; European Parliament, Draft report with recommendations to the Commission on corporate due diligence and corporate accountability, 2020/2129 (INL) (11 September 2020), online: www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf.

[154] Fox (n 153). See also the Agenda for Action launched on 2 December 2019 by the Finnish Presidency: 'The fragmented landscape of (existing and envisaged) regulatory measures governing responsible management of supply chains and due diligence has led to the need for further EU-wide initiatives, including regulation on mandatory human rights due diligence.' Finland's Presidency of the Council of the EU, *Agenda for Action on Business and Human Rights* (2019) para 13.

[155] See BHRRC, 'MEPs & companies call for EU-level human rights due diligence legislation' (2019) www.business-humanrights.org/en/meps-companies-call-for-eu-level-human-rights-due-diligence-legislation.

[156] The new instrument will probably have as its legal basis the EU norms on the freedom of establishment. TFEU (n 1) Articles 49–50.

[157] Finland's Presidency of the Council of the EU 2019, (n 154) para 13. Modelez International recently stated: '[m]any companies like ours are already implementing due diligence measures and we want to avoid a patchwork of legislation at national level'. Benjamin Fox, 'Companies will support EU law on due diligence, but need assurances on liability' (*EURACTIVE*, 19 March 2019), online: www.euractiv.

victims of business-related harms occurring in third countries still face excessive barriers to access to remedies in EU courts.[158] Therefore, it is argued here that CCP-based sectoral regulation and the adoption of EU-wide norms on mandatory human rights and environmental due diligence are not mutually exclusive, but complementary actions to be pursued without delay.

4.2. Investment protection and 'policy space' for human rights protection

It also follows from the discussion in section 3 that the EU has an obligation not to facilitate human rights violations committed by corporations under the protective umbrella of its investment protection agreements (IPAs) and not to interfere with the ability of host states to protect human rights from those harmful impacts.[159] International investment agreements and the related Investor-State Dispute Settlement (ISDS) mechanisms can have a 'regulatory chill' on host states. This can stem from certain elements of the agreements (eg, expansive formulations of 'fair and equitable treatment' clauses) as well as from the very nature of ISDS, through which foreign investors can leverage the threat of international arbitration and high compensation claims against host states.[160] The EU arguably holds an obligation to formulate its IPAs in a way that does not unduly curtail the host state's policy space to adopt legislation for the protection of human rights. In its new IPAs, the EU has in part addressed this obligation through a restrictive formulation of fair and equitable treatment ('FET') clauses departing from the 'blanket clauses' found in some of the previous member states' bilateral investment treaties (BITs), which left an ample interpretation margin to arbitral tribunals.[161] Similarly, provisions relating to indirect expropriation in

com/section/economy-jobs/interview/companies-will-support-eu-law-on-due-diligence-but-need-assurances-on-liability/. EU countries that have taken action or that are considering human rights due diligence legislation include France, the Netherlands, the UK, Finland, Denmark, Austria, Germany and Sweden. ECCJ, 'ECCJ publishes comparative legal analysis of HRDD and corporate liability laws in Europe' (12 September 2019), online: http://corporatejustice.org/news/16783-eccj-publishes-comparative-legal-analysis-of-hrdd-and-corporate-liability-laws-in-europe .

[158] See, among others: 'FRA Legal Opinion on improving access to remedy in the area of business and human rights at the EU level' (2017) 1/2017, 2017; EU Parliament Study, 'Access to legal remedies for victims of corporate human rights abuses in third countries' (2019) online: www.business-humanrights.org/sites/default/files/documents/EXPO_STU%282019%29603475_EN.pdf.

[159] Krajewski notes that '[e]ven if one does not want to go as far as accepting positive obligations of international organisations under customary human rights law, it seems safe to assume that international organisations are obliged not to frustrate the attempts of states to honour their human rights obligations'. Markus Krajewski, 'Human rights and austerity programmes' (2013) 8, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2199625.

[160] The UNGPs tackle the issue at GP 9 (n 3) ('the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so').

[161] Benedetta Cappiello, 'Stability vs. Flexibility: Can the European Union find the Balance?' (*EJIL: Talk!*, 2017), online: www.ejiltalk.org/stability-vs-flexibility-can-the-european-union-find-the-balance/; Steffen Hindelang and Jurgita Baur, 'Stocktaking of investment protection provisions in EU

EU's new IPAs limit the arbitrators' discretion to sanction host states for adopting legislation aimed at realising legitimate public policy objectives.[162]

In spite of this progress, the EU model of a permanent investment court system (or multilateral investment court), while solving some of the legitimacy problems posed by the classic ISDS mechanism, risks failing to overcome the 'built-in bias in favour of investors' that endows the latter with substantive rights and privileges, without reciprocal obligations.[163] As noted by Dietz et al., under the new EU model, international investors 'still enjoy a unique position in international law insofar as they can mobilize norms of transnational investment law to attack democratic public policies'.[164] The 'chilling effect', therefore, risks remaining embedded and being further institutionalised by the proposed dispute settlement system.[165]

5. Conclusions

This paper has argued that EU's fundamental rights obligations are founded in a non-territorial standard, as they attach to all 'functions' exercised by EU institutions, regardless of their internal or external scope. Such obligations also follow EU action under the CCP, which has, by definition, an extra-EU reach. This function-based foundation for fundamental rights jurisdiction is entrenched in EU law, but also constitutes, *mutatis mutandis*, a useful paradigm to read the concept of ETOs under IHRL. The risk of an overextension of the EU's positive obligations under such a paradigm, as shown above, is defused by the fact that such obligations are confined, depending on the circumstances, by the limits of the legal competences assigned by EU law, and/or by the limits imposed by PIL, and/or by factual elements.

Shaping the CCP coherently with the EU's CFR obligations can mitigate the adverse effects of power dynamics that restrict the third countries' policy space to protect human rights, impose harmful projects on local communities

agreements and Member States' bilateral investment treaties and their impact on the coherence of EU policy' in *EU investment protection after the ECJ opinion on Singapore: Questions of competence and coherence* (INTA Committee, 2019) 8, 10, online: www.europarl.europa.eu/RegData/etudes/STUD/2019/603476/EXPO_STU(2019)603476_EN.pdf.

[162] Hindelang and Baur, (n 161) 10. However, the EU-Vietnam Investment Protection Agreement (EUVIPA) has been criticized for an insufficiently strong affirmation of the host state's right to legislate in the public interest and for the absence of a 'supremacy' clause ensuring that the state's international human rights obligations prevail over EUVIPA in case of controversies. Milena Mottola, 'Only a small step forward - The shy contribution of the EU-Vietnam Investment Protection Agreement to the ISDS reform' (*Völkerrechtsblog*, 25 September 2019), online: https://voelkerrechtsblog.org/only-a-small-step-forward/.

[163] Thomas Dietz, Marius Dotzauer and Edward S Cohen, 'The legitimacy crisis of investor-state arbitration and the new EU investment court system' (2019) 26(4) *Review of International Political Economy* 749, 766–7; Anil Yilmaz Vastardis, 'Justice bubbles for the privileged: a critique of the investor-state dispute settlement proposals for the EU's investment agreements' (2018) 6(2) *London Review of International Law* 279, 287. See also Mottola (n 162).

[164] Dietz et al., (n 163) 766.

[165] Yilmaz Vastardis (n 163) 295.

without their consent, allow global supply chains to thrive on labour rights violations, or create a privileged access to justice for powerful investors to the detriment of human rights and of minor economic actors. In the framework of the CCP, the due diligence steps required from the EU will typically constitute procedural devices in the decision-making process, such as the performance of HRIAs, or treaty clauses agreed upon with the third state. However, in line with both the definition of due diligence under IHRL and with the definition of human rights due diligence under the UNGPs, risk assessment only represents one prong, albeit fundamental, of the EU's duty of due diligence.

To ensure that its policies and actions under the CCP are not contributing to human rights violations in third countries, the EU will be sometimes required to adopt legislation aimed at severing the link between imports in the EU and identified human rights risks in the global supply chain of certain products. This paper takes the view that the required sector-based regulation of at least certain categories of imports under the CCP does not exclude, nor diminish the need for, EU-wide mandatory human rights and environmental due diligence based on internal market rules and aimed at regulating the conduct of companies throughout their supply chains. The EU's fundamental rights obligations also bear on its exclusive competence in the field of FDI and require the EU to shape its IPAs in a way that does not cause or contribute to a regulatory chill in host countries to the detriment of individuals and communities affected by business activities.

Some final considerations are needed on the policy-coherence dimension. Not only are fundamental rights entrenched as legal underpinnings, 'values' and 'principles' across the whole range of EU policies, but within the CCP itself, non-EU countries are required to implement their human rights obligations as a condition to obtain preferential access to the EU market. Therefore, in addition to the legal reasoning developed in this paper, there are strong policy coherence arguments to support the idea that the EU should 'walk the talk' on human rights. The EU's ambition to ensure policy coherence within and across its areas of intervention, and to present itself as a value-based global actor, can be best achieved by recognising and consistently acting upon the fundamental rights obligations that, as this article has shown, attach to all EU functions, regardless of their internal or external scope.

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