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The Contribution of the EU to the Development of Customary Norms in the Field of Human Rights Protection

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Content

I. A BRIEF LEGAL OVERVIEW OF THE PROMOTION OF HUMAN RIGHTS ACROSS EU'S EXTERNAL ACTION

THE ROOT OF the intergovernmental coordination of the positions of the Member States in face of situations of mass violation of human rights in third countries is found in the second half of the 1970s with the new-born European Political Cooperation.[2] Those questions were dealt with despite the initial absence of any explicit reference to human rights and democracy in the Founding Treaties of the European Communities. On their part, the institutions showed their interest from the early stages: the European Parliament since the early 1980s

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[2] Member States established the practical pattern of consulting each other within the framework of the European Political Cooperation in order to coordinate the measures to be adopted. That happened primarily when the United Nations Security Council had previously adopted a resolution condemning a situation as particularly serious from the point of view of human rights protection. See M. Candela Soriano, *Los Derechos Humanos, la Democracia y el Estado de Derecho en la Acción Exterior de la Unión Europea. Evolución, Actores, Instrumentos y Ejecución* (Madrid, Dykinson, 2006) 75–79.

called attention to the necessity to build a European Communities' foreign policy for human rights; in the 1990s, the European Commission defended the introduction of the promotion of human rights and democracy as a critical orientation for the development of cooperation policies; the Council, on its behalf, declared itself in favour of the universality and indivisibility of human rights, and hence, of the interdependence between those principles, and democracy and development, respectively.[3]

The Treaty of the European Union (TEU), adopted in Maastricht in 1992, for the first time introduced at the level of primary law the objective of the development and consolidation of democracy, rule of law, and respect of human rights and fundamental freedoms[4] as a target for the Common Foreign and Security Policy (CFSP, which was in fact the successor of the European Political Cooperation).

Therefore, since the 1990s, it can be assured that the promotion of human rights, democracy and rule of law[5] in EU's international relations has evolved into a transversal goal of the praxis of Member States and Community Institutions, in the same way for the community pillar as for the intergovernmental pillar. This objective, following the suppression of the pillar structure operated by the Lisbon Treaty, has been reflected in articles 3.5 and 21.1 of the TEU.[6]

Since the beginning of the '90s, the introduction of the so called *human rights and democracy clause* has been widespread in the EU's practice concerning different types of international agreements: for instance, in the agreements concluded with the candidates prior to their accession,[7] in its commercial agreements,[8] and

[3] Ibid 79–82.

[4] See, P Koutrakos, *EU International Relations Law* (Oxford, Hart Publishing, 2006) 383–413.

[5] The European Union acts with the conviction of their *universality and indivisibility*.

[6] Article 21 TEU concerns the complete scope of the EU's external action: that is, Title V of the TEU – including CFSP—and the Fifth Part of the Treaty on the Functioning of the European Union (TFEU) which encompasses the Common Commercial Policy, the Development Cooperation, the Economic, Financial and Technical Cooperation and Humanitarian Aid.

[7] See M Nowak, 'Human Rights "Conditionality" in Relation to Entry to, and Full Participation in, the EU' in P Alston, MR Bustelo and J Heenan (eds), *The EU and Human Rights* (Oxford, OUP, 1999) 687–98. The political criteria for the accession of countries from Central and Eastern Europe were stipulated at the European Council of Copenhagen, which took place during 21 and 22 June 1993.

[8] Further analysis of the utilisation of the human rights clause in the scope of commercial relations can be found in DJ Liñán Nogueras and LM Hinojosa Martínez, 'Human Rights Conditionality in the external trade of the European Union; legal and legitimacy problems' (2001) 7 *Columbia Journal of European Law* 307–36. See also, B Brandtner and A Rosas, 'Trade Preferences and Human Rights' in P Alston, MR Bustelo and J Heenan (eds), *The EU and Human Rights* (Oxford, OUP, 1999) 699–722. Alston warns about the risk that the conditionality discourse entails subordinating the logic of International Human Rights Law to WTO Law and broadly to Economic Policy goals, in that sense: P Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Pettersmann' (2002) 13 *European Journal of International Law* 815–44. It has been said that the European Union has lost its momentum to speak with one voice in the discussion on correlation between trade and labour standards, which was at an impasse within the WTO framework when the single voice was reached by the European Union. The future of social rights conditionality seems to be in bilateral and regional agreements, in cooperation with international organisations, such as the ILO, the World Bank and UNCTAD (more so than in WTO). As has been brilliantly illustrated: 'The EU, as the world's largest trading bloc, still maintains a powerful tool in its conduct of external trade to enhance the convergence between internationally recognized labour standards and the implications of globalization': Tamara Takacs, 'Human rights in trade: the EU's experience with labour standards conditionality and its role in promoting labour standards in the WTO' in JE Wetzel (ed), *The EU as a 'Global Player' in Human Rights?* (London, Routledge, 2011) 97–112. In that sense, J Kenner, 'Economic Partnership Agreements: Enhancing the Labour Dimension of Global Governance? in B Van Vooren, S Blockmans and J Wouters (eds), *The EU's Role in Global Governance. The Legal Dimension* (Oxford, OUP, 2013) 306–22.

finally, its many association and development cooperation agreements—including in this last category the agreements concluded with the ACP countries. By means of these ACP agreements a preferential access to the Union internal market is granted to a group of developing countries from the African, Caribbean and Pacific regions, most of them being former colonies of the EU's Member States.[9]

Until the present moment the EU has succeeded in including the *human rights and democracy clause* in international agreements with more than 120 States.

It has to be borne in mind that accession agreements are formally negotiated and concluded by Member States; therefore there are no restrictions on the EU's competencies regarding the conditionality on human rights issues that can be exercised toward the third countries which are candidates to accession.

The Court of Justice of the European Union (ECJ) recognised in 1996 the competence of the, at that time, European Community to negotiate and conclude international agreements with third countries in the field of development cooperation, including the above-mentioned *human rights and democracy clause* as an essential element.[10] Thus the Court admitted the possibility for the Community unilaterally to terminate or suspend the application of the international agreement when it considers that the third country has violated substantially the human rights obligations:[11] this reasoning seems to be in accordance with paragraphs 1 and 3(b) of article 60 of the Vienna Convention on the Law of the Treaties of 1969,[12] concerning the serious violation of an essential element of a bilateral treaty.[13]

[9] The text of the agreement can be found in (EC) 2000/483 Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000—Protocols—Final Act—Declarations [2000] OJ L317/3; the agreement was modified for the first time by Council Decision (EC) 2005/599 of 21 June 2005, signed in Cotonou on 23 June 2000 [2005] OJ L209/26; and it was reviewed for the second time by Council Decision (EU) 2010/648 of 14 May 2010, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005 [2010] OJ L287/1. The former Yaounde Conventions only included a brief mention to the United Nations principles in their Preambles. For their part, the Lomé III (1985) and Lomé IV (1990) Conventions only referred in a broad manner to the obligation to respect human rights, but they did not provide for a legal basis which allowed the suspension or termination or those international agreements. See H Cuyckens, 'Human Rights Clauses in Agreements between the Community and Third Countries. The Case of the Cotonou Agreement', Katholieke Universiteit Leuven, *Institute for International Law Working Paper No 147* (March 2010).

[10] See E Riedel and M Will, 'Human Rights Clauses in External Agreements of the EC' in P Alston, M R Bustelo and J Heenan (eds), *The EU and Human Rights* (Oxford, OUP, 1999) 723–54.

[11] Case C-268/94 *Portugal v Council* [1996] ECR I-6177, para 27.

[12] The same applies to the identical articles of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986.

[13] It is not the object of the present research to analyse the practical application of the *human rights and democracy clause* throughout the external action, for that purpose: E Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Leiden, Martinus Nijhoff, 2003); also A Rosas and B Brandtner, 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice' (1998) 9 *European Journal of International Law* 468–90.

Nowadays we find the use of *human rights and democracy clauses* not only in the above-mentioned cases,[14] but also in the context of the European Neighbourhood Policy and the Stabilisation and Association agreements concluded in the framework of the enlargement towards the Western Balkans:[15] both cases constituted, even before the entry into force of the Lisbon Treaty, examples where the separation between pillars blurs and the political and economic conditionalities overlap.[16] In respect of the European Neighbourhood Policy,[17] it comprises both cooperation agreements concluded with former Soviet Union countries[18] and the association agreements concluded within the framework of the Strategic Partnership with the Mediterranean and the Middle East, which was launched with the Barcelona Declaration in 1995.[19]

[14] The European Union has used the *human rights and democracy clauses* both in international agreements concluded only by the European Union and in international mixed agreements concluded by the Member States and the Union itself, A Rosas, 'Mixed Union—Mixed Agreements' in M Koskenniemi (ed), *International Law Aspects of the European Union* (TheHague, Kluwer, 1998) 144–45.

[15] As an example we find the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part—Protocols—Declarations [2009] OJ L107/166. This agreement considers Albania as a 'potential candidate' for accession to the EU; for this reason it stipulates in its article 2 a *human rights clause* more stringent than those contained in commercial or association agreements: 'Respect for the democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the European Convention on Human Rights, in the Helsinki Final Act and the Charter of Paris for a New Europe, respect for international law principles and the rule of law as well as the principles of market economy as reflected in the Document of the CSCE Bonn Conference on Economic Cooperation, shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement'.

[16] M Cremona, C Hillion, 'L'Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy', *EUI Working Papers Law No 39* (2006).

[17] See the Communication from the Commission, *European Neighbourhood Policy*, Strategic Paper, COM(2004) 373 final; the Joint Communication of the European Commission and of the High Representative of Foreign Affairs and Security Policy to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A new response to a changing Neighbourhood*, COM(2011) 303; and finally the Joint Communication of the European Commission and of the High Representative of Foreign Affairs and Security Policy to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *European Neighbourhood Policy: Working towards a Stronger Partnership*, JOIN(2013) 4 final.

[18] The regime of these agreements is studied in C Hillion, 'The EU's Neighbourhood Policy towards Eastern Europe' in A Dashwood, M Maresceau, *Law and Practice of EU External Relations* (Cambridge, Cambridge University Press, 2008) 309–33; also, P Koutrakos, *EU International Relations Law*, n 4 above, 363–65. Article 2 of the agreement with Georgia could be taken as a reference: 'Respect for democracy, principles of international law and human rights as defined in particular in the United Nations Charter, the Helsinki Final Act and the Charter of Paris for a New Europe, as well as the principles of market economy, including those enunciated in the documents of the CSCE Bonn Conference, underpin the internal and external policies of the Parties and constitute essential elements of Partnership and of this Agreement'—Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Georgia, of the other part [1999] OJ L205/3. This clause is contained as well in the cooperation agreements concluded by the European Union and its Member States with Armenia, Azerbaijan, Moldavia and Ukraine, but not with Belarus. This case, compared with the clause in the agreement with Albania, reflects a tangential and less strict mention of human rights obligations.

[19] Barcelona Declaration, adopted at the Euro-Mediterranean Conference of Foreign Affairs Ministers, celebrated in Barcelona during 27 and 28 November of 1995, and by virtue of which the Euro-Mediterranean Partnership was created. In this sense, see A Blanc Altemir, 'El proceso euromediterráneo: una década de luces y sombras' (2005) 21 *Anuario de Derecho Internacional* 185–225; also, Erwan Lannon, 'The EU's Strategic Partnership with the Mediterranean and the Middle East: a new geopolitical dimension of the EU's proximity strategies' in A Dashwood, M Maresceau, *Law and Practice of EU External Relations* (Cambridge, Cambridge University Press, 2008) 360–75; and R Rhattat, *La politique européenne de voisinage dans les pays de l'aire méditerranéenne* (Brussels, Bruylant, 2011). Taking into account the development of the so called '*Arab Springs*' in some of the countries on the South Shore of the Mediterranean it is evident that neither the Neigbourhood Policy nor the association agreements concluded have supposed a sufficient incentive in order to improve substantially the situation of human rights in Algeria, Egypt, Israel, the Palestinian Occupied Territories, Syria or Tunisia, for instance.

An example of a democracy clause in the Euro-Mediterranean agreements is found in Article 2 of the agreement with Algeria: 'Respect for the democratic principles and fundamental human rights established by the Universal Declaration of Human Rights [UDHR] shall inspire the domestic and international policies of the Parties and shall constitute an essential element of this Agreement'.[20] This clause mentions explicitly and places in a central position in the agreement respect for the rules enshrined in the UDHR, in clear contrast with what has been revealed regarding the collaboration and cooperation agreements concluded with former Soviet Union States, where an *in abstracto* reference to human rights or a simple invocation of instruments adopted within the framework of the OSCE is formulated. A clause similar to the one included in the agreement with Algeria is contained in the Euro-Mediterranean agreements concluded with Egypt, Israel, Jordan, the Palestinian Occupied Territories, Lebanon, Morocco and Tunisia. However this kind of clause has not been possible in the relationship between the EU and Libya or Syria.

Concerning the Eastern dimension of the Neighbourhood Policy, it has been said that the experience and rules of the Council of Europe in the field of human rights can be utilised, and that the EU could benefit from this synergy and that, besides, it has the legitimacy to guide by means of political and financial mechanisms their Eastern partners towards respect for international agreements and obligations that have been assumed by itself in the framework of the Council of Europe.[21]

The EU has shown its preference for positive conditionality[22] instead of negative conditionality,[23] which remains as an *ultima ratio*, because of both the greater

[20] Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part [2005] OJ L265/2.

[21] Barbara Schumacher, 'The Influence of the Council of Europe on the European Union: Resource Exchange and Domain Restriction as Venues for Inter-Institutional Influence' in O Costa and K Jørgensen (eds), *The Influence of International Institutions on the EU: When Multilateralism hits Brussels* (Basingtoke, Palgrave MacMillan, 2012) 186–206.

[22] For instance, Council Decision 2011/106/CFSP of 15 February 2011 on adapting and extending the period of application of the measures in Decision 2002/148/EC concluding consultations with Zimbabwe under Article 96 of the ACP-EC Partnership Agreement [2011] OJ L43/31.

[23] M Candela Soriano, *Los Derechos Humanos, la Democracia y el Estado de Derecho en la Acción Exterior de la Unión Europea. Evolución, Actores, Instrumentos y Ejecución*, n 2 above, 249–51. However, the negative measures are not negligible. This is the case in respect of sanctions adopted even without a contractual link with the third country. They constitute a selective and decentralised enforcement of human rights towards third countries, as for instance Syria, Iran, Libya, Ivory Coast, etc. See in that respect, A Pellet, 'Les sanctions de l'Union européenne' in M Benlolo-Carabot, U Candas and E Cujo (eds), *Union européenne et droit international. En l'honneur de Patrick Daillier* (Paris, Pedone, 2012) 431–55.

efficacy of positive measures and the problems of international legality that the doctrine has emphasised regarding sanctions in face of violations of human rights obligations committed by third countries within their own territories.[24]

Moreover, this criticism is sharpened by the fact that has been suggested brilliantly by De Waele:

> there is an ample proof that the Union does not treat all its partners alike, and that some countries are seen as patently more equal than others. Quite often, such blatant inconsistencies can be explained by the overriding commercial interests, which 'necessitate' turning a blind eye to a partner's fundamental rights record. In the past, this has particularly held true for relations with many African and Middle Eastern nations. Vivid examples can also be found in Europe itself, especially in the run-up to the most recent rounds of EU enlargement. Officially, the admittance of new members is conditional upon an unqualified respect for fundamental rights, as the Copenhagen Criteria make clear. Yet, in 2004 as well as 2007, the EU consciously eroded its own precepts, contenting itself instead with empty promises and paper realities, so as to avoid political feuds and humiliation when the timetables for accession would prove impossible to meet.[25]

Concerning the positive measures, the special regime of tariff preferences aimed at sustainable development and good governance constitutes an interesting example: this regime is offered to developing countries, classified as vulnerable, which voluntarily demand its application. It consists of the suppression of custom tariffs for certain products, which is made conditional upon the ratification of certain United Nations and ILO Conventions related to human rights and labour rights. Within the first group of treaties upon which these preferences are made conditional we find: the two United Nations Covenants adopted in 1966 (Civil and Political Rights, and Economic, Social and Cultural Rights, respectively), the Covenant on the Elimination of Racial Discrimination, the International Covenant on the Suppression and Punishment of the Crime of Apartheid, the Covenant on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and finally, the Convention on the Prevention and Punishment of the Crime of Genocide. Among the second group of ILO Conventions whose ratification is required in order to obtain the commercial preferences, we find those relating to: the minimum legal age of admission to employment, the prohibition of the worse forms of child labour, the

[24] In this regard, DJ Liñán Nogueras, 'Límites del discurso de la condicionalidad en la acción exterior de la Unión Europea' in F Mariño Menéndez (ed), *Acción Exterior de la Unión Europea y Comunidad Internacional* (Instituto de Estudios Internacionales y Europeos 'Francisco de Vitoria', Universidad Carlos III de Madrid, 1998) 433–34. Detractors of all forms of political conditionality could be classified in two groups: those who consider the subordination of external aid to the fulfilment of western patterns as a return to paternalist models with ambitions of neo-colonialist domination; and those who are opposed to the link between aid and political values, being simply partisans of the apparently 'aseptic' market economy from an axiological point of view, see MC Muñoz Rodríguez, *Democracia y derechos humanos en la acción exterior de la Unión Europea* (Madrid, Reus, 2011) 26.

[25] H de Waele, *Layered Global Player. Legal Dynamics of EU External Relations* (Berlin, Springer, 2011) 103–4.

abolishment of forced labour, equal remuneration for men and women workers for work of equal value, the prohibition of discrimination in the field of employment, and freedom of association and collective bargaining. Besides these international treaties relating to the protection of fundamental and worker's rights, this preferential regime is also conditional upon the ratification of other treaties concerning environmental protection, the fight against the trafficking of drugs and psychotropic substances and the fight against corruption.[26]

Concerning the negative measures, the EU has applied the *human rights and democracy clause* suspending partially and temporarily some of the international agreements with the ACP countries.[27] It also withdrew the tariff preferences from Burma because of its infraction of the ILO Convention no 29 (forced labour) and from Belarus due to the violation of ILO Conventions no 87 and 98 (referring to freedom of association and to collective bargaining, respectively). In 2010, the EU suspended temporarily the application of special tariff preferences to Sri Lanka, because it failed to apply effectively the provisions of the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and finally the Convention on the Rights of the Child.[28]

[26] Council Regulation (EC) 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) 552/97, (EC) 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007, [2008] OJ L211/ 1. The EU has decided to extend the application of this regulation until the end of 2013, see Regulation (EU) 512/2011 of the European Parliament and of the Council of 11 May 2011 amending Council Regulation (EC) 732/2008, [2011] OJ L145/28. Since the beginning of 2014, the new Generalised Scheme of Preferences granted to countries which ratify and implement such international conventions relating to human and labour rights, environment and good governance (called GSP +) has replaced the above-mentioned schemes: see in that sense Regulation (EU) 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) 732/2008 [2012] OJ L303/1; and finally the Commission Delegated Regulation (EU) 155/2013 of 18 December 2012 establishing rules related to the procedure for granting the special incentive arrangement for sustainable development and good governance under Regulation (EU) 978/2012, [2013] OJ L48/5. This unilateral fight by the EU against social and environmental dumping is often perceived by the developing countries as a hidden protectionism, see C López-Jurado, 'La oferta comercial preferencial de la Unión Europea a los Países en Vías de Desarrollo: modalidades e interacciones' (2011) 39 *Revista de Derecho Comunitario Europeo* 443, 461; or, more concretely, about social conditionality and the importance of fundamental labour rights, LM Hinojosa Martínez and T Fajardo del Castillo, 'Los nuevos problemas del comercio internacional y la Ronda de Doha' in LM Hinojosa Martínez and J Roldán Barbero (coord), *Derecho Internacional Económico* (Madrid, Marcial Pons, 2010) 223; and also Luis Miguel Hinojosa Martínez, *Comercio justo y derechos sociales*, (Madrid, Tecnos, 2002). Obviously the fight against dumping at a multilateral level can lose its credibility due to the fact that companies legally based in the European Unions internal market profit by the lower labour standards in third countries by means of delocalisation. The exigency of a corporate social responsibility to European companies which operate in third countries is of utmost importance in order to break the natural trend to a race to the bottom concerning labour standards and in order to promote the realisation of a universal respect to the fundamental social and labour rights.

[27] See, B De Witte, 'The EU and International Legal Order: The Case of Human Rights' in M Evans and P Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Oxford, Hart Publishing, 2011) 142; and also K Del Biondo, 'EU Aid Conditionality in ACP Countries: Explaining Inconsistency in EU Sanctions Practice' (2011) 7 *Journal of Contemporary European Research* 380–95.

[28] The measures adopted in respect of Sri Lanka have had little success both from a geostrategic point of view and from the perspective of human rights and democracy improvement: C Castillejo,

II. THE CONTRIBUTION OF THE EU TO THE CREATION AND DEVELOPMENT OF INTERNATIONAL CUSTOMARY NORMS IN THE FIELD OF HUMAN RIGHTS PROTECTION

From the above-mentioned practice, can we infer that the EU has conviction about the obligatory character of the main international normative instruments for the protection of human rights, besides any conventional link to them?[29] Notwithstanding all the diversity and complexity of the activity of promoting human rights that the EU carries out in its external action and despite criticism of double standards, the answer should be unambiguously in the affirmative: there is a category of international instruments for the protection of human rights that the EU has permanently invoked in its external relations. This is the case of instruments belonging to the International Bill of Human Rights,[30] the remaining international conventions for human rights protection adopted within the United Nations' framework, the European Convention on Human Rights, and finally some instruments from the OSCE which are not international treaties, such as for instance the Helsinki Final Act of 1975, or the Charter of Paris for a New Europe of 1990.[31]

The EU is not formally bound as an International Law subject by any of the above-mentioned international conventions for the protection of human rights. Therefore, this constitutes a fracture in the conditionality carried out by the EU in its external action that can only be solved by considering that the European Union is indeed bound by those instruments in the guise of General International Law, that is, as International customary law.[32]

The international instruments from the Council of Europe or OSCE framework belong to a customary heritage of regional character (not only European, but Western States in the case of the latter). In the case of international instruments of universal scope adopted within the framework of United Nations,

'Sri Lanka: The failure of EU human rights sanctions' (2011) 63 *FRIDE Policy Brief*. In the case of Venezuela the application of the 2009 preferential regime was suspended due to the lack of ratification of the United Nations Convention against corruption: see C López-Jurado, 'La oferta comercial preferencial de la Unión Europea a los Países en Vías de Desarrollo: modalidades e interacciones', n 26 above, 443, 468. The doctrine has raised problems of compatibility with WTO Law of those commercial sanctions put in place without the existence of a *human rights and democracy clause*, see RL Howse and JM Genser, 'Are EU Trade Sanctions on Burma Compatible with WTO Law?' (2008) 29 *Michigan Journal of International Law* 165–96; in this line, see B Wardhaugh, 'GSP+ and Human Rights: Is the EU's Approach the Right One?' (2013) 16 *Journal of International Economic Law* 827–46.

[29] T Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford, Clarendon Press, 1991).

[30] This is to say the ensemble composed of: the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1966, the International Covenant on Economic, Social and Cultural Rights, and the Optional Protocols to both.

[31] Both constitute examples of non-normative acts, following the expression used by P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413, 414.

[32] A Rosas, 'The European Union and Fundamental rights/Human rights' in C Krause and M Scheinin (eds), *International Protection of Human Rights: A Textbook* (Turku/Åbo, Institute for Human Rights of the Åbo Akademi University, 2009) 466.

the EU has acted under the internal assumption that those instruments reflect General International Law, be it in terms of international custom or as general principles of International Law.[33] As the judge Rosas of the Court of Justice of the European Union puts it:

> The human rights clause seems to be based on the understanding that the principles contained in the Universal Declaration reflect existing general international law, whether seen as customary law or as general principles of law recognised by civilized nations. While this does not necessarily mean that each word of the Universal Declaration has become legally binding, the EU's treaty practice contributes to the reaffirmation of the status of the Declaration as an expression of general international law binding on all States.[34]

Obviously, problems might appear when the question of identifying which of the articles of the UDHR benefit from such general acceptance is faced.[35]

The muddle in search of international legality and legitimacy for political conditionality would be solved if the EU became a party to most of the international agreements concerning human rights protection that it constantly invokes in its relations with third countries: being tied by international agreements in this field could bring legal certainty, as opposed to the enigmatic and mysterious character of international custom. In a certain way, the question of legality is already clarified with the Lisbon Treaty, which introduces explicitly among the objectives of the European Union in its relations with the wider world the protection of human rights and the strict respect and development of International Law, with a particular emphasis on the principles of the United Nations Charter (article 3.5 TEU).[36] Thus this reference in European Union primary law finds accommodation in General International Law, in line with the United Nations Human Rights Committee's view: every State which is party to the International Covenant on

[33] A Rosas, 'The Role of the Universal Declaration of Human Rights in the Treaty Relations of the European Union' in P Baehr, et al (eds), *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (Koninklijke Nederlandse Akademie van Wetenschappen, 1999) 201–9.

[34] A Rosas, 'The European Union and International Human Rights Instruments' in V Kronenberger (ed), *The EU and the International Legal Order: Discord or Harmony?* (Amsterdam, Asser Press, 2001) 61.

[35] The practice of judicial and quasi-judicial bodies suggest that the recognition through customary law is essentially referred to civil and political rights, at a doctrinal level more doubts seems to cast the inclusion of economic, social and cultural rights within the body of customary international human rights law, see J Bonet Pérez, 'Aproximación al tratamiento jurídico de las crisis de naturaleza económica en el ámbito del Derecho Internacional de los Derechos Humanos' in J Bonet Férez and J Saura Estapà (eds), *El Derecho internacional de los derechos humanos en períodos de crisis. Estudios desde la perspectiva de su aplicabilidad* (Madrid, Marcial Pons, 2013) 181. Beyond legal analysis, it has been assessed that the hegemony of neo-liberalism in the process of globalisation clearly undermines socioeconomic rights reducing their emancipatory potential by presenting them as mere aspirations and market outcomes, see J Wills, 'The World Turned Upside Down? Neo-Liberalism, Socioeconomic Rights, and Hegemony' (2014) 27 *Leiden Journal of International Law* 11–35.

[36] See J Larik, 'Shaping the international order as an EU objective' in D Kochenov and F Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (Cambridge, Cambridge University Press, 2014) 62–86.

Civil and Political Rights has an interest in its due compliance, especially in the respect towards the basic rights of the human person which constitute *erga omnes* obligations.[37] Therefore beyond the contractual dimension, 'there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms'.[38] International human rights treaties impose integral obligations which go beyond the bilateralist or synallagmatic logic of traditional international law.

The EU has therefore incorporated the provisions of the UDHR as an essential element of many of its international agreements with third countries. The EU has also encouraged third countries to ratify a large number of international treaties for human rights protection adopted under the auspices of United Nations, and also some of the fundamental ILO Conventions,[39] and it has done so both through its development cooperation and through its purely commercial relations. This behaviour of the EU constitutes an expression of its internal conviction that the above-mentioned instruments are generally binding beyond State consent, and it also has shown the conviction that those international treaties together with the UDHR form a *corpus* of general customary norms which the EU itself feels obliged and engaged to respect.[40] In that way some of the provisions enshrined in those instruments invoked in the EU's external relations become legally binding for third States, overcoming the relative effect of those treaties as article 38 of the Vienna Convention on the Law of the Treaties stipulates: thus

[37] International Court of Justice (ICJ), *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)*, Judgment of 5 February, ICJ Reports 1970, p 32, paras 33–34.

[38] Human Rights Committee, General Comment No 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) CCPR/C/21/Rev.1/Add.13, para 2. Indeed, due to the *erga omnes* nature of the obligations arising from International Human Rights Law a large number of treaties have foreseen interstate complaint mechanisms. These mechanisms reflect the legitimate interest which every single State of the international community has in respect for human rights obligations. The activation of such control mechanisms is possible because every contracting State has locus standi to denounce other States for the violation of human rights obligations.

[39] ILO is a specialised organism which integrates the family of the United Nations in a broad sense.

[40] Evidence of this internal conviction is the adoption by the Council of the European Union on 25 June 2012 of the EU Strategic Framework and Action Plan on Human Rights and Democracy, 11855/12, as well as the designation of a European Union Special Representative for Human Rights, Mr Stavros Lambrinidis. In the former document the European Union expresses its commitment to the Universal Periodic Review mechanism by the United Nations Human Rights Council: 'The EU underlines the leading role of the UN Human Rights Council in addressing urgent cases of human rights violations and will contribute vigorously to the effective functioning of the Council; the EU stands ready to cooperate with countries from all regions to this end. The EU calls on all members of the Human Rights Council to uphold the highest standards of human rights and to live up to their pledges made before election. Welcoming the establishment of Universal Periodic Review (UPR), the EU and its Member States are committed to raising UPR recommendations which have been accepted, as well as recommendations of treaty monitoring bodies and UN Special Procedures, in bilateral relations with all third countries; the Member States are equally determined to ensure implementation of such recommendations within their own frontiers. In forthcoming UPR rounds, the EU will pay close attention to the degree of implementation by third countries of UPR commitments which they have accepted and will endeavour to provide support for their implementation'.

it can be said that an exception to the general rule *pacta tertiis nec nocent nec prosunt* arises.[41]

The suitability of custom as a way of creation of norms concerning the international protection of human rights is beyond any reasonable doubt in the case of negative obligations, that is, the obligation to refrain from actively infringing those norms which may have acquired a customary legal value. On the other hand, the potentiality and utility of custom are clearly lower in the field of positive obligations, which are destined to establish authentic subjective rights that entail a correlative duty to act. Moreover, the suitability of custom comes from the fact that the international instruments concerning the protection of human rights aim at establishing a permanent and stable regime.[42] Customary international law, as is well known, presents particular difficulties when it comes to the delimitation between the *ascending* phase, concerning its formation and creation, and the *descendent* phase, regarding its application and reception. It could be said that both phases are practically simultaneous: the EU's legal order consecrates the automatic reception of customary international law.[43] It is possible that the existence of customary norms of general scope concerning the protection of the fundamental rights of human beings preceded the practice of political conditionality carried out first by the European Community, and later the EU, since the '90s. This idea seems to appear from the following words expressed at that time by Schermers: 'Public international law offers a strong legal obligation to respect the most fundamental human rights. This obligation is addressed to all subjects of international law and therefore also to the European Community'.[44] Nowadays, responsibility

[41] The harsher questions could be on the one hand, the identification of the concrete norms which have become *erga omnes*, and on the other hand, how to establish if such norms are legally binding for other international organisations. It is abundantly evident that the EU in the same way that identifies norms as binding for third countries remains itself bound by them. But even third party international organisations could be bound by such norms concerning human rights protection, that possibility is feasible by means of an analogical application of article 38 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, adopted in 1986. This possibility was recognised by the ICJ, *North Sea Continental Shelf cases*, Judgment of 20 February 1969, ICJ Reports 1969, p 3.

[42] The contribution to the development of international law by judicial and quasi-judicial human rights monitoring bodies shall not be underestimated: 'There is no doubt, in fact, that, starting with the Universal Declaration of 1948, and then with the entry into force of the various conventions on human rights and the institution of the above-mentioned organs, not only has the system of protection of human rights constituted a revolutionary development in itself, but it has also produced an innovative effect on various institutions of a general nature disciplined by customary law, as well as affecting the discipline of other specific international actors': see Benedetto Conforti, 'The specificity of human rights and international law' in Ulrich Fastenrath, et al (eds), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (Oxford, OUP, 2011) 440.

[43] See among other judgments of the ECJ: Case C-162/96 *A Racke GmbH & Co v Hauptzollamt Mainz*, [1998] ECR I-3655; Case C-366/10 *Air Transport Association of America and others v Secretary of State for Energy and Climate Change*, EU:C:2011:864; and finally Case C-286/12 *Commission v Hungary*, EU:C:2012:687.

[44] Henry G Schermers, 'The European Communities bound by Fundamental Human Rights' (1990) 27 *Common Market Law Review* 249, 251.

to protect in the light of recent experiences in Libya, for instance, can be seen as an emerging area where a general obligation of customary law might one day crystallise, but this does not impair the EU's pursuit of the development of international law and the definitive emergence of customary law in this field through its fragmented Common Foreign and Security Policy, according to the objectives of articles 3.5 and 21.1 of the TEU.[45]

An additional issue for reflection could be the unilateral initiative of the EU of introducing as an essential element of its international agreements with third countries the *human rights and democracy clause*; to what extent does the EU become bound by its own acts according to the *estoppel* doctrine, and to what extent does it contribute to the creation of customary law with the exercise of political conditionality?[46] In order to answer these questions it is convenient not to neglect the fact that when the EU introduces respect for human rights as an essential element of an international agreement it is giving to its counterpart a clear message: the EU respects and feels itself obliged by those international standards of human rights protection for which it demands respect by third countries. Any change of that state of assumptions can never be detrimental to the third country, consequently, it can be inferred that the EU, being a subject of international law, is obligated by the same international standards concerning human rights protection which the third country is required to respect. As it was put by the Vice-President of the ICJ Alfaro in his Separate Opinion in the *Temple of Preah Vihear* case:

> Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (*nemo potest mutare consilium suum in alterius injuriam*). *A fortiori*, the State must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it. (*Nullus commodum capere de sua injuria propria*). Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (*venire contra factum proprium non valet*).[47]

Moreover, according to the ICJ jurisprudence on the *North Sea Continental Shelf* cases, the body of customary law could be integrated with the norms enshrined in international treaties to which a large number (*widespread and representative participation*) of States of the International Community have become parties, and that is undoubtedly the case of the United Nations' core human rights conventions[48] which are constantly wielded by the EU throughout its external action.[49] Additional elements which support this idea can be found in the ICJ's jurisprudence

[45] G De Baere, 'The EU and the Responsibility to Protect' in B Van Vooren, S Blockmans and J Wouters (eds), *The EU's Role in Global Governance. The Legal Dimension* (Oxford, OUP, 2013) 95–109. A critical appraisal of the EU's role in the Libyan armed conflict raised in 2011 from the perspective of human rights and democracy in J Ferrer Lloret, 'La Unión Europea ante la crisis Libia ¿Derecho Internacional, Democracia y Derechos Humanos en las Relaciones Euromediterráneas?' (2012) 41 *Revista de Derecho Comunitario Europeo* 13–56.

[46] The *human rights and democracy clause*, once incorporated into an international agreement, is transformed into a bilateral act. To the extent that it receives consent by both parties it becomes reciprocal and its infraction would enable either of them to terminate or suspend the application of the international agreement according to articles 60.1 and 60.3(b) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, adopted in 1986. However, the original gestation of this clause has to be attributed to the EU, adding that its respective counterparts have accepted it—with a few exceptions—in an uncritical and unconditional way which means in practice adhering to it as a non-negotiable element. It is in this sense that the doctrine of the own acts and *estoppel* is brought. The practical application until the present moment of the clause reaffirms this approach to the extent that it has only been wielded by the EU and not against it. This reasoning could be illustrated by Australia's reluctance to include the above-mentioned clause. In that case, negotiations could be released only when political conditionality was substituted by a declaration merely mentioning in abstract terms the compromise with democratic values, see J Roldán Barbero, 'Les relations extérieures de l'Union européenne: quelques faiblesses et incertitudes juridiques' in *Jean-Victor Louis*, et al, *Mélanges en Hommage à Jean-Victor Louis*, vol II (Brussels, Éditions de l'Université Libre de Bruxelles, 2003) 182.

[47] See the Separate Opinion of Judge Alfaro in the *Temple of Preah Vihear (Cambodia v Thailand) case*, Judgment of 15 June 1962, ICJ Reports 1962, p 40.

[48] We consider that a reasonable threshold in order to have a large and representative number of States of the International Community which are parties to an international treaty could be a two-thirds majority of the 193 States which are members of the United Nations. Therefore, a majority of 128 States which are parties to a human rights multilateral convention will enable us to think that its rules may have a customary nature and be binding as general international law. This is the case with the seven following human rights conventions adopted under the auspices of United Nations: the International Covenant on Civil and Political Rights of 16 December 1966; the International Covenant on Economic, Social and Cultural Rights of 16 December 1966; the International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966; the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984; the Convention on the Rights of the Child of 20 November 1989; and finally the Convention on the Rights of Persons with Disabilities of 13 December 2006. However, two of the considered *core* conventions have not reached such a threshold of ratifications: namely the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, of 18 December 1990 and the more recently adopted International Convention for the Protection of All Persons from Enforced Disappearance, of 20 December 2006. Even if it is not considered one of the *core* human rights conventions the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, has also reached the above-mentioned threshold for accession. Among the optional protocols to the conventions previously referred to only two of them have reached the two-thirds majority of State parties: the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict of 25 May 2000 and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 25 May 2000. States are verbally more engaged with the idea of recognising and protecting human rights at the universal level than with real support to the mechanisms established for their guarantee at the international level.

[49] ICJ, *North Sea Continental Shelf cases*, Judgment, n 41 above, para 73. The ECJ has invoked this jurisprudence in Case C-37/00 *Herbert Weber v Universal Ogden Services Ltd* [2002] ECR I-2013, para 34. Notable as well is the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p 257, para 79: 'It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*ICJ Reports 1949*, p 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified

where it affirms the customary nature of some basic human rights[50] that the EU has tried to promote through its external action with third States, namely: the prohibition of genocide,[51] the prohibition of racial discrimination, including apartheid, and the prohibition of slavery,[52] the right to physical integrity,[53] the right of protection against arbitrary denial of justice,[54] and more recently the prohibition of torture.[55] Nowadays, there is not, concerning the customary nature of those rights, any State which openly characterises itself as an official *persistent objector*.[56]

Therefore, the EU has promoted respect for the international norms concerning human rights protection that it considers to have customary nature and to be of universal scope. Therefore, the spiritual element in the creation of custom (*opinio iuris sive necessitatis*) appears to be without difficulties. More objections could affect the health of the objective element of custom in this case: despite hesitations and vacillations[57] and despite the examples of double standards it

the conventions that contain them, because they constitute intransgressible principles of international customary law'. See D Momtaz and A Ghanbari Amirhandeh, 'The interaction between international humanitarian law and human rights law and the contribution of the ICJ' in K Bannelier, T Christakis and S Heathcote (eds), *The ICJ and the Evolution of International Law. The enduring impact of the Corfu Channel Case* (London, Routledge, 2012) 256–63.

[50] See, B Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice' (2012) 3 *Journal of International Dispute Settlement* 7–20. An article which draws a comparison between the contribution to human rights of the ICJ jurisprudence and the specialist courts and bodies suggests that the ICJ has a potential *ripple effect* when it comes to interpretation of fundamental issues rather than enforcement of individual rights, see R Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' (2013) 12 *Chinese Journal of International Law* 639–77.

[51] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, p 23. The judgment which has contributed definitively to the explanation of the regime of international liability arising from genocide is the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February, ICJ Reports 2007, p 43.

[52] *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)*, Judgment, n 37 above, paras 33–34; see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 57.

[53] *United States Diplomatic and Consular Staff in Tehran*, Judgment of 24 May, ICJ Reports 1980, 42, para 91. The Court cited the fundamental principles enshrined in the UDHR to support the illegality of wrongful deprivation of a person's freedom.

[54] *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)*, Judgment, n 37 above, 47, para 91.

[55] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012, 457, para 99: 'In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)'.

[56] It should be borne in mind that it is not welcomed that the persistent objector status might be used concerning matters of a general interest, which the international norms relating to human rights or environmental protection are. South Africa was in fact an active objector to the apartheid prohibition for decades, but that conduct has not released that State from the international liability which is a consequence of the infraction of the prohibition. See Y Dinstein, 'The Interaction between Customary International Law and Treaties', *Collected Courses of the Hague Academy of International Law* vol 322 (Leiden, Brill/Nijhoff, 2007) 243, 285–87.

[57] Beyond the scope of the present study remain the fractures and ruptures which often appear in the framework of the CFSP and the dissonances that also happen between the latter and the respective foreign policies of every single Member State.

cannot be denied that the EU has a uniform and reiterated practice of utilisation and invocation, vis-à-vis third countries, of international human rights instruments. From this *usus*, from this voluntary repetition of precedents it is possible to infer the juridical obligation for the EU itself. Before giving lessons one must first lead by example; however, an excessive degree of self-criticism is also dangerous as eloquently has been enunciated: 'If the passionate demand for self-scrutiny leads to paralysis, we should perhaps begin to wonder if we have not gone too far in our denunciations of those who appeal to the universal'.[58]

Even though the material element is weaker than the spiritual one in order to ascertain the EU's contribution to the creation of customary international law in the field of human rights, it is appropriate to point out that international jurisprudence has granted an increasing importance to the subjective element for the emergence of international custom.[59] It is worthwhile to note the ICJ's position on the *Nicaragua v United States* case, where it took the view that *opinio iuris* should prevail over practice in order to affirm and determine the existence of a customary norm:

> The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[60]

According to that reasoning, whereas in the field of human rights dissonances between practice and juridical belief are frequent, those discordances are not strong enough to constitute the denial of the customary norm in the field; nor do they propose an alternative customary norm: they suppose examples of deviation from the norm, infraction of international customary norms concerning human rights protection, which simply entail violations within the general framework

[58] P-M Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi' (2005) 16 *European Journal of International Law* 136.

[59] See in that respect among others, G Abi-Saab, 'La coutume dans tous ses états ou le dilemma du développement du droit international général dans un monde éclaté' in *Le droit international à l'heure de sa codification. Études en l'honneur de R Ago*, vol I (Milan, Giuffrè 1987) 53–65; M Mendelson, 'The Subjective Element in Customary International Law' (1995) 66 *British Yearbook of International Law* 177–208; and finally, it has been maintained that *opinio iuris* cannot be distinguished, at least, functionally, from State consent: O Elias, 'The Nature of the Subjective Element in Customary International Law' (1995) 44 *International and Comparative Law Quarterly* 501–23. Domestic courts may face problems due to the primacy of the subjective element in the formation of custom, which may lead to antagonistic international norms being raised, RB Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates' (2010) 21 *European Journal of International Law* 173–204.

[60] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment of 27 June 1986, Merits, ICJ Reports 1986, p 98, para 186.

of subsistence, acceptance and observance of the norm.[61] This dilution of the material element for the identification of customary norms is not an exclusive phenomenon of the International Human Rights Law field, it also appears within the scope of International Humanitarian Law, as has been shown by the International Criminal Court for the Former Yugoslavia, which has put a prevailing attention on the psychological element in order to determine the existence of the customary norm.[62]

[61] See in that sense, J Roldán Barbero, 'El valor jurídico de las Resoluciones de la Asamblea General de la ONU en la Sentencia Nicaragua contra Estados Unidos de 27-6-86' (1990) XLII *Revista Española de Derecho Internacional* 81, 88–91. It has been argued by human rights-oriented lawyers that the method of customary law in the field of human rights and international humanitarian law differs structurally from the classical positivist customary law method of formation. Giving a greater role to *opinio iuris* than to State practice allows one to ascertain more easily a customary norm in the field of human rights protection through what has been called *the Nicaragua method*, see J Wouters and C Ryngaert, 'The Impact of Human Rights and International Humanitarian Law on the Process of the Formation of Customary International Law', Katholieke Universiteit Leuven, *Institute for International Law Working Paper No 121* (2008). This method not only emphasizes *opinio iuris* over State practice, it also gives a greater role to verbal State practice over physical State practice. According to verbal practice of the States in the field of basic human rights it is difficult to find examples of a *persistent objector*: even States which formulate reservations prima facie contrary to the object and purpose of human rights conventions try to defend the compatibility of their domestic legislation with the standards of the international treaty; for instance, the United Nations Committee on the Elimination of Discrimination against Women has found that Saudi Arabia, despite its general reservation to the Convention, is bound to implement all the provisions of the Convention in its legal order. Moreover, the delegation of Saudi Arabia, even if it has not withdrawn the reservation which undermines the effective application of the Convention, has assured that there is no contradiction in substance between the Convention and Islamic Sharia. See 'Concluding comments of the Committee on the Elimination of Discrimination against Women' (2008) CEDAW/C/SAU/CO/2, paras 8–10. About this topic in a broad perspective see A Pellet, 'Reservations to Treaties and the Integrity of Human Rights' in S Sheeran and Sir N Rodley (eds), *Routledge Handbook of International Human Right Law* (Abingdon, Routledge, 2013) 323–38.

[62] See for instance, Case no IT-95-16-T *Kupreškić et al*, International Criminal Court for the Former Yugoslavia, Judgment of 14 January 2000, para 527: 'As for reprisals against civilians, under customary international law they are prohibited as long as civilians find themselves in the hands of the adversary. With regard to civilians in combat zones, reprisals against them are prohibited by Article 51(6) of the First Additional Protocol of 1977, whereas reprisals against civilian objects are outlawed by Article 52(1) of the same instrument. The question nevertheless arises as to whether these provisions, assuming that they were not declaratory of customary international law, have subsequently been transformed into general rules of international law. In other words, are those States which have not ratified the First Protocol (which include such countries as the U.S., France, India, Indonesia, Israel, Japan, Pakistan and Turkey), nevertheless bound by general rules having the same purport as those two provisions? Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely *usus or diuturnitas* has taken shape. This is however an area where *opinio iuris sive necessitatis* may play a much greater role than *usus*, as a result of the aforementioned Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law'. Some authors had pointed out some time before the major role of *opinion iuris* and the minor relevance of State practice for the emergence of customary norms in the field of human rights protection. See in that respect: B Simma, 'International Human Rights and General International Law: a Comparative Analysis' in *Collected Courses of the Academy of European Law (vol IV, Book 2)* (Florence, 1994) 226; also R Huesa Vinaixa, 'El impacto de los regímenes especiales en las fuentes del Derecho internacional' in ÁJ Rodrigo and C García Segura (eds), *Unidad y Pluralismo en el Derecho internacional Público y en la Comunidad internacional, Coloquio en Homenaje a Oriol Casanovas, Barcelona, 21–22 de mayo de 2009* (Madrid, Tecnos, 2011) 184–85.

Henceforth, it is not ludicrous nor unrealistic to affirm that the EU's juridical conscience—previously analysed throughout its practice in external action—constitutes a valuable argument to support its contribution and impulse as an international organisation for the emergence and creation of legally binding norms in the field of human rights protection of a customary nature. Normativity as brilliantly was exposed by Weil is above all 'a matter of degree', and a rule enshrined in an international treaty for human rights protection, as vague as it might be, does not cease to be a legal norm with extra-conventional effects when it has already crystallised into the *corpus* of customary law.[63] Thus, the obligatory character of most of the rules enshrined in the core United Nations human rights treaties[64] and more precisely their binding nature for the EU—as a subject of international law[65]—are not undermined by the fact that in the face of comparable violations of human rights committed by third countries, the EU has adopted different responses and positions through its external action according to its political margin of appreciation: be it on the scope of CFSP, be it through the suspension or not of trade preferences, the continuation or termination of development cooperation international agreements, or the maintenance of financial assistance in some cases and not in others, etc.[66]

[63] Prosper Weil, 'Towards Relative Normativity in International Law?' n 31 above, 413, 414–16. The author explains the process described as a *veritable revolution in the theory of custom* at p 439: 'Once the conventional norm had been absorbed into the customary norm and deprived of its specificity, all that remained to be done, in the second place, was to submit it to that increasing indeterminacy of the subjects of international obligations which we have seen affecting the customary norm. Thus, through the relay of the customary norm—itself qualified as a general rule or rule of general international law—the conventional norm, too, comes to be imposed on all states, including those who never became parties to the convention in question or never even signed it'. And more precisely at p 440: 'In sum, the intention manifested by a state in regard to a given convention is henceforth of little account: whether it signs or not, becomes party to it or not, enters reservations to such and such a clause or not, it will in any case be bound by any provisions of the convention that are recognized to possess the character of rules of customary or general international law. Thus, while nearly all the distinctions established by the classic law of treaties have finally been more or less blurred, it has at the same time become necessary to differentiate, within each conventional instrument, between those provisions which are subject to the diluted regime of the customary norm and those remaining subject to the strict traditional discipline of classic conventional norms'.

[64] See A D'Amato, 'The Concept of Human Rights in International Law' (1982) 82 *Columbia Law Review* 1110, 1137–38.

[65] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, pp 89–90, para 37: 'International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties'.

[66] The following words may illustrate the aforementioned statement: 'The degree to which new customary rules may be imposed on recalcitrant States will depend, and should depend, on the whole set of relevant circumstances. It would be unwise, as well as futile, to prescribe a categorical rule for so complex and delicate issue': O Schachter, *International Law in Theory and Practice* (Leiden, Martinus Nijhoff, 1991) 14, quoted in J Roldán Barbero, *Ensayo sobre el Derecho Internacional Público* (Almería, Universidad de Almería, 1996) 82.

Fluctuations and inconsistencies that happen within the different instruments of the EU's external action practice, as well as recourse in some cases to measures of negative conditionality while it employs positive measures in others according to a political margin of appreciation, are all factors which do not impair the *opinio iuris* that the EU has shown when identifying as compulsory the basic norms which integrate the human rights *acquis*. This affirmation is perfectly plausible if the scopes of the existence and the efficacy of legal norms are conceptually separated and thereby, the customary norm resists both the political discretion which might exist in its effective application and its open texture which brings it closer to the notion of general principles of international law.

The real motivation behind measures of retaliation or sanctions adopted against a third State responsible for a violation of the international norms protecting human rights is not always legal; frequently legal reasoning is the mask which conceals economic or political reasons.[67] Admittedly, real reasons could remain more or less hidden or visible; the difference in intensity of the reaction of the EU in the face of violations of the international norms concerning human rights protection clearly depends on priorities and interests of every Member State's own foreign policy. Therefore, even if the *opinio iuris* should be analysed in the light of the practice of the EU, a possible subordination of its function to promote human rights protection in the wider world to other goals and less altruistic finalities does not per se deny the EU's contribution to the development of norms of general International Law of a customary character concerning human rights protection.

III. FINAL QUESTIONS: AN *ETERNAL RECURRENCE* OVER THE OLD QUESTIONS OF LEGITIMACY AND EFFICACY. FROM PARTICULARISM TO UNIVERSALISM?

According to Koskenniemi, facing the material inexistence of a representative who embodies the universal, it is not outrageous that the EU, as a regional actor and a particular element of the international system, proclaims itself as a leader and defender of universal values:[68] the EU, from its particular perception and interpretation of general international law, approaches the former with the intention to identify international norms of a customary nature and to promote respect for them by third countries through its external relations. In other words, from its internal conviction and belief that respect for human rights and their *universality and indivisibility* constitute norms of general international law of a customary nature, the EU has dared to pursue a practice which prima facie is consequent

[67] J Ferrer Lloret, *Responsabilidad internacional del Estado y Derechos Humanos* (Madrid, Tecnos, 1998) 152–53 and 177–97.

[68] M Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 *European Journal of International Law* 113–24.

upon its own perception of the international legal order, a practice which is not exempt from controversy nor from valid grounds.[69]

This desired leadership of the EU as an exponent of the universal reflects its own belief in international law with all its strengths and weaknesses, and is inevitably influenced by its own values and particular vision. Prima facie it seems legitimate that the EU tries to universalise its own tradition of pluralistic democracy and respect for human rights, a tradition that might achieve a global dimension if it succeeds in proving itself as the more satisfactory in competition with the other traditions. This objective clearly entails several risks and responsibilities, the promotion of human rights cannot be an argument used to impose one's own convictions or preferences, with an ethnocentric or solipsistic vision which hides an instrumental and economic vision oriented at generating relations of dependence and domination with third countries. On the opposite side, it is also possible to incur what has been described as *kitsch*,[70] that is, an excessively sentimental vision which may turn the promotion of human rights and democracy into a simply aesthetic trend. It has to be rejected that the EU's external action concerning human rights obeys mainly to altruist motivations. *Realpolitik*, geostrategy, casuistic pragmatism and politicisation are always present. However, it can be maintained that through its external action the EU contributes to reinforcing and identifying respect for human rights and their universality, indivisibility and interdependence as a general principle of international law or even as an emerging or emerged international customary norm. From the most optimistic point of view, the EU's position can be said to be aimed at establishing the pillars of an international legal order which goes beyond the statist function of regulating bilateral rights and obligations of States, creating the multilateral Public International Law of an International Community which locates the human being at the centre of its construction. In the also enthusiastic words of Simma, the establishment of a universal public order with human rights at its centre would entail more profound transformations of the nature of current Public International Law:

> The concept implies the expansion of international law beyond the inter-state sphere, particularly by endowing individuals with international personality, establishing a hierarchy of norms, a value-oriented approach, a certain 'verticalization' of international law, de-emphasizing consent in law-making, introducing international criminal law, by the existence of institutions and procedures for the enforcement of collective interests at the international level—ultimately, the emergence of an international community, perceived as a legal community.[71]

[69] A brief analysis of the ideological split *North-South* and the criticism of *eurocentrism* which faces the discourse and practice of political conditionality can be found in J Roldán Barbero, *Democracia y Derecho Internacional* (Madrid, Civitas, 1994) 77–91.

[70] This expression used by Koskenniemi is borrowed from the Czech writer Milan Kundera from one of the passages of its famous novel *The Unbearable Lightness of Being*, see M Koskenniemi, 'International Law in Europe: Between Tradition and Renewal', 113, 121–24.

[71] B Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 *European Journal of International Law* 265, 268. This view received sharp criticism by the traditional

This contribution of the EU and its own subordination to International Human Rights Law is a step, incipient as it may be, toward the reaffirmation of the legal and normative element, regarding Public International Law as more than a simple instrument of foreign policy. Not in vain has the EU been characterised as an international player which demands and promotes on the multilateral plane the establishment and consolidation of normative standards that it is prepared to guarantee at a domestic level; while the United States, is often figured as a hard power (not a mere 'herbivore' as the EU is) which is able to venture in a unilateralist manner where Public International Law is a tool at its own service, entailing a weak inner compromise, but for which the United States is able to demand respect with rigorous and coercive mechanisms toward third countries (this characterisation could be at stake after the Syrian episode).[72] Nowadays, neither realist hypothesis nor a naïve altruistic approach suffices to explain the EU's position: its defence of the universality, indivisibility and interdependence of human rights starts with the assumption that their enjoyment is inextricably linked to the establishment of a pluralist democracy with a social dimension. Both of them, human rights and democracy, depend on the stability, security and development in third countries. These factors are widely believed to condition the stability, security and well-being of the EU itself and its Member States, this belief being particularly deep-rooted concerning the immediately neighbouring countries.[73]

This *civilizing* mission of regenerating, reincarnating, and developing democracy, rule of law and human rights on a planetary scale has both an altruist and an egoist component, but the predominance of the latter, as has been pointed out by Morin, is highly likely.[74] Inclination for the universality, indivisibility and interdependence of human rights has its formal justification in the Vienna Declaration

scholarship, because in their view, an attempt to establish a content-based or value-based hierarchy of international norms rather than attending to the process by which international obligations are created could be a misleading appreciation towards what international law is, see P Weil, 'Towards Relative Normativity in International Law?', 413, 425–26.

[72] B de Witte, 'International Law as a Tool for the European Union' (2009) 5 *European Constitutional Law Review* 265–283. The situation of *impasse* Syria is facing since the beginning of 2011, which has turned into a bloody civil war, illustrates what has been described as a *G-Zero World*, a multipolar world where the balance of powers leads to a paralysis of multilateral action or even unilateral action in order, for instance, to stop crimes against humanity: inaction is a consequence of the fact that no single State or coalition of States has the real capacity to provide effectively global goods: see I Bremmer, *Every Nation for Itself, Winners and Losers in a G-Zero World* (Portfolio, Penguin, 2012).

[73] A description of the different means by which the EU tries to promote its holistic view of the so-called *human rights–democracy–rule of law trinity* is found in L Pech, 'Promoting the rule of law abroad: the EU's limited contribution to the shaping of an international understanding of the rule of law' in D Kochenov and F Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (Cambridge, Cambridge University Press, 2014) 108–29.

[74] E Morin, *Penser l'Europe* (Paris, Gallimard, 1990) 235. The EU's fisheries agreements with Morocco have been argued as illustrations of the primacy of economic interests over human rights in practice, due to the fact that they include the Western Sahara's waters without a clear respect for the right to self-determination of the Saharawi people: see J Soroeta Liceras, 'La posición de la Unión Europea en el conflicto del Sahara Occidental, una muestra palpable (más) de la primacía de sus intereses económicos y políticos sobre la promoción de la democracia y de los derechos humanos' (2009) 34 *Revista de Derecho Comunitario Europeo* 823–64.

and Programme of Action adopted at the World Conference on Human Rights on 5 June 1993, by consensus of the representatives of 171 States: its text reflects the link between democracy and human rights upon which security and development seem also to depend.[75] In consequence, the EU when it identifies International Human Rights Law as customary international law of a general nature, acting with a clear preference for a concrete conception of democracy, contributes to a certain degree to eroding the traditional neutrality of Public International Law regarding the political system of States.[76] In fact, the whole of the UDHR is influenced by the notion of democracy. In particular, its articles 21 and 29.2 illustrate that requirements of a democratic society could be validly wielded as a legitimate objective capable of restrict the scope of some basic human rights.[77] It has been argued that a 'rule of law and pluralistic democracy based system' is not the unique and exclusive model capable of being compatible with International Human Rights Law. Chinese authoritarianism has been described as an appropriate model for shaping international law despite Western scholars' apparent *phobia* of it; according to some scholars it could be an alternative reading of International Human Rights Law which puts more emphasis on local self-goverment and cultural rights with an absence of freedom of expression and in spite of the hegemony of the Communist Party.[78] The EU has a long way to go if it aims at persuading the rest of the world (or at least the vast majority of it) of the self-conviction that its own social model and values are the ones which ensure the higher degree of individual freedom, social justice and equity.

[75] This connection between pluralistic democracy and human rights can be also found in the United Nations General Assembly Resolution 55/2 *United Nations Millennium Declaration* [2002] A/RES/55/2, and in the Report of the Secretary-General Kofi Annan, *In larger freedom: towards development, security and human rights for all* [2005] A/59/2005/Add.3.

[76] European Parliament and Council Regulation (EC) 1889/2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide [2006] OJ L386/1. See J Roldán Barbero, 'Democracia y Derecho Europeo' (1993) 20 *Revista de Instituciones Europeas* 101, 131.

[77] It is often argued that a pluralistic democracy with periodical multiparty elections is not explicitly required in International Human Rights Law, in spite of the fact that it permeates the European public order. As a matter of fact, it is notable that the European Court of Human Rights, when interpreting the provisions of the European Convention on Human Rights, defends a substantial conception of democracy not limited to the formal organisation of periodical elections. Even though the invocation of pluralistic democracy in the framework of the United Nations is more frequent since the end of the Cold War, it has been maintained that a more explicit link between International Human Rights Law and a pluralistic conception of democracy is required. Some objections to the universalisation of the conception of democracy enshrined in the jurisprudence of the European Court of Human Rights are revealed by J Vidmar, 'Multiparty Democracy: International and European Human Rights Law Perspectives' (2010) 23 *Leiden Journal of International Law* 209–40. Its main objection resides in the inexistence of a customary norm of general scope in favour of a concrete model of political participation. However, article 25(b) of the International Covenant on Civil and Political Rights concedes to the EU enough legitimacy and a wide margin of appreciation to promote on a multilateral level its particular conception of democracy: 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:... (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage ard shall be held by secret ballot, guaranteeing the free expression of the will of the electors'.

[78] PCW Chan, 'Human Rights and Democracy with Chinese Characteristics?' (2013) 13 *Human Rights Law Review* 645–89.

Nowadays, the EU's institutions and the traditional democratic institutions of its Member States are facing a serious loss of confidence from European citizens. Xenophobic, populist, nationalist and Europhobic feelings are spreading throughout the Member States, contributing to the erosion of the axiological heritage that liberal democracy does undeniably constitute for Western Europe. This situation, due partially to the various financial and sovereign-debt crises which the Euro Zone has experienced uninterruptedly since 2008, undermines both the credibility and the legitimacy of the EU's discourse on the promotion of human rights and democracy in the wider world, which is underpinned by its external policies. A good start could be the introduction of a more preventive, proactive and effective mechanism to govern Member States' internal situation that the one foreseen in article 7 TEU.[79] Further reflection is also required in order to determine if the EU should accede, not only to the European Convention on Human Rights, but to the main human rights multilateral conventions adopted under the auspices of the United Nations.[80] Following the example of the United Nations Convention on the Rights of Persons with Disabilities to which the EU has already become a party,[81] if this line were to be followed with other international treaties, the EU could perhaps increase the level of credibility of its *civilizing* role towards third countries (and why not its efficacy?), and it would in all likelihood have higher

[79] For instance, Hungarian Prime Minister Mr Viktor Orban has defended openly the possibility of reinstating the death penalty in Hungary during a debate at the plenary session of the European Parliament held on 19 May 2015. The abolition of the capital punishment is precisely one of the main goals that the European Union pursues throughout its external action, see *Bulletin Quotidien Agence Europe*, 11317, 20 May 2015.

[80] Dinstein, following the opinion of the *Institut de droit international* has proposed an interesting method to ascertain the existence and consolidation of a communal *opinio iuris*: successive treaties may imply it through repetition. He finds that a model of successive law-making treaties that reaffirm the customary nature of the initially non-binding UDHR is the *plethora* of treaties that has been concluded both on the global and regional plane in the realm of human rights. Thus, *a contrario* when a particular human right has been included in some treaties while deliberately excluded from others doubts about the existence of a communal *opinio iuris* emerge. As a subject of international law which the EU is, it is undoubtedly bound by the norms which have acquired customary status in the field of human rights and through their reaffirmation in its external relations it contributes to the progressive development of international law, notwithstanding inconsistencies or double standards. This reasoning does not undermine EU's suitability to be subject and explicitly committed beyond customary law to the external mechanisms of supervision of human rights performance existing on the global plane. See Y Dinstein, 'The Interaction between Customary International Law and Treaties' n 56 above*loc. cit.*, 243, 299–303. Of course, the customary nature of each one of the particular provisions of the human rights treaties has to be assessed individually and proved independently on its own merits, as the same author states at p 372.

[81] See Council Decision (EC) 2010/48 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ 23/35. In more detail, G De Búrca, 'The EU in the Negotiation of the UN Disability Convention' (2010) 35 *European Law Review* 174–96. An overview about possible motivations of the EU to conclude international agreements in the field of human rights in T Stiegler, 'Reaching for a Calculator or a Mirror? Why the EU Joins International Human Rights Treaties', *EU Diplomacy Papers* 2013/1, College of Europe, Bruges.

legitimacy from an international law point of view if it were subject to the scrutiny of those conventional mechanisms for human rights protection.

Human rights rules enshrined in multilateral global conventions are thus nearer to *jus cogens* than to *jus dispositivum*. However, a severe setback to the envisaged process of the EU's accession to the European Convention on Human Rights has been given by the recent Opinion 2/13 of the European Court of Justice, where the Court has found the draft agreement on the accession to be incompatible with primary law. None of the obstacles raised by the ECJ in this opinion are insurmountable but they oblige the EU to reopen a complex set of negotiations which have already taken more than three years to reach the rejected draft agreement involving the European Union and the Council of Europe Member States.[82]

The EU's role as a promoter of worldwide human rights respect has made it worthy of characterisation as a *normative power*, a *rule generator* and even as a *norm entrepreneur*.[83] Even so the temptation to exaggerate the EU's role as guardian of the universal morality shall be avoided. It shall not be ignored that the influence of the positions of the EU and its Member States in multilateral fora is nowadays clearly decreasing:[84] in the General Assembly of the United Nations during the 1997–98 period the most influential positions concerning human rights issues were those of the United States followed by the EU as a bloc. By contrast, during the 2010–11 period China and Russia have had the main voting coincidence percentage regarding human rights matters. Nowadays, the EU can be said to be the third diplomatic power in that sense, with about a 44 per cent of voting coincidence on their opinions, overcoming the United States influence.[85] Within the

[82] See Opinion 2/13 of 18 December 2014, EU:C:2014:2454. Further comments on this opinion can be read in: Steve Peers, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection' (*EU Law Analysis*, 18 December 2014): eulawanalysis.blogspot.com.es/2014/12/the-cjeu-and-eus-accession-to-echr.html; J-P Jacqué, 'Non à l'adhésion à la Convention européenne des droits de l'homme?' (*Droit de l'Union Européenne*, 23 December 2014): www.droit-union-europeenne.be/412337458; L Besselink, 'Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13' (*Amsterdam Centre for European Law and Governance* (*ACELG*), 24 December 2014) acelg.blogactiv.eu/2014/12/24/acceding-to-the-echr-notwithstanding-the-court-of-justice-opinion-213/; and finally, PJ Kuijper, 'Reaction to Leonard Besselink's ACELG Blog' (*ACELG*, 6 January 2015) acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselinks%E2%80%99s-acelg-blog/.

[83] See I Manners, 'Normative Power Europe: A contradiction in terms?' (2002) 40 *Journal of Common Market Studies* 235–58; M Cremona, 'The Union as a Global Actor: Roles, Models and Identity' (2004) 41 *Common Market Law Review* 553, 557; and E Herlin-Karnell, 'EU values and the shaping of the international legal context' in D Kochenov and F Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (Cambridge, Cambridge University Press, 2014) 103–6, respectively. The description of the EU as a *rule generator* reflects its efforts to actively export its own normative *acquis* to the domestic law of third countries.

[84] A broader perspective of analysis about the European Union and Human Rights at the United Nations is contained in Chapter 10 of the present volume by C Pérez Bernárdez, where the EU in the Third Committee of the General Assembly of the United Nations and the EU in the Human Rights Council are examined.

[85] A different question is the internal voting consistency and cohesion of the Member States which has increased clearly in positive terms concerning human rights issues. Nowadays, cohesion of the Member States regarding its positions on human rights matters is about 85 per cent.

United Nations Council of Human Rights the influence of the EU and its Member States can be said to be suffering a similar trajectory. In both cases, the questions which more often divide the sense of the votes of the Member States are related to the conflict between Israel and Palestine.[86] The process of adoption of the Resolution 26/9 of the Human Rights Council could be illustrative of this trend: this resolution on the elaboration of an international instrument, legally binding on transnational corporations and other business enterprises with respect to human rights was adopted with a recorded vote of 20 to 14, with 13 abstentions, the EU Member States being among those who voted against.[87]

An opportunity to correct this trend toward the permanent loss of influence comes with the new enhanced observer status which the EU has recently acquired in the United Nations General Assembly.[88] The EU will need to work to forge new strategic diplomatic partnerships in order to reach general consensus on new human rights problems. Nowadays, besides Russia and China, African and Arab countries are the States which clearly differ more frequently from the EU's Member States in voting.[89] The potential of the Resolutions adopted by consensus in the United Nations General Assembly or within the Human Rights Council should

[86] See inter alia: KE Smith, 'The European Union at the Human Rights Council: Speaking with One Voice but Having Little Influence' (2010) 17 *Journal of European Public Policy* 224–41; R Gowan and F Brantner, *The EU and Human Rights at the UN* (European Council of Foreign Relations, 2011); J Ferrer Lloret, 'La acción exterior de la Unión Europea en el Consejo de Derechos Humanos de Naciones Unidas: luces y sombras de la Política Exterior europea' in A Blanc Altemir, *Las relaciones entre las Naciones Unidas y la Unión Europea: seguridad, cooperación y derechos humanos* (Madrid, Tecnos, 2013) 414–35; and finally in the same collective work, see the contribution of S Salinas Acelga, 'La acción de la Unión Europea en la Asamblea General de las Naciones Unidas: un test de su condición de actor global en materia de derechos humanos' at 436–63.

[87] Human Rights Council Resolution 26/9 *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights* [2014] A/HRC/RES/26/L.22/Rev.1. The voting results were the following: *In favour:* Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela (Bolivarian Republic of), Vietnam; *Against:* Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom, United States of America; *Abstaining:* Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, United Arab Emirates.

[88] See United Nations General Assembly Resolution 65/276 *Participation of the European Union in the work of the United Nations* [2011] A/RES/65/276. In that respect, see J Wouters, J Odermatt and T Ramopoulos, 'The Status of the European Union at the United Nations After the General Assembly Resolution of 3 May 2011' (2011) *Global Governance Opinions*, Leuven Centre for Global Governance Studies. As stated in this paper one of the main handicaps the EU shall overcome is that: 'The international community apparently does not conceive the EU as a powerful actor capable of pursuing and achieving its central goals without bending to pressure', p 8.

[89] Sergio Salinas Acelga, 'La acción de la Unión Europea en la Asamblea General de las Naciones Unidas: un test de su condición de actor global en materia de derechos humanos', n 86 above, 449–450.

not be underestimated.[90] Even though to date the EU has not succeeded as an autonomous international actor due mainly to its ties with its own Member States, human rights in the external relations constitute an excellent opportunity (as only a few others, like environment, common trade policy, and monetary policy) where co-existence and complementarity between the Union and its Member States is fundamental. The rising EU prominence due to the increasing external competence it has in this area can only be beneficial and synergic for the Member States, because it is the only way in which their accelerated road to invisibility in human rights matters can be reversed in the global scene.

[90] They constitute a reflection of the attitude of the States,which can provide certain evidence of the existence of *opinio iuris*, essential for the establishment of custom. In further detail, Y Dinstein, 'The Interaction between Customary International Law and Treaties' n 56 above, 243, 303–12.