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The human rights dimension of the European External Policy: implications in the Neighbourhood

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List of Abbreviations:

AA: Association Agreement

CFSP: Common Foreign and Security Policy

CJEU: Court of Justice of the European Union

EaP: Eastern Partnership

EC: European Community

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

EEAS: European External Action Service

EHRP: External Human Rights Policy

ENP: European Neighbourhood Policy

EPC: European Political Cooperation

EU: European Union

EUGS: European Union Global Strategy

HR: High Representative

HRC: Human Rights Clause

MENA: Middle East and North Africa

MS: Member State

TEC: Treaty on the European Community

TEU: Treaty on the European Union

TFEU: Treaty on the Functioning of the European Union

ABSTRACT

Se nel mondo di oggi siamo ormai abituati ad associare il concetto di rispetto e promozione dei diritti umani all'Unione Europea ed alla sua azione normativa, questo stesso concetto incontra ancora diversi ostacoli nella sua effettiva implementazione all'interno della vasta politica estera europea.

Lo scopo di questa tesi è proprio di affrontare il tema di come l'Unione Europea si occupa di tenere saldi i suoi principi di universalità dei diritti umani nella pratica effettiva della sua azione esterna.

Costruiremo il nostro discorso partendo dal concetto stesso di diritti umani e dalla loro evoluzione all'interno delle dinamiche legali e giudiziarie europee, fino ad arrivare a costituire parte integrante dell'azione esterna. All'inizio del processo di integrazione europeo i diritti umani non erano contemplati dai Trattati, perché confinati alla competenza di altre istituzioni ad essi esclusivamente adibite, come la Corte Europea dei Diritti Umani. Tuttavia, nel corso del processo di integrazione politica e culturale europea, provvedimenti riguardanti la protezione e promozione dei diritti umani hanno progressivamente fatto il loro ingresso nell'ordinamento giuridico europeo. All'indomani del Trattato di Lisbona, essi hanno guadagnato il loro posto non solo come principi e valori fondanti, ma come veri e propri provvedimenti di diritto primario, a loro volta in grado di stabilire diritti e doveri.

Ian Manners descrisse, nei primi anni 2000, l'Unione Europea come il vero "normative power" della nostra era. Essendo essa un attore internazionale senza precedenti, dalla sua essenza stessa scaturisce una competenza normativa in grado di determinare nuove linee di condotta nel panorama delle relazioni internazionali. Questa concezione è indispensabile per affrontare il tema principale di questo elaborato, ossia la Politica Esterna per i Diritti Umani. Sebbene uno specifico provvedimento in questo senso non sia ancora presente nell'ordinamento Europeo, gli svariati articoli e disposizioni da Trattato riguardanti il rispetto e la promozione dei i diritti umani costituiscono un filo rosso che permea ogni disposizione europea sull'Azione Esterna. Applicando a ciò la cornice di "normative power", possiamo osservare come la Politica Esterna per i Diritti Umani diventi uno strumento normativo che permette all'Unione Europea di produrre norme di diritto esterne al suo stesso

ordinamento, che vanno ad influire nella vita di relazione internazionale e che determinano la personalità stessa dell'Unione in relazione ad altri attori internazionali.

Seguendo questo ragionamento, la personalità internazionale dell'Unione viene definita nel nostro elaborato come strettamente legata, se non addirittura basata, sui valori fondanti che ne hanno determinato in primo luogo l'esistenza, ossia sul rispetto per la democrazia, le libertà individuali ed i diritti umani. Questi ultimi, come vedremo, si sono fatti strada nell'ordinamento europeo fino ad essere considerati, nel post-Lisbona, prerogative indispensabili per la legittimità stessa dell'Unione di agire come entità propria nello scenario internazionale.

Risulta necessario dedicare ampio spazio di questo lavoro alla giurisprudenza della Corte di Giustizia dell'Unione Europea e della Corte Europea dei Diritti Umani, per denotare quanto effettivamente i diritti umani siano tenuti in considerazione dalle due corti Europee al di là dei confini fisici dell'Unione. Infatti, come vedremo, l'Azione Esterna dell'Unione Europea è esclusa dall'azione regolatrice della Corte di Giustizia, causando un vuoto giurisdizionale che è oggetto di critiche per quanto riguarda la responsabilità giuridica delle istituzioni europee e degli stati membri per i loro atti di politica estera. La Corte Europea dei Diritti Umani si è invece pronunciata in svariate occasioni in merito a violazioni dei diritti umani da parte di stati membri avvenute in territori terzi. La capacità della Corte di dirimere sulla responsabilità extraterritoriale delle parti contraenti, applicando un'interpretazione vasta al concetto di giurisdizione esplicitato all'Art.1 CEDU, potrebbe rivelarsi una valida soluzione alle lacune giuridiche della Corte di Giustizia dell'Unione Europea. È per questo motivo che, all'Art.6 TUE, si determina che l'UE debba accedere, come sua propria entità giuridica, alla CEDU, divenendone una parte contraente e di conseguenza soggetta a revisione di ogni suo atto, compresi quelli sui quali la Corte di Giustizia non ha voce in giudizio, ossia l'Azione Esterna.

Dall'analisi della giurisprudenza europea trarremo la conclusione che la Politica Esterna per i Diritti Umani, seppur fondata su nobili premesse e promettendo encomiabili risultati, ha principalmente lo scopo di giustificare e legittimare la personalità internazionale dell'Unione Europea, e sul lato pratico è caratterizzata da innumerevoli contraddizioni e inconsistenze. Indubbiamente, la sfera in cui queste inconsistenze si manifestano in modo più preponderate è la Politica Europea di Vicinato. Procederemo

dunque ad analizzare la nascita e sviluppo di questa politica regionale, basata sui successi della politica di allargamento, che trae la sua ragion d'essere proprio dal concetto di esportazione dell'*acquis communautaire*, lo stesso concetto alla base della Politica Esterna dei Diritti Umani. La PEV è dunque strettamente collegata a quest'ultima, ed in essa sono riscontrabili le sue principali difficoltà di applicazione pratica.

Il Vicinato, contestata regione artificialmente riunita sotto un solo nome, raccoglie in sé i temi più caldi e le realtà più scottanti del panorama internazionale contemporaneo. Basti pensare alla crisi migratoria che interessa i Paesi del Vicinato Meridionale, oppure la crisi post-2014 con la Russia e le sue ripercussioni nel Vicinato Orientale. Verrà quindi sostenuto in questa sede che è proprio in questa regione che l'Unione Europea potrebbe affermarsi come un efficace e influente attore politico internazionale, ponendo l'accento sulla sua linea di politica estera che necessariamente poggia sul rispetto e la promozione dei diritti umani. Questo processo è già iniziato grazie all'utilizzo sempre più ampio delle clausole di condizionalità all'interno degli accordi di cooperazione e associazione con i Paesi del Vicinato, che fanno riferimento sempre più spesso a quadri internazionali di protezione dei diritti umani, come vedremo analizzando più approfonditamente gli Association Agreements con Ucraina, Moldavia e Georgia.

Tuttavia, molti ostacoli di natura endogena intralciano un'applicazione coerente della Politica Esterna per i Diritti Umani all'interno della PEV ed in questa specifica regione. Ci concentreremo dunque sui due principali livelli di inefficienze a livello europeo: orizzontale e verticale. Prima di tutto, è interessante evidenziare come una frammentata divisione di competenze a livello interistituzionale europeo si traduce in una inconsistente produzione di iniziative e policy making riguardo il Vicinato. Inoltre, la mancanza di una sistematica cornice per l'applicazione della Politica Esterna per i Diritti Umani e che concretizzi gli obiettivi descritti all'Art.21 TUE causa ritardi e confusione nell'applicazione di questi stessi obiettivi. In secondo luogo, a livello verticale si assiste ad azioni disaggregate, spesso contro produttive e contrarie agli obiettivi della Politica Esterna per i Diritti Umani da parte dei Paesi Membri, i quali sempre più spesso e specialmente nei confronti dei Paesi del Vicinato tendono a dare

priorità alla propria linea di politica estera nazionale indipendentemente dall'approccio comune a livello europeo.

Questi mutevoli confini nella Politica Europea di Vicinato pongono all'UE il difficile compito di dover combinare le norme nazionali, europee e internazionali sui diritti umani con obiettivi politici spesso contrastanti. Tale conflitto tra valori ed interessi rappresenta una seria sfida per la comunità giuridica europea: l'Art.21 TUE obbliga infatti l'Unione a promuovere lo Stato di diritto e la validità universale dei diritti umani nella sua azione esterna. L'UE ha una sua personalità giuridica internazionale ed è vincolata a questi obiettivi anche dalla sua Carta dei Diritti Fondamentali. Al contrario, vi sono forti incentivi politici ad aggirare i requisiti legali europei tramite accordi bilaterali tra Paesi Membri e Paesi del Vicinato o tramite accordi non vincolanti sponsorizzati dall'Unione stessa. Voci contrastanti all'interno delle istituzioni europee ed idiosincrasie nazionali che prepongono interessi nazionali ai valori comuni generano necessariamente politiche incoerenti nei confronti del Vicinato, dove è più necessario per l'UE presentarsi con una voce unita e coerente in modo da smentire finalmente il suo epiteto di "political dwarf".

Senza alcun dubbio, la PEV deve dimostrare la sua efficienza e rilevanza non solo alla comunità internazionale, ma ai Paesi Membri, gli stessi che hanno preso parte alla sua creazione. Per quanto riguarda la Politica Esterna per i Diritti Umani, le sue competenze e provvedimenti richiedono un potenziamento, se non una vera e propria ristrutturazione radicale.

INTRODUCTION

The purpose of this work is to outline and provide a critical analysis to the concept of a European External Human Rights Policy (EHRP) and its implications in the European Neighbourhood. We will argue that although the EHRP does not entail a specific treaty provision, it runs through European foreign policy provisions as a silver thread. As a consequence, European foreign policy is based and finds its legitimacy on the founding values on which the Union itself was built, and specifically on human rights. In order to support this concept, the jurisprudence of the two European Courts will be taken into account, and the ECtHR and the CJEU's most referential cases will be taken as useful examples of the relevance that human rights have played and play in the European legal order, even outside of the physical borders of the Union.

As the majority of these instances refer to events occurring in Neighbourhood countries, a large space of this thesis will be dedicated to investigating the reasons behind the creation of the ENP, its legal base, its functioning and policymaking. We will try to figure out the role that human rights play in the structuring of this policy and to what level they are included in the ENP's design. In this respect, we will consider conditionality as one of the most effective tools to implement, protect and promote European human rights in Neighbourhood countries. We will point to the recent AAs with Eastern Neighbourhood countries in order to evaluate the evolution of HRCs and the extent to which the EU values the EHRP with respect to more compelling economic interests or political pressure.

Finally, we will proceed to highlight the ENP most evident contradictions with respect to EHRP precepts. These observations will help us figure out why this extremely valuable policy has not yet given the expected results. In fact, the Neighbourhood is in a more chaotic condition than it was when the ENP was first launched, in 2004. How could the ENP, based on the same values at the heart of the EHRP ex. Art.8 TEU, having at its disposal powerful leverage instruments such as the HRCs, not pay back in terms of expected results?

The research question we will try to provide an answer to is whether the Union is equipped with the necessary means to put in place an effective EHRP in the European Neighbourhood or if these notions lay on idealistic foundations which do not find a consistent application in practice.

In order to provide a comprehensive answer to the research question indicated above, the work will be divided into four chapters, which will follow the concept of a European EHRP in different fields of the European system. We will provide a complete overview of the subject matter before analyzing European actions in practice and conclude that issues in coherence and consistency continue to damage the successful realization of the ENP, examined through the scope of the EHRP.

In the first Chapter, the European External Human Rights Policy of the EU will be analyzed, and its birth and development outlined. It is important to remind that the EU has been a leading actor in the promotion of human rights since the end of the Cold War. The way the EU pursues its human rights objectives in the wider world, in particular, is unique. In fact, the EU's approach is based on legal text and a solid preference for attraction over coercion. We will argue that the EU presents itself on the international scene as a normative power, relying on soft power instruments and rejecting traditional hard power measures. In other words, the EU has been able to define its identity and role within the new world order through human rights treaty provisions, presenting itself as a tireless defender of universal rights and individual liberties. In this context, we will analyze relevant provisions in the context of the EHRP prior to and following the Lisbon Treaty, and focus on the post-Lisbon expansion of the human rights spectrum within the broader External Action of the EU.

Outside EU borders, the TEU as modified by the Treaty of Lisbon stipulates at Art.21 that the Union's action on the international scene shall be guided by the founding values and principles laid out at Art. 2 and 3(5) TEU. The main claim at the heart of Chapter 1 will be to demonstrate that the human rights feature common to every European Treaty has grown from being a value to an objective, from an internal objective to an external objective and from an accession requirement to a foreign policy requirement. In fact, the European External Human Rights Policy is not specifically provided for in the Treaties, but its legal *raison d'être* is derived from the very own European *acquis communautaire*, values and principles at the heart of European foreign policy and the pertinent provisions enshrined at Art.21 TEU. Although the premises and promises of the EHRP are exceptional for a global economic power, this thesis will be constellated by critiques to the European approach toward coherence and consistency, that we will begin to present in the last section of Chapter 1. In fact, issues in double standards and internal/external

inconsistencies continue to affect the legitimacy, credibility and effectiveness of European EHRP.

The main issue in this regard will be presented in the second Chapter. Through an in-depth analysis of European judiciary engagement with human rights issues, by discussing the relevant jurisprudence of the European Court of Human Rights (ECtHR) and that of its Luxembourg sister organization, the Court of Justice of the European Union (CJEU), we will present the justiciability gap affecting the European legal order for foreign policy actions. In this context, Art.24 TEU and 275 TFEU, delineating the restricted field of action of the CJEU, will be taken into consideration. In this respect, we will argue that in the field of foreign policy, the CJEU is far from being self-sufficient: the legal ambiguity of European foreign policy implies several shortcomings in terms of European accountability. Because of this justiciability gap, human rights violations are still perpetuated in third countries on account of European Institutions and Member States, which do not undergo judicial review for their foreign policy acts at European level. We will infer that, in order to fill this gap in justiciability, the European Union shall accede to the European Convention on Human Rights (ECHR), as required by the Lisbon Treaty ex Art.6 TEU.

In the third Chapter, we will approach the subject matter of this thesis by introducing the legal basis for the ENP and we will focus on Art.8 TEU as a back reference to the European founding values and principles and the intentions of the EU to export them in the wider world. This will characterize the ENP as a frontline policy in the context of the European External Human Rights Policy, presented in light of its unambiguous human rights provisions. Moreover, in the context of bilateral relationships between the EU and Neighbourhood countries, the instrument of human rights conditionality and in particular human rights clauses (HRCs) will be considered in their functions of soft power measures. Their effectiveness in implementing the European human rights objective will be proven, and critiques to the implementation of negative conditionality through HRCs, affecting the normative image of the EU, will be dismissed.

In the fourth chapter, we will analyze the current challenges facing European normative action in those countries to the east and south of the Union that are known in European policymaking as the Neighbourhood. Admittedly, exogenous factors

participate in damaging the potential for European EHRP effectiveness in the Neighbourhood, but for the sake of our argument we will mainly dedicate our discourse to endogenous issues within the European multi-level and inter-institutional system. In this regard, we will focus on the relevant shortcomings and inconsistencies at constitutional, horizontal and vertical level, that hamper the successful realization of European External Human Rights Policy. On second hand, we will consider the European Neighbourhood Policy as the environment where the EU can best show its human rights-oriented attitude in foreign policy, for two main reasons. First, the ENP is strongly intertwined with and derives its normative essence from EHRP provisions and specifically the values and principles at the heart of the enlargement process, strictly related to human rights requirements. Second, the Neighbourhood is one of the most tumultuous regions in the current global context and happens to be extremely close to European borders. European influence in the area cannot go unnoticed: the ENP victories and failures have profound repercussions on the international image of the EU and contribute to highlight European strengths and especially weaknesses.

The EU should not lose the normative design of its foreign policy, that differentiates it from any other international actor, as being reliant on norms and values rather than investments and coercion. However, the challenges facing the Neighbourhood need all the best of European capabilities. The internal social unrest, the migration crisis, the rise of populist movement, put into question the very idea of European integration. The foundation of the legitimacy of the supranational organization to act as a foreign policy actor lays on the exportation of European values abroad. If Europe itself is not united, its normative power loses its appeal. The loss of influence in the Neighbourhood, that results in other international actors overpowering the Union's soft-power approach in foreign policy, leads many scholars to question its very legitimacy as an international actor, and pushes it back down the road of being a simple "political dwarf".

CHAPTER 1

EUROPEAN EXTERNAL HUMAN RIGHTS POLICY: LEGAL BASIS

Introduction

Before discussing the human rights issues and relevant case law distinguishing the External Action of the European in what is today the Neighbourhood, it is necessary to consider the steps in European integration that have led the way for the creation of a European External Human Rights Policy. In this first chapter, the issue of the international role of the European Union as an actor in foreign policy will be discussed, starting from the very notion of Common Foreign Policy and its development, moving to the place human rights have grown to reach in the field of European foreign policy, to conclude that not only has the European Union become an influent international actor, but its foreign policy influences the concept itself of foreign policy worldwide. Our analysis will focus on the reasons why this happened and is happening, starting from the paradigm of the EU as a normative power.

There has been much debate on the role of the EU as an actor in international politics. Some recent opinions have focused on the increasing irrelevance of European action in the global arena[1], due to issues related to its complex functioning and the difficulties of making 28 (now 27)[2] countries agree on necessary stances regarding global events, resulting in late and ineffective acts. Some would say it's the "necessary evil" of being a Union of States that, no matter how integrated on the economic side, is still composed of sovereign states; the Treaty of Lisbon made sure to keep it that way, granting Member States the ability to conduct their own agenda in foreign policy at the same time as they conduct the Common Foreign Policy. This is why many criticize the reluctance of action from the EU, often incarcerated by moral standards and torn apart by internal bickering[3].

[1] Kagan,R. (2008). Sliding Towards Irrelevance. The New York Times. Accessed on 12/12/2020. Available at: https://www.nytimes.com/2008/06/26/opinion/26iht-edkagan.1.14013210.html

[2] At the time of writing, the United Kingdom has left the European Union following the Withdrawal Agreement signed in December 2020.

[3] Kagan,R. (2008). Supra note 1.

On the other hand, some scholars refer to the Union as one of the main empires of the 21st century[4], owing to the influence it is able to exert in the realm of international relations.

The profound difference in the understanding of the international role of the European Union is three-fold. First, the European Union represents the biggest and most integrated single market of the world, a fact that provides it with an enormous power in international negotiations. Second, its Common Foreign and Security Policy, although improved and in constant evolution during the years, is still a half-functioning machine that needs refinement. Third, since its foundation, the EU has evolved into a hybrid of supranational and international forms of governance which transcends Westphalian norms[5]. Policy and identity are, in the case of the EU, strictly bound to one another. One shapes the other continuously, and debate over which one is dominant or coherent to the other is simply pointless.

One feature, however, has always accompanied the EU in its structural and legislative development and integration process, and it is the reliance on its founding values: democracy, rule of law and respect for human rights. The latter has found its place in European foreign policy, after some turbulences in previous Treaties, thanks to the Lisbon Treaty, which specifies not only human rights as a fundamental requirement to take into consideration when adopting external acts and policies, but allows the EU to act in the field of foreign policy solely to achieve human rights objectives.

In this Chapter we will demonstrate that the human rights feature common to every European Treaty has grown from being a value to an objective, from an internal objective to an external objective and from an accession requirement to finally a foreign policy requirement.

1.1 European approaches to human rights considerations in foreign policy

States have always been interested in promoting only their own interests and economic gains in the international scene, through whatever means and methods. However,

[4] Khanna, P. (2008). The second world: how emerging powers are redefining global competition in the Twenty-first century. Penguin Books Ltd. London, p.2.
[5] King, T. (1999). Human Rights in European Foreign Policy: Success or Failure for Post- modern Diplomacy?, EJIL, vol.10, no.2, p.313.

especially in the aftermath of the Cold War, foreign policy has started to be paired with values and ethics. The European Community led the way for this to happen.

Scholars such as François Duchene[6], since the 70s, began to investigate the contribution to world politics by a super-national organization whose main goal was maintaining peace and prosperity in an entire continent. It was the first time States somehow at odds with one another put aside differences and individualism to openly work together, not with the prospect of conquering land or winning wars, but of creating a stronger, interconnected unit where it was made crystal clear that working together is always better than working against each other. In other words, this "armless revolution" of the concept of statehood rests upon the promises that were made when the Treaty of Rome was signed.

While the previous modern establishment relied on the notion of sovereign equality and non-interference in domestic affairs, the Treaty of Rome established the European Community as a post-modern state system[7] in a mainly modern scenario for what concerns statehood and states involvement in relation with each other. Member States agreed to give up part of their sovereignty to a super-national organization under the motto of cooperation, peace and interdependence. The Treaty of Rome gave way to a new era of world politics, where traditional military power had given way to civilian power[8] in order to achieve consensus and exert influence in the realm of international relations.

The European Union, as a super-national system of conferred competences, has been searching for a reason for its legitimacy as a political actor in the international arena, and seems to have found it in the values and principles it embeds and projects abroad. Since its foundation, in fact, the European Union has relied its grounds on the protection of human rights and individual liberties. Its institutions are directed to guaranteeing democracy, the rule of law, human rights and the respect and protection of minorities.

In 1969, the European Court of Justice recognized that fundamental human rights could be classified as "general principles of Community law and [therefore were to be] protected by the Court"[9]. The founding principles for European legitimacy were

[6] Duchêne, F. (1973). The European Community and the Uncertainties of Interdependence. In: Kohnstamm M., Hager W. (eds). A Nation Writ Large? Palgrave Macmillan. London, p.2.
[7] King, T. (1999). Supra note 5, p. 314.
[8] Duchêne, F. (1973). Supra note 6, p.17
[9] Case 26/69. Erich Stauder v City of Ulm, Sozialamt, ECLI:EU:C:1969:57, §.419.

subsequently officialized in 1973, with the Copenhagen Declaration on the European Identity in which human rights played a major role. Despite the foreign policy goals of Member States were altogether different and focused on sometimes very varied issues, the Copenhagen Declaration managed to set values that each Member State could share internally and promote abroad, and which would later become the basis for the Union's Common Foreign and Security Policy. With several subsequent reports and declarations, during the 90's the European Political Cooperation[10] reiterated the principles that were supposed to guide the Community's foreign policy and the image it was going to project in the realm of international relation[11]: essentially, a protector of fundamental rights, individual liberties, a champion of international law and defender of all the peoples' rights, not only of its citizens.

In 1986 Vincent seemed to support this new European view of foreign policy by opposing to the widely accepted school of thought of realism the idea of an "inescapable tension" that had grown to contrast traditional concepts of foreign policy, and that discovered human right as a moral traction in international relations[12]. The inclusion of references to principles such as democracy, human rights and rule of law during the 1990s has contributed to an evolving EU foreign policy consensus over important international principles, such as human security, sustainable peace and effective multilateralism[13]. More than anything, the Union repeatedly stressed the importance of achieving consensus rather than imposing coercion in international relations, drifting away from the traditional understanding of foreign policy and specifically the use of hard power[14].

Although the Copenhagen Declaration already stressed the importance that human rights[15] were going to play in foreign policy, it was not until 1986 that the Community approved a Declaration on Human Rights. Notwithstanding its naivety and dearth of clear

[10] The European Political Cooperation (EPC) is the forerunner of today's Common Foreign and Security Policy (CFSP) of the EU. It covers the period 1970 to 1993 and its aim was to coordinate MS actions in foreign policy.
[11] Gerrits, A. (2009). Normative power Europe in a changing world: a discussion. Netherlands Institute of International Relations Clingendael. The Hague, p.19.
[12] Vincent, R.J. (1986). Human Rights and International Relations. The American Journal of Comparative Law. Vol. 36, No. 4., p. 798.
[13] Ibid.
[14] Hyde-Price, A. (2006). 'Normative' power Europe: a realist critique. Journal of European Public Policy. Vol.3. Issue 2: What kind of power? pp. 217-234.
[15] For the purpose of this paper, the term *human rights* is to be considered an inclusive term, embracing the human rights and fundamental freedom provisions enshrined in the Charter of Fundamental Rights of the European Union.

steps in order to achieve the human rights objectives it posed, the Declaration can be nonetheless considered a first step in order to initiate promotion, supervision and monitoring of human rights abroad. Since then, the European Political Cooperation created new mechanisms of monitoring human rights abroad and introduced official ways for the Community to respond to human rights abuses in third countries, such as public statements, public *démarches* and confidential *démarches*[16]. The increase in the use of these instruments grew steadily in the following decades. From the Copenhagen Declaration to the Lisbon Treaty, Member States adopted several means and methods in order to endorse abroad the values and principles they vowed to protect. For example, the European Initiative for Democracy and Human Rights (EIDHR), originally conceived by the European Parliament, was created in 1994 to promote the rule of law and human rights worldwide[17].

The "ethical dimension" of European foreign policy aims at the creation of a European identity in the scope of projecting it into the wider world, sometimes opposing pre-existing rationales of foreign policy by traditional states[18]. The ethics enshrined in European foreign policy is part of a complex ideological system that provides the super-national organization with a straightforward and accessible ratio for its citizens, creating consensus and identification in mechanisms which are not traditional, as for the protection and promotion of human rights. The creation of such an abstract goal for its foreign policy shed light on the underlying contradictions and hypocrisy of Member States: the internal adherence to the values and principle that the super-national organization aimed to promoting abroad were, and are, not always respected withing the borders of Europe[19]. Moreover, developing countries have always an eye on their sovereignty and independence in domestic affairs, and the public proposition by the European Union to advocate, assist and monitor human rights abroad has often created cause for concern and reluctance to cooperate, favoring other foreign policy actors in the international scene who proudly support the line of non-interference, such as China. The European States

[16] T. King (1999), Supra note 5, p. 337.
[17] Babayan, N. and Viviani, A. (2013). Shocking adjustments? EU human rights and democracy promotion. Transworld. The Transatlantic relationship and future global governance. ISSN 2281-5252. Working paper 18, p.7.
[18] Khaliq, U. (2008). Ethical dimension of the Foreign Policy of the European Union. A legal appraisal. Cambridge University Press. Cambridge, p.6.
[19] King, T. (1999). Supra note 5, p.315.

place the common values and principles shared between one another at the heart of their relations with third countries. However, for developing countries, the concept itself of sovereignty acts as a guarantee of their independence won from, keeping in mind their colonized past, Europeans themselves. That is why the foreign policy of the European Union is often accused of neo-imperialism[20]. The values and principles shared and put forward by European States are, in fact, European. The modern conception of non-interference in domestic affairs and sovereign equality would eventually clash with the claim that European concepts of human rights and fundamental freedoms are, according to Europeans, universal in fact.

The values and principles included in the Copenhagen Declaration can be clustered in the umbrella term *acquis communautaire*, a combination of principles, legal acts and court decisions that together constitute the body of European law and its political objectives[21]. At the time of the Treaties of Rome in 1957, Europe was a rather small reality[22]. The small size of the European Economic Community allowed its six Member States to commit to major projects easily and successfully, both domestically, as for the Common Agricultural Policy, and internationally, as for the participation to the General Agreement on Trade and Tariff, making it possible to claim their place on the world stage as an actual united political power. However, the enlargement that saw Greece, Spain and Portugal entering the Community already showed how difficult accession negotiations could be for some European countries in poor economic conditions and low development[23]. This enlargement is important for our analysis because of the requirements for entering the Community. States were required to comply with all legal acts, rules, and especially principles and objectives contained in the treaties concluded by the Community until the time of their accession. This heritage of rights and duties is precisely the *acquis communautaire* and represents the *conditio sine qua non* for becoming a Member State of what is now the European Union[24]. Member States cannot require amendments to the *acquis communautaire*. The acceptance and fulfilment of this

[20] Ivi, p.314.
[21] Pech, L. and Grogan, J. (2020). EU External Human Rights Policy. In Wessel, R. and Larik, J. (eds). "EU External Relations Law. Text, cases and materials. Hart Publishing. London., p.329.
[22] Cagiano de Azevedo, R., Paparusso, A. and Vaccaro, M. (2013). Sovereignty and acquis communautaire: the new borders of the European Union. L'Europe en Formation. 2013/2 n°368, p.189.
[23] Ivi, p.190.
[24] Ivi, p. 192.

set of rules and principles has become more and more complex over the years, due to an increasingly substantial and extensive Community and later Union production that has been evolving and maturing over time, consisting of legislation and values which inspire the European regulatory action. For this reason, and to facilitate the adjustment of all the new Member States with the *acquis communautaire*, the enlargements have often been followed or anticipated by in-depth analysis of the Community and legislative acts to ease the process of integration[25]. In 2000, for the 50th anniversary of the Schuman Declaration, the EU published "50 years of Solidarity, Prosperity and Peace", where it took credit for its work in domesticating relations between Member States[26] and progressively integrated their legal and socio-economic conditions, ideally placing them on the same level in terms of values, principles and legal systems.

The *acquis communautaire* is not only the burden of obligations and duties that weighs on states applying for EU membership[27], it also represents the chance to benefit from the values the EU sponsors: democracy, social stability and economic development. This became clear after the fall of the Iron Curtain: the central and east-European countries applying for accession to the Union had socio-economic conditions very different from their western colleagues and much more difficult to include in the European *acquis*; moreover, their wish to take part to a Western international organization had not only economic, but more importantly political meaning. This induced European institutions to increase the level of accession requirements and in doing so expanded the norms, principles and values that identified the Union as such. In particular, stable institutions guaranteeing democracy, rule of law and respect for human rights. Only those who respect "human dignity, freedom, democracy, equality, the rule of law, human rights, including the rights of persons belonging to minorities" and only those whose societies are based on "pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men"[28] may take part to the European Union.

The borders of Europe are not only geographical, but political and most of all moral: the boundaries of the respect of democracy, rule of law and human rights. The debated

[25] For example, with the first enlargement that saw the accession of Greece, Spain and Portugal, the EU promulgated the Single European Act.
[26] European Commission. (2000). A new Idea for Europe. The Schuman Declaration 1950-2000, p.5. Available at: http://aei.pitt.edu/13909/1/EURDOC_newidea.PDF
[27] Cagiano de Azevedo, R., Paparusso, A. and Vaccaro, M. (2013). Supra note 22, p. 190.
[28] Art.2, Treaty on the European Union (TEU).

identity of the European Union is not something innate and intrinsic to its existence, as in the case of usual modern states. It is a constantly evolving concept, like its very own *acquis*, that allows Europe to mature and develop according to the necessities of the times it faces. The *acquis communautaire* rather than making Europe an unachievable target and render it an exclusive reality finds itself to be a boost for inclusiveness.

The international role of the European Union is strongly influenced by the values and principles it rests upon; in this sense the *acquis* plays a major role in shaping its global action in terms of foreign policy. In fact, the European constitutive treaties express the will to spread and promote human rights and fundamental freedoms that are common to their heritage of rights in third countries through foreign policy actions[29].

1.1.1 The European Union as a normative power for what concerns human rights

The Treaty of the EU as amended by the Treaty of Lisbon asserts that European External Action shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the world: the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, democracy, the rule of law, the principles of equality and respect for the principles of the UN Charter and international law. The multi-faceted nature of human rights and democracy requires initiatives in a broad set of policies including development, trade, security, climate change, employment, education, digital, and other sectoral policies with an external dimension[30]. Action at EU level is justified as setting priorities on human rights and democracy allows to mobilize EU policies and instrument as well as the action of EU Member States in a more focused, coherent and effective manner. The EU is uniquely placed to take the lead to promote and protect human rights and support democracy in line with its founding principles.

[29] White, B. (2001). Understanding European Foreign Policy. Palgrave. New York. p.7.
[30] Joint communication to the European parliament and the council. 25 march 2020. EU Action Plan on Human Rights and Democracy 2020-2024. JOIN(2020) 5 final. Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12122-EU-Action-Plan-on-Human-Rights-and-Democracy-2020-2024

On the one hand, the role of the European Union in international relations was depicted, after the Gulf War, as an "economic giant, political dwarf and military worm"[31], a narrative that became recurring when describing European moves in the international arena; on the other hand, former High Representative Javier Solana stated that "the Union has the responsibility to work for the common global good"[32]. This declaration gives us an idea of the role that Europe should play in world politics according to its representatives and leaders but raises several questions on whether this would be feasible for a "political dwarf".

As mentioned above, European asset and characteristics are unique and incomparable to other political superpowers and make it hard to compare European achievements in foreign policy to the United States' or China's. The more the Member States, the harder it is to reconcile everyone's political views, and oftentimes the bloc of European states splinters into tribes and factions when required to take stances about global events[33]. Moreover, shortcomings in interinstitutional communication and decision-making process make European external actions result in a late and ineffective response by the Union as a whole. However, The European Union has at its disposal the largest, most integrated single market of the planet. This is indeed the most powerful and persuasive instrument the Union can dispose of, using its economic power for political gains in the name of democracy, rule of law and human rights.

In fact, the Union is a party to international agreements and enjoys now enhanced participation rights at the UN general assembly, where it has permanent observer status. Throughout the 1990s EU Member States have increasingly coordinated their positions and the implementation of their actions within international organizations and conferences, such as the Vienna Conference on human rights in June 1993; the Cairo Conference on population in September 1994; the Copenhagen Conference on social development in March 1995; and the Beijing Conference on women in September 1995.

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[31] Whitney, R. (25 January 1991). War in the gulf: Europe; Gulf Fighting Shatters Europeans' Fragile Unity. The New York Times. Accessed on 21/10/2021. Available at: https://www.nytimes.com/1991/01/25/world/war-in-the-gulf-europe-gulf-fighting-shatters-europeans-fragile-unity.html

[32] Solana, J. (20 May 2002). A partnership with many missions. Speech by the HR for the CFSP. Washington DC. Available at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/discours/70588.pdf

[33] Gropas, R. (2002). Is a Human Rights Foreign Policy Possible? The case of the European Union. OP99.02, p.11.

Furthermore, the communications and declarations of intent published in European history shape and give meaning to the international identity of the European Union, that lies on a constructive normative basis which reconciles the idea of the Union being able to "act in a normative way in world politics"[34].

The European Union has designed its External Action objectives on the post-war values of peace and liberty it was created with. For these reasons, European foreign policy has often been described as an "ethical foreign policy"[35]: democracy, rule of law, human rights are described as major objectives of foreign policy for the Union, derived from the lessons learnt from internal politics and policies which had been implemented during the long enlargement process. The same values Europe endorsed and required from countries wishing to take part to the Union had to find their place in its external action, as for the creation in 2004 of the first European Neighbourhood Policy, later revised. This first attempt to externalize the European *acquis* failed for a number of reasons, but it is indeed a symptom of the extent to how ethical considerations are now unequivocally an established part of the equation in the Union's dealings with third states.

After a long road in accession negotiations with Eastern Europe post-communist states, in 2014 Europe could finally say to have turned around disruptive social conditions and have created more or less liberal democracy in those countries. And it didn't do so by retaliation, war or menace. It acted only by propagation of its norms, by diffusion of its *acquis*[36]. In this case, Europe acted in a normative way within its borders. The question then is whether the Union can act in a normative way outside its borders as well.

The concept of normative power associated to Europe was introduced by Ian Manners in 2002. It describes the European Union as an actor capable of diffusing and transferring its normative basis in the realm of international relations. According to Manners, the normative power diffused by the Union is intrinsic to its existence as an international actor, based on the fact that it is different from any other modern political entity. This fact predisposes the Union to act normatively in the realm of international relations. In

[34] Manners, I. (2002). Normative Power Europe: a contradiction in terms? Journal of Common Market Studies, vol.40, No.2, p. 252.
[35] Khaliq, U. (2008). Supra note 18, p.1.
[36] Cagiano de Azevedo, R., Paparusso, A. and Vaccaro, M. (2013). Supra note 22, p. 193.

Manners' words, "the most important factor shaping the international role of the EU is not what it does or what it says, but what it is"[37].

Manners gives five founding norms that have contributed to shape its normative basis: peace, liberty, democracy, rule of law, respect for human rights. All of these norms can be found in the Copenhagen Declaration, in the founding values and principles of the constitutive treaties of the Community first and Union later, and of course in the *acquis communautaire*. The most important dimension with regard to developing these norms are the instruments through which Europe contributes to their recognition and development and leads to their diffusion in international relations. These factors are contagion, informational diffusion, procedural diffusion, transference, overt diffusion and cultural filter[38]. For the sake of our analysis, it can be inferred that the EU seeks to promote its international role and preserve its interests by promoting and exporting the norms and principles deeply rooted in its constitution and practice.

Joseph Nye took forward the concept of normative power introduced by Manners and in 2004 affirmed that the European Union is capable of diffusing its norms through attraction rather than coercion or payment, speaking of soft power opposed to hard power in the case of the Union's action in foreign policy[39]. Drawing from these two scholars, we can affirm that the European Union is a normative power in the sense that it operates a procedural diffusion of its norms through the use of soft power.

What traditional states failed to understand, and as a result criticized in the context of European external action, was the lack of hard power at its disposal[40]. However, as it has been clarified and reiterated by EU institutions and leaders in the following years, the politics of the European Union is always one step ahead in the future. From a long-term perspective, the interests of a state, or in this case, Union of states' can be best protected and promoted through a change in international standards and morals. The promotion of ethical values in third states benefits the citizens of all states. As the former Commissioner for External Relations, Chris Patten noted in a speech, "human rights make moral,

[37] Manners, I. (2002). Supra note 34, p.237.
[38] Manners, I. (2001) Normative Power Europe. The International Role of the EU. Presented at the Conference of the European Union between International and World Society. Wisconsin USA. Available at: http://aei.pitt.edu/7263/1/002188_1.PDF
[39] Nye, J. (2004). Soft power and American foreign policy. Political science quarterly. Vol.119. No. 2, p. 256.
[40] Vincent, R.J. (1986). Supra note 12, p. 798.

political and economic sense […] But it is also sensible for strategic reasons. Free societies tend not to fight one another or to be bad neighbours […] Countries that treat their citizens decently are the best countries in which to do business"[41]. In other words, foreign policies with a soft power dimension serve the long-term interests of the promoter, and the final goal of the Community has always been to operate a worldwide change in how foreign policy was intended in the first place, making it conditional on the respect of fundamental rights, through the use of its normative power.

1.2 Foreign policy and relevant Treaty provisions prior to the Treaty of Lisbon

"The European Union is well placed to promote democracy and human rights [...] Uniquely amongst international actors, all fifteen Member States of the Union are democracies espousing the same Treaty-based principles in their internal and external policies. This gives the EU substantial political and moral weight."[42]

European Commission (2001)

This extract from a Commission communication in 2001 asserts the normative power of the European Union and its ambition to present itself as an international actor capable of promoting the values of human rights and democracy through the power of diffusion and persuasion, factor that shape its External Action as a normative force. In this sense the normative power of the European Union stems from the concept of "soft power" opposed to "hard power" which is generally intended as the use of military force in international relations[43]. The Union became the first international actor to challenge this view, exercising its soft power through attraction of its values and principles as opposed to coercion into compliance[44].

[41] Patten, C. (1999). Speech by the Rt Hon Chris Patten. Human Rights discussion forum. Speech 99/193. Available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_99_193

[42] Commission of the European Communities. 8 May 2001. Communication from the commission to the council and the European parliament. The European union's role in promoting human rights and democratisation in third countries. Brussels., pp.3-4. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0252:FIN:EN:PDF

[43] Nye, J. (2004). Supra note 39, p.255.

[44] Ibid.

At the time of the Treaty of Rome, in 1957, the main objective for countries taking part to the project of the European Community was to prevent another war, death and destruction in the continent. As a matter of fact, in the early decades of European integration, the expression external relations deliberately avoided the term foreign policy. According to the then-dominant realist school[45] of international relations studies, statal foreign policy was determined by the features of diplomacy, security and defense. International trade, development assistance or environmental protection, the original and fundamental features of European external relations, had no significant impact on international relations, according to the realist theory. For this reason, the Treaty of Rome did not use the term foreign policy, thereby allowing it to evolve with international events and shape it according to a future more progressive understanding of foreign policy.

For four decades, the External Actionof the European Community reflected an initial abstraction and unreadiness to face the international scene on account of the European Political Cooperation, a political instrument that allowed Member States to hold informal talks in order to give a sense of a common approach foreign policy matters. In fact, the process of European integration immediately following the Second World War was primarily concerned with economic reconstruction and co-operation. The founding treaties (Treaty of Paris of 1951, and Treaty of Rome of 1957) made no reference to a common foreign policy, nor to a "human dimension" in their external relations[46]. Gradually, however, the EU Member States recognized that they shared a common values system and that respect for human rights was a fundamental element of the European identity[47]. Nevertheless, there was no legal basis within the EC Founding Treaties upon which to develop an external human rights policy: a common explanation for this is that that the *pères-fondateurs* expected human rights to be a matter for the Council of Europe,

[45] Realism: school of thought that has dominated the study of international relations since the end of the Second World War. Realism can be described as a set of international relations-related theories that focus and stress the role of the State, national interests and military power in world politics.
[46] Pech, L. and Grogan, J. (2020). Supra note 21, p.327.
[47] Bulletin of the European Communities. 14 December 1973, No 12. Luxembourg: Office for official publications of the European Communities. Declaration on European Identity, p. 118-122. Available at: https://ec.europa.eu/dorie/fileDownload.do;jsessionid=1KGyQ1tKtTpNjBQwQh6cwgC2yLn7BJMymvTrDq5s2rD3JYR9RfGQ!243197488?docId=203013&cardId=203013

and that the European project of economic integration would not come close to the subject[48].

The clear weakness of the European Political Cooperation as a political institution directed to coordinating Member States actions in foreign policy, found its *cul de sac* during the Yugoslav wars[49]: the Twelve, divided, had to rely on the intervention of the United Nations and the United States, which played the leading role in the Yugoslav crisis. The European Union regained some measure of cohesion only with the adoption of an Action Plan for the former Yugoslavia in November 1993[50]. The war in the former Yugoslavia was indeed a test for the ill-functioning foreign policy provisions established by the previous constitutive Treaties. Consequently, the failure of European Member States to contain death and destruction within their own borders and before their own eyes led the Community to elaborate the necessity of improving and strengthening their action in foreign policy.

Since the Treaty of Rome, the European Union has grown to become a global actor not only in the economic sphere but also in the political one. For what concerns the Union's investment in the promotion of human rights in its External Action and foreign policy, however, it took almost four decades to see the principles part of European heritage of values and principles recognized and applied to the Union's foreign policy, specifically with the Maastricht Treaty in 1992 and the foundation of the Common Foreign and Security Policy (CFSP) as the second pillar of the structure of the Union[51]. Specifically, at Art.F(2), the Treaty emphasized that the EU would respect fundamental rights as guaranteed by the ECHR. Back then the EU had multiple economic and trade agreements and was just beginning to consolidate itself as a major foreign policy actor, and yet was characterized as "an economic giant, a political dwarf and a military worm" by Mark Eyskens, then Belgium's foreign minister.

The 1992 Maastricht Treaty recognized the EU as an international organization with a dual legal personality, the Union and the Community, and designed a three pillars

[48] De Waele, H. (2017). Legal dynamics of EU external relations. Dissecting a layered global player. Springer Nature. Berlin., p.114.
[49] White, B. (2001). Supra note 28, p. 106.
[50] Gerbet, P. (8 July 2016). CVCE.EU by UNI.LU. The vain attempts of the European Community to mediate in Yugoslavia. Available at: https://www.cvce.eu/content/publication/2003/5/15/cf4477b6-87a5-4efb-982d-fb694beac969/publishable_en.pdf
[51] Art. J(1), TEU. Treaty of Maastricht.

structure for the international organization, the second pillar being the Common Foreign and Security Policy. Finally, the transfer of sovereignty by the Member States to the Community institutions took place, in areas involving economic, social and environmental policies, the Common Foreign and Security Policy and cooperation in the field of justice and home affairs[52]. For the first time, the Twelve agreed to a transfer of state sovereignty to the transnational institutions of Europe. Thanks to the Maastricht Treaty, the European Union laid the foundations for a foreign policy that would give the international organization a unified and coherent voice on international matters and would finally place the EU on the international scene as a political force. The first actions for a coherent and effective foreign policy were laid with the aims of "preserve peace and strengthen international security, protect the security of the EU, promote international cooperation, and to develop and consolidate democracy, the rule of law, and respect for human rights and fundamental freedoms"[53]. As Richardson has argued, after Maastricht, European foreign policy can be labelled as "clearly based on principles and not on *Realpolitik*"[54]. According to the Maastricht Treaty establishing the Treaty on the European Union, under the CFSP the EU and its Member States had a variety of instruments at their disposal to implement the promotion of human rights in third countries. These ranged from unilateral instruments such as declarations, confidential or public *démarches*, to Action Plans, common positions and joint actions, although the use of the latter two remained limited. Furthermore, economic sanctions have been explicitly referred to as instruments of foreign policy in the Maastricht Treaty[55].

Five years later the Amsterdam Treaty confirmed the choices in foreign policy introduced by the Maastricht Treaty but solidified the agenda of the Common Foreign and Security Policy. The Maastricht provision at F(2) was rendered justiciable, that mean that European Court of Justice was allowed to engage in a review of EU rules for compliance with Human Rights standards[56]. Amsterdam improved the mechanisms available to act effectively in foreign policy. First of all, it provided for a more involved

[52] European Parliament. (2020). The Maastricht and Amsterdam Treaty. Fact Sheets on the European Union, p.3, available at: http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.3.pdf
[53] Art. J(1), TEU. Treaty of Maastricht.
[54] Richardson, J. (2002). The European Union in the world: a Community of values. Fordham International Law Journal, vol.6 issue 1, p.15.
[55] Art. 228(a), TEU. Treaty of Maastricht.
[56] De Waele, H. (2017). Supra note 48, p.117.

role of the Council, that would have first-hand in decision-making power regarding foreign policy[57]. Moreover, it introduced the post of the High Representative for the Common Foreign and Security Policy, one of the main actors in the decision-making of foreign policy and an individual representing the united from of European Member States in the international arena[58].

The Treaty of Nice, signed on 29 February 2001 and entered into force on 1 February 2003, was intended to adapt the constitutive treaties of the Community to the latest eastern enlargement. To our analysis, the Treaty of Nice, which established the Treaty on the European Community (TEC), is a turning point for the international organization in its role on the international scene, since it saw recognized and officialized the legal personality of the Community. However, many criticized the three-pillar structure, which maintained two separate legal personalities, and argued that those legal personalities should be merged as to avoid overcomplications; this is now reflected in Art.47 TEU as amended by the Treaty of Lisbon. In fact, the three-pillar structure had the disadvantage of conferring legal personality to the European Community, following the provision in Art.210 TEC, but not to the Union[59].

In the study of international law, legal personality is a relative concept[60]. Only sovereign states possess the entirety of rights and duties according to international law; that is why all entities that seek to see their legal personality recognized do not have identical powers and rights[61]. To make up for this, the TEC stated at Art. 281 that the Community "shall have legal personality". European institutions provided, furthermore, at Art. 310 TEC, that express power would be conferred to the Community to conclude treaties with third countries and organizations, treaties that would be binding on all Member States. Numerous provisions, such as Articles 133 and 181 TEC, in the fields of the common commercial policy and development cooperation respectively, conferred competence to conclude agreements with third states in a specific area. Moreover, Nice amended Art. 24 TEU to make sure that international agreements concluded by the Council under the CFSP are binding not only on Member States but also on the

[57] European Parliament. (2020). Supra note 52, p. 2.
[58] Ibid.
[59] Lang, A. and Mariani, P. (2014). La politica estera dell'Unione Europea: inquadramento giuridico e prassi applicativa. Giappichelli. Torino., p.4.
[60] Khaliq, U. (2008). Supra note 18, p. 20.
[61] Ibid.

institutions of the Community. This fact stresses, it is argued, that the agreements are concluded on behalf of the Community as a distinct entity rather than the Member States acting collectively[62]. The Community came to enjoy legal personality thanks to treaty provisions regarding its External Action in order to allow it to sign international treaties. Arguably, if the Community had legal personality, it had responsibility for its international actions.

Once established the way through which the European Community acquired legal personality, it is interesting to address how this new competence was intended to be employed in world politics and negotiations. Article 177(2) TEC stated clearly that the Common Foreign and Security Policy as a second pillar of the Community "shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms"[63]. Furthermore, Article 177(3) TEC obliged the Community and its Member States to comply with "the commitments and take account of the objectives they have approved in the context of the United Nations and other competent organizations"[64]. At the time of the Treaty of Nice, however, the Community was not able, as a non-state organization, to enter or be a party to international human rights treaty, unless specified, as in the case of the United Nations Convention on the Rights of Persons with Disabilities: this Convention specifically allowed international organizations to be among the contracting parties[65]. Another exception is represented by the European Convention on Human rights, to which the following Treaty of Lisbon imposes to accede[66].

For seventeen years, the Common Foreign and Security Policy was established as the second pillar of the European structure, later amended by the Lisbon Treaty, when the three-pillar-structure was eventually abandoned. The Nice asset had its most evident flaws precisely in its external actions, both in the internal management of initiatives and

[62] Ibid.
[63] Art.177(2), TEC. Treaty of Nice.
[64] Ivi, Art. 177(3).
[65] UN General Assembly. United Nations Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006 at the United Nations Headquarters in New York, opened for signature on 30 March 2007. Art. 42. Available at: https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf
[66] Art.6(2), TEU. Treaty of Lisbon.

the acts in international relations[67]. The confounding three-pillar structure entailed institutional shortcoming and legal loopholes that needed to be rectified. Furthermore, possible internal contrasts between the Community and the Union personalities in the exercise of their respective competences in the External Action would generate an interinstitutional conflict and a strong incoherence risk due to the duality of institutions able to make decisions and act in foreign policy matters[68]. This uncertainty could not last.

In the Treaty of Nice, human rights provisions regarding foreign policy were given more obligatory nature by introducing mechanisms to set up sanctions against states in case of gross and constant violations of human rights. According to the Treaty of Nice, the Union should consider its values of democracy, rule of law and respect and protection of human rights when concluding economic, financial and cooperation agreements with third countries[69]. This was made clear with the requirement of "a human rights clause allowing for trade benefits and development cooperation to be suspended if abuses are established"[70]. The Union would be able to sign bilateral trade agreements with third countries through human rights negotiations: if the third country did not correspond to European standards, or abused the principles of democracy, rule of law or human rights, repercussions from European side would occur.

What is important to underline, after having taken into account the provisions of the precedent treaties, is that the protection and promotion of human rights has grown throughout the years to become a founding principle of the Union and it is now an indispensable prerequisite for its legitimacy as a global political actor. As a study shows, before the 2004 enlargement 81% of European citizens agreed with the proposition of the Union to promote Human Rights abroad[71]. Promoting human rights gives a practical goal to European Foreign Policy, something which is accessible to every citizen. No wonder then that precisely in 2004 the first European Neighbourhood Policy was launched. It

[67] Smith, K. (2014). European Union Foreign Policy in a changing world. Third Edition. Polity Press. Cambridge, UK., p.95.
[68] Lang, A. and Mariani, P. (2014). Supra note 59, p.5.
[69] Art.18, TEC. Treaty of Nice.
[70] European Parliament. 16 September 1996. Resolution on the Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries. COM(95)0216 - C4-0197/95., p.261 . Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1996:320:FULL&from=EN
[71] Leino, P. (2000). Particularity as universality. The politics of human rights in the European Union. University of Helsinki. Helsinki.

aimed to externalize the European *acquis*, with ambitious policy objectives, making of European foreign policy a means to pursue an end: harmonization of European values in the Neighbourhood, following the same path of accession negotiations.

The pre-Lisbon structure of external competences resulted in shattered and non-consistent approaches to a European External Human Rights Policy, where the several human rights instruments applied to each context proved to be biased, ineffective on the ground, not primarily right based and considered a political pressure instrument in disguise[72]. The division of competences in the pre-Lisbon structure saw human rights considered as a small part of development cooperation and CFSP, often employed as a conditionality instrument for trade agreements to compel third countries to comply with European human rights requirement through the so-called "carrot-stick strategy"[73]. The pre-Lisbon approach proved not to take into account other feasible alternative for an European External Human Rights Policy, and the influence of human rights in European foreign policy was mostly ancillary to other domains. This was due to shortcomings in the division of horizontal competences at European level, that created confused and shattered response in the global arena, contributing to the definition of Europe as a "political dwarf" in conducting its foreign policy.

After having outlined the pre-Lisbon provisions on human rights in the context of European foreign policy, we will move to delineate the Lisbon amendments to this area. In the next section we will conclude that, although a specific provision on a European External Human Rights policy was never laid down in the Treaties, the Lisbon amendments in the field of foreign policy have created the preconditions for such a policy to be implemented effectively by Union institutions.

1.3 Relevant amendments in the field of foreign policy after the Treaty of Lisbon

[72] Kube, V. (2016). The European Union's external human rights commitment: What is the legal value of Article 21 TEU?. European University Institute. EUI Department of Law Research Paper No. 2016/10, p.4. Available at: http://ssrn.com/abstract=2753155

[73] Zalewski, P. (2004). Sticks, carrots and great expectations: Human rights conditionality and Turkey's path towards membership of the European Union. Centrum Stosunków Międzynarodowych. Center for International Relations. Warsawa., p.3.

The Lisbon Treaty, signed on 13 December 2007 and entered into force on 1 December 2009, was initially referred to as the "Reform Treaty". The project for a Constitution for Europe[74] had just failed, and the Lisbon Treaty tried to fill the gaps and loopholes in the European institutional system that precedent treaties had left open. Firstly, it eliminated the long criticized three-pillar structure, creating a united legal entity: "the Union shall replace and succeed the European Community"[75]. This meant the elimination of legal uncertainties related to the Common Foreign and Security Policy and its place as the second pillar in the European institutional system. Secondly, the Lisbon Treaty made sure to reiterate the foreign policy provisions that have accompanied the External Action of the Union since its very foundations: "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world"[76].

We have discussed how since the adoption of the Maastricht Treaty, the choice was made to give the Union a single voice in international affairs and progress in the creation of an effective External Action that would not be limited to economic and trade objectives. Human rights and the institutionalized concept of an ethical foreign policy contributed to prepare the ground for the implementation of an effective Common Foreign and Security Policy that could influence today world politics.

The Lisbon Treaty was a fundamental turning point in the process of the development of the European Union as an influent actor in world politics, since it provides legal basis to European foreign policy regarding what objectives to pursue, to what extent and making use of what legal means. As it was anticipated with the Treaty of Nice and the TEC, with the entry in force of the treaty of Lisbon, the EU became officially obliged to consider human rights implications when signing international agreements with third countries. The Lisbon Treaty provides a dual legal basis for international agreements: the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)[77]. Notably, Art.2 TEU presents the European Union as a political project based and driven by values, those that make up the European *acquis*: respect for human

[74] Treaty establishing a constitution for Europe. 29 October 2004. (not ratified). Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AC%3A2004%3A310%3ATOC
[75] Art.1 TEU
[76] Art.21 TEU
[77] Tizzano, A. and Adam, R. (2017). Manuale di diritto dell'Unione Europea. G. Giappichelli Editore. Torino., p.132.

dignity, freedom, democracy, equality, the rule of law, and respect for human rights[78]. The TEU as amended by the Lisbon Treaty commits the Union to respect human rights and promote them abroad and lays down the foundation of the EHRP. The European Union's External Human Rights Policy is designed to show the advantages of developing a society where human rights, democracy and the rule of law are respected[79]; it aims to encourage the countries the Union has agreements with to undertake these changes on their own initiative. In sum, Art.2 put beyond doubt that the Union nowadays truly "means business" proclaiming that the EU is founded on the respect for human rights[80].

As general principles, Article 3(5) and 21 TEU commit the EU to protect and promote human rights globally when developing and implementing its foreign policies[81]. As legal basis for the signing of international agreement, the Union employs a combination of art 31(1), 37 TEU and 217 TFEU[82]. More specifically, Art. 217 and 218 TFEU allow the Union to conclude Association Agreements with third countries as an entity with recognized legal personality[83]. For what concerns the content of international agreements, Article 21(1) TEU addresses the general provisions for the Union's external relations. Art. 11 TEC Nice provided a list of policy objectives for external policies, whereas Art. 21(1) TEU now creates a hierarchy of guiding principles and objectives, placing the same fundamental principles of a constitutional character toward the top, as Art. 2 TEU does with the codification of the constitutional values of the Union[84]. Furthermore, the principles mentioned in article 21(1) are re-emphasized in article 205 of the Treaty on the Functioning of the European Union (TFEU). It is important to underline that the catalogues of principles inspiring the fundamental values structure of the Union at Art.2 and the foreign policy at Art.21 are the same, including the values of democracy, rule of law, respect of human rights, the principles of equality and solidarity, and respect for human dignity. There is in essence a deliberate congruence between both catalogues[85]. In sum, although there is no distinct set of provisions on European External Human Rights

[78] Lang, A. and Mariani, P. (2014). 6, p.124.
[79] Lang, A. and Mariani, P. (2014). Supra note 59, p.190.
[80] De Waele, H. (2017). Supra note 48, p.117.
[81] Lang, A. and Mariani, P. (2014). Supra note 59, p.206.
[82] Tizzano, A. and Adam, R. (2017). Supra note 77, p.132.
[83] Art. 217 and 218 TFEU.
[84] Blanke, H., and Mangiameli, S. (2013). The Treaty on the European Union (TEU): a commentary. Springer. London, p.842.
[85] Ibid.

Policy, the substance is however integrated in the Union's substantive external policies as a silver thread running through it all[86].

The Lisbon Treaty creates ample opportunities for the EU to reinforce its External Action so that it could address the global complex, multi-actor, multi-dimensional crises and growing security threats. In the short period of little more than 30 years, we witnessed the creation of the European Union that resembles more and more a federal state[87]. In a nation state system, it is common that foreign policy matters and competences are handled exclusively to the central or federal government, or an inherent part of the executive power. However, in a conferred system, such as the European Union, it is interesting to investigate how these competences are shared among not only European institutions and Member States, but also how European institutions share them among themselves, in order to protect rule of law provisions and institutional balance at European level. There are three key actors involved in decision-making in the Common Foreign and Security Policy: the European Council, the High Representative and the European External Action Service (EEAS)[88].

To begin with, it is relevant to underline the role of the European Council, which defines, implements, and makes the final decisions regarding the CFSP. It must act unanimously, and every Member State retains the power of veto. The European Council sets out common strategies, which aim to strengthen the economic and political cooperation between the EU and third countries. The Council also sets out general principles and guidelines for the conduct of the CFSP. It is also important to note that Member States are free to pursue their own foreign policy agenda if it is not in conflict with the objectives set out by the CFSP.

Secondly, the Lisbon Treaty introduced in the area of European External Action the figure of High Representative, in order to improve efficiency in decision-making and consistency in European External Action, giving Europe a united voice in foreign policy matters. Of course, a first improvement in this sense was already brought about with the introduction of the Treaty of Amsterdam, when the High Representative for the Common

[86] De Waele, H. (2017). Supra note 48, p.118.
[87] Viilup, E. (2015). The EU, Neither a Political Dwarf nor a Military Worm. The EU: a true peace actor? Peace in progress. Brussels. Available at: http://www.icip-perlapau.cat/numero23/articles_centrals/article_central_2/
[88] Blanke, H., and Mangiameli, S. (2013). Supra note 84, p.871.

Foreign and Security Policy was established[89]. However, the post of High Representative at the time had its authority incarcerated by the shortcomings in the division of competences between the Common Foreign and Security Policy and the other European External Action policies. This is why the new figure of the HR is aimed at merging the preexisting High Representative for the Common Foreign and Security Policy and the European Commissioner for External Relations and European Neighbourhood Policy[90]. The powers given to the High Representatives by the Treaty of Lisbon are much broader and thorough: Article 27(2) asserts the post of High Representative to represent the Union in foreign policy matters and to be the face of the Union in international negotiations and dialogue, as well as coordinate Member States' actions.

Thirdly, the Treaty of Lisbon provides that the High Representative shall be assisted by a European External Action Service[91]. The idea behind this, following the creation of the High Representative, is again an institutional bridge between Commission and Council departments responsible for the External Action. This "functionally autonomous body"[92] is placed under the authority of the High Representative and acts as the diplomatic service of the Union, aiming at strengthening European voice in international affairs. It must cooperate with Member States' diplomatic representations outside the European bloc and ensure coherence and consistency.

Notwithstanding these improvements, the Treaty of Lisbon did not remove all differences between the Common Foreign and Security Policy (CFSP) and other European External Action policies[93]. Whereas before Lisbon the CFSP was governed by its own set of objectives, that is no longer the case, and this has made the task of defining the scope of this policy even more difficult than before[94]. The provisions on the CFSP continue to be located in the TEU, in contrast with those on other policies. Furthermore, no legislation can be made under CFSP Lisbon Treaty provisions. It is clear then how the

[89] European Parliament. (2020). Supra note 52, p. 2.
[90] Blanke, H., and Mangiameli, S. (2013). Supra note 84, p.842.
[91] Art. 27(3) TEU.
[92] Council of the European Union. 26 July 2010. Official Journal of the European Communities. Council Decision 2010/427 Establishing the Organization and Functioning of the European External Action Service. OJ L201/30., para 1. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010D0427&from=EN
[93] Eeckhout, P. (2012). The EU's Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism. In "EU after Lisbon" Biondi, A. and Eeckhout, P. (eds). Oxford University Press. Oxford., p.265.
[94] Ivi, p.266.

Common Foreign and Security policy is subject to specific provisions that help to address it as a distinct entity[95]. This is because CFSP competences are undefined, in the sense of being neither exclusive nor shared, but rather they are defined as "special competences"[96]. Art. 24(1) TEU excludes the adoption of legislative acts within the scope of the CFSP. The CFSP is not an area of general lawmaking, or normative action, where EU acts have a preemptive effect on national competence.

Eeckhout argues that the legal nature of CFSP ought to be considered a *lex specialis* until the entry into force of the Treaty of Lisbon, that tried to overcome this distinction and unite CFSP provisions under the umbrella of European External Action as a whole. He argues that thanks to the Lisbon treaty, the division of competence and the status of the CFSP as a "supplementary" policy whose legal basis has always been unclear, became more balanced[97]. According to Art.21(2) TEU, however, CFSP objectives are so broadly defined that literally any foreign policy act could fall into the categories of "preserve peace, prevent conflicts and strengthen international security"[98].

The impossibility to adopt legislative acts under the CFSP is a consequence of the complex decision-making process at institutional level, that drifts away from traditional European expressions of normative power[99]. In fact, the European Parliament is not involved in the decision-making process for CFSP matters, making the requirement of representative democracy not present and general normative action not possible[100]. It's not legally feasible under European law to create rights and obligations for European citizens in the scope of CFSP actions. Moreover, according to Art. 275 TFEU, the Court of Justice of the European Union has no jurisdiction over CFSP acts.

The European general principle of rule of law imposes that any legislative acts can be reviewed. In a Union governed by the rule of law, all acts of the institutions producing legal effects in relation to third parties must be reviewable. This is not possible in CFSP matters, following treaty provisions. Eeckhout goes further asserting that "the exclusion of legislative acts for the conduct of the CFSP is to be understood as an exclusion of

[95] Eeckhout, P. (2012). Supra note 93, p.273.
[96] Thies, A. (2020). Principles of EU external action. In Wessel, R. and Larik, J. (eds). "EU External Relations Law. Text, cases and materials". Hart Publishing. London., p.31.
[97] Eeckhout, P. (2012). Supra note 93, p.273.
[98] Art. 21(2) TEU.
[99] Blanke, H., and Mangiameli, S. (2013). Supra note 84, p.840.
[100] Lang, A. and Mariani, P. (2014). Supra note 59, p.28.

general normative action producing legal effects in relation to third parties"[101]. In fact, according to the general principle of rule of law, CFSP acts cannot create obligations for European citizens in European Member States. CFSP acts cannot, consequently, have direct effect, and the principle of primacy of EU law does not apply to CFSP acts[102].

Starting from the idea that the Common Foreign Policy itself cannot emanate legislative acts, in other words its normative action is void, it is the case to ask oneself whether the human rights objective of European External Action might encounter the same existential issue. The principles at the heart of this question are listed in the TEU, where Art.21(1) and Art.21(3) TEU, address the general provisions of the EU's external relations. To our analysis, Art.21 TEU is the most important piece of information regarding the External Human Rights Policy of the EU, since it officializes its human rights dimension: "the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law"[103]. Thus, human rights frame EU External Action as a founding value (Article 3(5) in conjunction with Article 2 TEU), as a guiding principle (Article 21(1) TEU) and as an objective (Article 21(2)(b) TEU)[104]. Moreover, if we bear in mind the pre-Lisbon provisions on human rights in foreign policy, we observe that the Lisbon Treaty made sure to provide the human rights objectives to be placed on top of all European foreign policy objectives[105]. This means that European External Action is now able to overcome its previous (pre-Lisbon) consideration of human rights as an ancillary requirement for development cooperation and to consider them as a primary objective in foreign policy[106].

The European Charter of Fundamental Rights, international human rights obligations and the relevant provisions expressed in the Treaty of Lisbon are all included in European primary law ex Art.3(5) TEU. With the Treaty of Lisbon, the values, principles and rights

[101] Eeckhout, P. (2012). Supra note 93, p.283.
[102] Ibid.
[103] Art. 21(1) TEU.
[104] Kube, V. (2016). Supra note 72, p.3.
[105] Ibid.
[106] Ivi, p.11.

enshrined in these documents and treaties became legally binding on the European Union and consequently on Member States. The treaty of Lisbon requires to respect them and implement them both internally and externally. More importantly, it provided for a new competence for the Union as a legal entity in international relations: the capacity to become a party to international human rights agreements[107]. The obvious consequence of the above-mentioned provisions is that the Union is able to generate normative power through its External Human Rights Policy. The human rights objective is not just an ancillary requirement of foreign policy, but it is boosted to a higher level, as a moral and most importantly normative goal of the Union in its foreign policy. This assumption breaks the international law doctrine on the territorial/extraterritorial jurisdiction of States, allowing the EU to act in a normative way outside of its borders[108]. Hence, European human rights objectives as set forth in the Treaty of Lisbon allow the European Union to produce legislative acts that have an external reach. The combination between article 21(2) TEU and article 3(5) TEU enables the Union to conclude not only international agreements including human rights, but also international human rights agreements[109].

1.4 The European Convention on Human Rights and implications for European foreign policy

The challenges of the end of the Cold War provided the EU with the opportunity to make its foreign policy, its external economic relations, and its development cooperation conditional upon the respect for human rights[110]. Unquestionably, the realist dominant theory in international relations is that human rights, or other such ethical external policy considerations, should not be determinants of foreign policy making. However, the 1948 Universal Declaration on Human Rights set new standards in international relations and provided a dynamic platform for the development of international human rights law[111].

[107] De Waele, H. (2017). Supra note 48, p.118.
[108] Kube, V. (2016). Supra note 72, p.11.
[109] Nakanishi, Y. (2018). Mechanisms to Protect Human Rights in the EU's External Relations. In Nakanishi, Y. (eds)."Contemporary issues in Human Rights Law: Europe and Asia". Springer Nature. Singapore, p.5.
[110] Gropas, R. (2002). Supra note 33, p.2.
[111] Ivi, p.3.

The UN Declaration on Human rights represents an unquestionable paradigmatic shift in contracting parties' foreign policy making. It made sure to appoint developed countries to do whatever they could to promote human rights in developing countries. However, most relevant international law regarding this subject is controversial and uncoherent: the principles of state sovereignty and the equality of states *prima facie* excludes external coercion upon a States from a foreign actor to comply with certain values or principles. Accordingly, in terms of legal obligations, international law does frame the actions and policies of States with regards to the promotion of values abroad: there are limits to imposing human rights in third countries[112].

The relationship between state sovereignty and values promoted by the Declaration is one of the most complex issue that the international community has to face in the post-Cold War period. The ethical values of social justice, progress and development and the principle that every person in the world should enjoy them started to be in conflict with traditional norms of state sovereignty and non-intervention in domestic affairs. The fact that such values might actually take over and dethrone the principles at the very foundation of the modern concept of statehood is one of the big questions in external human right policy theory[113]. On this note, in 1986 Vincent spoke of an "inescapable tension" that had arisen after the Second World War, a tension between human rights and foreign policy, where states cannot avoid the human rights factor by "declaring that the former have no place in the latter. They are obliged to pay attention to human rights whether they like it or not"[114].

All European Member States vowed to comply with the provisions enshrined in the European Convention on Human Rights (ECHR). One wonders whether this fact implies consequences in the application of the provisions enshrined in the Convention by the international organization to which they are a party: the European Union. Does ratification of the ECHR by each and every Member State have consequences on European institutions foreign policy actions? The European approach to these issues tells us that yes, the principles of the ECHR have indeed their weight on European Union acts and policies. The Joint Declaration of the European Parliament, the Council and the

[112] Khaliq, U. (2008). Supra note 18, p. 56.
[113] Wessel, R. (2020). The EU and International Law. In Wessel, R. and Larik, J. (eds). "EU External Relations Law. Text, cases and materials". Hart Publishing. London., p.141.
[114] Vincent, R.J. (1986). Supra note 12, pp. 798.

Commission of 5 April 1977 indicates the importance of fundamental rights as part of the general principles of law recognized by Community law and emphasizes the key role played by the ECHR[115]. Since every Member State of the European Union is also a contracting party to the ECHR, the same rules apply in theory to the institutions of the European Union.

The Convention does not oblige a contracting party to uphold and promote Convention rights and principles in third countries[116], however things change when a contracting state is responsible for violations of Convention principles abroad. The *Soering v. UK* case[117] is a helpful example of the ECtHR course of action, where the Court has defined the "extra-territorial" application of the Convention. *Pro memoria*, the extraterritoriality, or extra-territorial application of the ECHR refers to the recognition and securing of ECHR rights by State parties and the identification of the corresponding duties on their part to individuals or group of individuals situated outside their territory[118]. In this judgment of 7 July 1989, the Court ruled on the extradition request made by the United States for an offense involving death penalty against a German citizen in the United Kingdom. In this matter, the Court identified in the exposure to the prolonged stay of the interested party in the death row a treatment incompatible with Art. 3 of the Convention and therefore concluded that the possible acceptance by the United Kingdom of the request of extradition formulated by the United States "would have given rise" to a violation, thus using a hypothetical form that establishes the jurisdiction of the Court to deal, in exceptional cases, with violations not yet occurred[119] and, for the scope of our argument, taking place outside or the territorial jurisdiction of the Court. This case gave birth to the "Soering principle", where the Court will somewhat depart from the territoriality principle in cases of extradition, that is to say "acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction"[120]. Therefore, it can be inferred that the State Parties to the ECHR are under an obligation to prevent any extraterritorial violations of the Convention rights

[115] Ibid.
[116] Khaliq, U. (2008). Supra note 18, p.21.
[117] *Soering v United Kingdom*, no.14038/88, §82, ECHR 1989.
[118] Milanovic, M. (2011). Extraterritorial Application of Human Rights Treaties. Law, Principles, and Policy. Oxford University Press. Oxford. UK, pp. 55-57.
[119] Raimondi, G. (2015). La qualità di "vittima" come condizione del ricorso individuale alla corte europea dei diritti dell'uomo. I quaderni europei. Università di Catania - Online Working Paper 2015/n. 71
[120] *Ilascu v Moldova and Russia* [GC], no. 48787/99, §317, ECHR 2004.

if it is within their power to do so[121]. After this landmark judgement, the Strasbourg organs of the ECHR have on a number of occasions determined the applicability of the Convention outside of the physical territory of the Contracting States and their respective responsibilities. The notion of extraterritoriality itself implies that the territorial application of human rights is the principle, but there are exceptions[122].

Human rights principles as enshrined in the ECHR have always been part of the European heritage; for example the Treaty of Maastricht made the Union's action conditional upon the Convention: under Art.F(2), "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law". Hence, the ECHR provisions were and are, to an extent, already indirectly included among the Union's principles and values; for example, Council of Europe membership is an implicit prerequisite for EU membership[123].

The principle of subsidiarity is reiterated several times in the text of the Convention and the objective of the European Court of Human Rights is to assist states in securing the objective of protection of human rights, not to replace them: its task under Article 19 is limited to "ensur[ing] the observance of the engagements undertaken by the High Contracting Parties". Nevertheless, the impact of the ECtHR in the multilevel European legal order is profoundly shaped by the fact that it is a permanent court which interprets the Convention authoritatively. Its judgments thus have a certain *erga omnes* effect and thereby shape states' expectations and future behaviour[124].

The ECtHR in Strasbourg has always played the role of human rights adjudicator for its Luxemburg sister organization, the Court of Justice of the European Union (CJEU).

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[121] Budzianowska, D.C. (2012). Some reflections on the extraterritorial application of the European Convention on Human Rights. Wroclaw Review of Law, Administration and Economics. Vol 2:1, p.57

[122] Besson, S. (2012). The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to. Leiden Journal of International Law, Cambridge University Press (CUP), 25 (4), pp.857–884.

[123] Commission of the European Communities. 22 November 1995. The European union and the external dimension of human rights policy: from Rome to Maastricht and beyond. Brussels. COM(95)567 final., p.8. Available at: https://eur-lex.europa.eu/LexUriServ.do?uri=COM:1995:0567:FIN:EN:PDF

[124] Follesdal, A. (2014). Squaring the circle at the battle at Brighton: is the war between protecting human rights or respecting sovereignty over, or has it just begun? In Arnadottir, O. M. and Buyse, A. (eds). "Shifting Centres of Gravity in Human Rights Protection" (2017). Routledge Research in Human Rights Law. University of California. San Diego, p. 200.

Recently, the CJEU is expanding its role in the field of protection of human rights. According to well established case law of the Court of Justice, fundamental rights form an integral part of the general principles of EU law[125]. Protection of fundamental rights in the European Union has developed especially since the 1970s[126]. The CJEU has relied on constitutional traditions common to the EU Member States and on the ECHR in particular, in order to guarantee standards for the protection of fundamental rights in the EU. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that context, the Court of Justice has stated that the ECHR has special significance[127].

On 7 December 2000, the European Parliament, the Council of the European Union and the Commission proclaimed the Charter of Fundamental Rights of the European Union. The Charter, which at that time was not a legally binding instrument, has the principal aim, as is apparent from the preamble thereto, of reaffirming "the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the [Court of Justice] and of the [ECtHR]"[128].

The Charter signed the establishment of an entirely European instrument of protection of human rights, that in theory was supposed to make European human rights protection independent from other sources of law. After the Lisbon Treaty, the establishment of the Charter as a legally binding instrument determined the intention of parting ways with the Strasbourg Court and conferred new competences to rule on human rights matters to the Court of Justice of the European Union. In the intentions of the drafters of the Lisbon Treaty, the protection of human rights within the European Union shall indeed take into consideration the provisions of the ECHR. However, recent developments show us that

[125] Case 26/69. Erich Stauder v City of Ulm, Sozialamt, ECLI:EU:C:1969:57.
[126] Nakanishi, Y. (2018). Supra note 109, p.3.
[127] Case 11/70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel EU:C:1970:114, §4.
[128] European Parliament, Council of the European Union, European Commission. 18 December 2000. Charter of fundamental rights of the European Union. Official Journal of the European Communities. C 364/1. Preamble. Available at: https://www.europarl.europa.eu/charter/pdf/text_en.pdf

the two adjudicators of human rights in the European context, the ECtHR and the CJEU, share a duality of power. From 2005 onwards, there has been an increase in human rights topics being invoked at Luxembourg; at the same time, the Court refers less and less to the ECtHR[129].

As mentioned, the issue of the legal personality of the European Union, as a completely novel entity in the international scene, has often left it behind in terms of accession to international conventions and more generally in foreign policy. Since the Union gains competences through the principle of conferral, it can only act in fields the constitutive treaties provide for. Until the Lisbon Treaty, the EU could not accede to the ECHR because of a lack of competence, although the principles of the European Convention for Human Rights were, traditionally or through accession negotiations, already shared among Member States, in the form of the previously discussed *acquis communautaire*.

The Treaty of Lisbon laid down new competences for this to happen: Article 6 (2) TEU establishes that the EU shall accede to the ECHR. The means that the EU may not only accede to the ECHR, but also must accede to it. Article 6 (2) TEU rules specifically, that is, it refers only to accession to the ECHR[130]: once set this forth in the Treaties, the Union obtains not only legal personality to accede to the ECHR, but also an obligation that entails legal responsibility. The reason behind this necessity are simply stated: the capacity of the Union to act as an international actor through the notion of the EHRP is more legitimate when the Union undergoes judicial review for its own policy acts. In this sense, the ECHR is a milestone not only for Member States to be consistent with their constitutional values and principles, but for Europe itself and its Treaty provisions. The European Union owes a great deal to the ECtHR in terms of coherence and consistency in its foreign policy acts; however, many scholars criticize the "special treatment" the two legal entities, ECtHR and CJEU, reserve to each other[131]. Taking into consideration European external actions that might affect human rights issues, possible violations in

[129] Groussot, X., et al. (2017). The paradox of human rights protection in Europe: two courts, one goal? In Arnardottir, O. M. and Buyse, A. (eds). "Shifting Centres of Gravity in Human Rights Protection" (2017). Routledge Research in Human Rights Law. University of California. San Diego, pp. 199.
[130] Khaliq, U. (2008). Supra note 18, p.21.
[131] Kosta, V., Skoutaris, N. and Tzevelekos, V.P. (2014). The EU accession to the ECHR. Hard Publishing Ltd. Oxford. United Kingdom., p.292.

this sense might have remained unaddressed. The question could therefore arise as to whether the EU provides effective internal remedies in relation to the CFSP acts[132].

The promotion of certain values and principles in foreign policy requires serious consideration of numerous issues if it is to be pursued in a meaningful fashion. The promoters of such values are in a stronger moral position if they themselves comply with the standards they promote for others. In a major Commission communication on human rights and democracy in external relations, for example, it was argued that the European Union's moral and political authority to engage in such practices stemmed from the fact that "the EU and all its Member States are democracies espousing the same policies both internally and externally"[133]. If the EU only drew its catalogue of human rights norms from its own legal system, it would be considered as a self-referential behaviour that in turn would cause great unnecessary criticism to its external human rights objective. This is why adherence to the ECHR provisions is so important in theory, and this is why the Union has disposed for its own accession to the Convention. How can the Union promote such moral standards when it does not undergo any judicial review for its actions?

This brings us back to Vincent's "inescapable tension" between human rights and other foreign policy objectives. Over the years the EU has developed several mechanisms in order to pursue an ethical foreign policy, as prescribed in its constitutive treaties: the Union has made its actions on the international scene conditional to UNDC and ECHR provisions, it has created its own legally binding human rights instrument, the European Charter for Fundamental Rights, has posed human rights guidelines it needs to adhere to when implementing foreign policy objectives[134]. Moreover, it has adopted since 1998 several Action Plans, such as the one adopted in July 2015 for the period 2015-2019, "Keeping Human Rights at the Heart of the EU Agenda"[135], which confirms the centrality of human rights for EU external relations. Since the creation of the CFSP, the European

[132] Court of Justice of the European Union. Opinion 2/13 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2454, §96.
[133] Commission of the European Communities. 8 May 2001. Supra note 42, p.6.
[134] Council of the European Union. 29 June 1998. Guidelines to EU policy towards third countries on the death penalty. Available at http://www.consilium.europa.eu/uedocs/cmsUpload/Guidelines%20DeathPenalty.pdf
[135] Council of the European Union. 20 July 2015. Council Conclusions on the Action Plan on Human Rights and Democracy 2015-2019, 10897/15, pp. 1-4. Available at http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdf

Union has accomplished quite a lot, most significantly establishing itself as a unified and strong political actor on the world map. It has also led multiple peacekeeping mission around the globe, for example in Macedonia, Bosnia-Herzegovina and the Congo in 2003. The EU has also imposed sanctions on countries such as Zimbabwe and Russia under the EHRP framwork and it has successfully launched its first maritime mission to prevent piracy of the coast of Somalia, which have been more than successful[136].

From its practice, it is undeniable how protection and promotion of human rights have been heartfelt matters to EU institutions. The inescapable tension between human rights and foreign policy has indeed been perceived and endorsed by the Union. What is missing in the European design of an ethical foreign policy is justiciability for its very own foreign policy acts, a fact that has confronted the EU with criticism and efforts to overcome this shortcoming.

Conclusions

To conclude this first chapter, we can outline that the EU has been on the frontline of the new international relation concept of an "ethical foreign policy". Through the deployment of its normative power, it has challenged the previous most accepted realist theory, and based on a constructivist approach, has fought to uphold the values and principles it was founded upon, not only within its borders, but also in the international arena[137]. It has done so by including a set of norms, values and principles in its founding Treaties and it has validated the recurrent human rights objective thanks to treaty provisions that were consistent and coherent with its *acquis communautaire*, laying down the foundation for the EHRP.

The post-Cold War trend that sees human rights play a bigger role in foreign policy has nowadays touched almost every country in the world, thanks to the establishment of ever more refined machines. International agreements and conferences promise to put human rights on top of foreign policy agendas worldwide. The EU is a pioneer of the new trend of an ethical foreign policy. In fact, in 2002, Ian Manners argued that "The EU has gone further towards making its external relations informed by, and conditional on […]

[136] James, W. (2015). Common Foreign and Security Policy. CIVITAS Institute for the Study of Civil Society., p.1. available at: https://civitas.org.uk/content/files/EX.3.CFSP_.pdf
[137] Stubbins Bates, E. (2015). Sophisticated constructivism in Human Rights compliance theory. The European Journal of International Law Vol. 25 no. 4, 1169–1182.

the European convention on human rights and fundamental freedoms (ECHR) and the universal declaration of human rights (UDHR) than most other actors in world politics. The EU is founded on and has as its foreign and development policy objectives the consolidation of democracy, rule of law, and respect for human rights and fundamental freedoms"[138]. At the time, the Treaty of Lisbon was not yet in force, but the long-term foreign policy objectives of the EU were already foreseeable. Since then, the European Union has enhanced and refined its foreign policy methods and instruments.

Prior to the Lisbon reforms, human rights permeated the European legal order as founding values and principles. Human rights protection then grew to become a specific objective of development cooperation, CFSP, financial and technical cooperation. However, it remained unclear whether these values could constitute a proper justification, let alone a legal base, for implementing a methodical foreign policy. Furthermore, on a practical frame of reference, the achievement of the human rights objective was still suffering from horizontal shortcomings and legal loopholes.

The Lisbon Treaty has defeated many shortcomings in European foreign policy provisions and institutionalized human rights as a primary foreign policy objective of the Union ex Art.21 TEU. The human rights objective is, to this day, the *conditio sine qua non* for Europe to act in a normative way in foreign policy. The multi-faceted nature of human rights requires initiatives in a broad set of policies. In this sense, the External Action is justified as setting priorities on human rights and democracy and allows to mobilize EU policies, instrument and the action of EU Member States in a more focused, coherent and effective manner. The EU is uniquely placed to take the lead to promote and protect human rights and support democracy in line with its founding principles. Although a specific provision for a European External Human Rights Policy has not yet been foreseen in the Treaties, human rights are embedded in every provision on External Action. It is undeniable that an "inescapable tension" between traditional foreign policy objectives and human rights exists in international relations theory. The Union is making sure to have the right tools and instruments to come to terms with it.

Due to the provisions introduced by the Treaty of Lisbon, the Union is not only required to include human rights in its foreign policy acts but was given the legal instruments to institutionalize its normative power through international agreements

[138] I. Manners (2002). Supra note 34, p. 252.

regarding human rights only. Arguably, human rights have grown to become not just an ancillary domain to foreign policy, but a proper foreign policy objective.

In this first chapter, we have enumerated the relevant human rights provisions in foreign policy by analyzing the constitutive Treaties of the European Union. We have discussed how human rights have grown from being a value and principle of the European legal order to being an objective in foreign policy. The way these provisions play out in world politics will be discussed in the next Chapter through the relevant jurisprudence and practice of the ECtHR and of the CJEU.

CHAPTER 2

ECtHR AND CJEU JURISPRUDENCE: ISSUES AND CONTRADICTIONS IN EUROPEAN EXTERNAL HUMAN RIGHTS POLICY

Introduction

As discussed in the previous Chapter, the European External Human Rights Policy is not specifically provided for in the Treaties, but its legal *raison d'être* is derived from the very European *acquis communautaire*, values and principles at the heart of European foreign policy and the pertinent provisions enshrined at Art.21 TEU.

We will proceed in this Chapter with an in-depth analysis of European judiciary engagement with human rights issues in foreign policy, by discussing the relevant jurisprudence of the European Court of Human Rights (ECtHR) and that of its Luxembourg sister organization, the Court of Justice of the European Union (CJEU).

At the very beginning of the process of European integration, the European Court of Justice left human rights matters to be adjudicated by its Strasbourg counterpart, the European Court of Human Rights. Nonetheless, human rights made their way in European jurisprudence owing to the increasing challenges posed by national courts and the broadening of European competences, authority and actions. Human rights steadily gained importance throughout the process of European integration and the post-Cold War era signed the establishment of the European Community as the forerunner of a shift in the human rights paradigm worldwide.

The Lisbon Treaty entailed the establishment of a series of human rights provisions for European foreign policy and made the European Charter of Fundamental Rights a binding instrument, providing the European judiciary system with its very own set of human rights norms. Slowly but surely, the European Court of Justice referred more and more often to human rights.

Although the reliance of the Court of Justice on the ECtHR has always been a given, considering the relevance of its jurisprudence in the European judiciary system, the new competences on human rights introduced by the Lisbon Treaty brought to a less frequent and extensive citing of the Strasbourg case law, making the CJEU more independent.

In the field of foreign policy, however, the CJEU is far from being self-sufficient: the legal ambiguity of European foreign policy, particularly with regard to CFSP actions, implies several shortcomings in terms of European accountability. This is why, in the intentions of the Lisbon treaty, the European Union shall accede to the European Convention on Human Rights (ECHR) ex Art.6 TEU.

In this Chapter, we will focus on the relevant case law of the ECtHR and the CJEU and their jurisdiction on, respectively, extraterritoriality and restrictive measures or sanctions. We will draw the conclusion that notwithstanding European provisions on human rights in foreign policy ex Art.21 TEU, human rights offences are still being perpetuated, by Member States and European institutions, to the expenses of individuals residing in third states.

A special focus will be given to the recent extensive use of targeted sanctions as the most efficient foreign policy tool at the Union's disposal. We will discuss whether the use of hard power in the form of sanctions is considered consistent with the image of the Union as a normative power. We will argue that the human rights dimension is pivotal in European foreign policy, and that even though sanctions do affect the targeted individual's human rights, they are necessary means to be included in the broader picture of European objectives of protection of human rights worldwide as foreseen by the Treaties. Finally, the last section of this Chapter will be dedicated to understanding discrepancies in coherence and consistency of the European External Human Rights Policy, to argue that in order for the Union to be an effective international actor as prescribed by the Treaties, a balance must be struck between its foreign policy goals and the omnipresent human rights dimension.

2.1. Human rights responsibility beyond the territorial dimension: ECtHR jurisprudence

There are certain international legal norms in whose violation all states have a legal interest[139]. This is the case for obligations stemming from human rights treaties: the norms promoted in international human rights treaties are no longer considered to be only within

[139] Khaliq, U. (2008). Supra note 18, p.36.

a state's domestic jurisdiction[140]. With regard to treaties that protect human rights, it can be argued that contracting parties have an interest in ensuring their provisions and need a right to act to protect that interest[141]. States ensuring the applicability of a human rights treaty need compliance of other countries in human rights provisions, and the means to tackle this issue.

Under international human rights law, state responsibility hinges on whether the violation of a human rights norm occurred within a state's jurisdiction[142]. This concept of jurisdiction has to be distinguished from the common understanding of jurisdiction under public international law. In this respect, Milanovic infers that "the extraterritorial application of human rights treaties notwithstanding, interpreting the notion of jurisdiction in these treaties as being identical to the one in general international law would lead to manifestly absurd results even in the domestic sphere, which the states parties to these treaties could not possibly have intended"[143]. On this note, Klug and Howe suggest that in international human rights law, jurisdiction may be established by "factual control" (over territory or person), *de jure* jurisdiction, or "a personal link"[144]. From this perspective, the notion of jurisdiction in human rights law is not primarily territorial, but it is established by factual evidence such as effective control over persons even outside states' territories. This is precisely the notion that the ECtHR developed in its jurisprudence with its "effective overall control of an area"[145] test, as sensible a definition of jurisdiction as any. It is this notion that defines the concept of jurisdiction and pervades international human rights treaties[146].

The traditional Westphalian understanding of jurisdiction is strictly linked to a state's sovereignty and consequently its territoriality, relying on the principle of non-intervention

[140] See for references: Coomans, F. and Kamminga, M. (2004). Extraterritorial application of Human Rights Treaties. Intersentia. Antwerp. Oxford ; Khaliq, U. (2008). Ethical dimension of the Foreign Policy of the European Union. A legal appraisal. Cambridge University Press. Cambridge ; Kadelbach, S. (2019). The European Court of Justice and Human Rights Law. In Kadelbach, S., Rensmann, T. and Rieter, E. (eds). "Judging International Human Rights". Springer International Publishing. London. UK.
[141] Smith, K. (2014). Supra note 67, p.95.
[142] Kube, V. (2016). Supra note 72, p.15.
[143] Milanovic, M. (2011). Supra note 118, p.30
[144] Klug, A. and Howe, T. (2010). The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures. In B. Ryan and Mitsilegas, V. (eds). "Extraterritorial Immigration Control: Legal Challenges". Cambridge University Press. Cambridge. UK, pp. 69-98.
[145] *Loizidou v Turkey* [GC], no. 15318/89, § 62, ECHR 1995.
[146] Milanovic, M. (2011). Supra note 118, p.30.

in domestic affairs. However, the advent of economic globalization and the generalized progress in trade and technology have meant that States and other global actors exert considerable influence on the realization of economic, social and cultural rights across the world[147].

It can be inferred that human rights are applicable independently of whether a state is legitimately competent to act under public international law according to the principle of non-intervention and state sovereignty[148]: from this argument stems the extraterritorial applicability of human rights treaties and conventions, which in turn gives rise to extraterritorial obligations. The human rights of individuals, groups and peoples are affected by and dependent on the extraterritorial acts and omissions of States. This was made clear in the International Court of Justice Advisory Opinion *on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where it was found that the occupying State was under a duty to apply international human rights law. What emerged is that occupation of foreign territory, in international law, is a basis for the recognition of extraterritorial human rights jurisdiction[149].

The principles on the extraterritorial obligations of States were laid down by a team of experts in international law and human rights during a gathering at the University of Maastricht on 28 September 2011, convened by Maastricht University and the International Commission of Jurists. It was held that extraterritorial obligations (ETOs) were the missing link in the universal system of protection of human rights. The Maastricht Principles constitute an international expert opinion, restating human rights law on ETOs. The principles do not purport to establish new elements of human rights law: rather, they clarify existing but not codified extraterritorial obligations of States on the basis of standing international law[150]. As clearly stated at Art.3 of the General Principles, "All States have obligations to respect, protect and fulfil human rights,

[147] De Schutter, O. et al. (2012). Commentary to the Maastricht Principles on Extraterritorial Obligations of States the Area of Economic, Social and Cultural Rights. Human Rights Quarterly. Vol. 34, No. 4. pp. 1084-1169.
[148] Kube, V. (2016). Supra note 72, p.16.
[149] International Court of Justice. Advisory opinion of 9 July 2004. Legal consequences of the construction of a wall in the occupied Palestinian territory. §90-91.
[150] ETO Consortium. (2013). Maastricht principles on extraterritorial obligations of states in the area of economic, social and cultural rights. Fian International. Heidelberg. Available at: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 p.1.

including civil, cultural, economic, political and social rights, both within their territories and extraterritorially". It should not be implied that each state is responsible for promoting and ensuring the fundamental rights and freedoms of every person in the world. Rather, this document indicates that extraterritorial obligations arise when a state exercises control, power or authority over people or situations located outside its sovereign territory in a way that could have an impact on the enjoyment of human rights by those people or in such situations[151].

The notion of jurisdiction in international human rights law has been briefly outlined. As to the European approach to these issues, the 1986 Declaration on Human Rights of the then twelve EU Member States states quite clearly that, "the protection of human rights is the legitimate and continuous duty of the world community and of nations individually. Expressions of concern at violations of such rights cannot be considered interference in the domestic affairs of a State"[152]. The 2000 Charter of Fundamental Rights of the European Union[153] reaffirms, in its preamble, the rights and freedoms enshrined in the European Convention of Human Rights and finally, the ECHR confers human rights to persons "under the jurisdiction" of the Contracting States[154].

The concept of jurisdiction as intended in the Charter of Fundamental Rights and in the Convention developed by the ECtHR in its case law will now be briefly discussed. First of all, in terms of applicability, the ECHR has a wider scope than the Charter, since it applies to 47 States, both members and non-members of the EU, while the Charter is only applicable to the EU institutions and its Member States when they apply EU law. It is clear, from ECtHR jurisprudence, that the Convention does not impose contracting parties to promote Convention rights outside their borders. However, a contracting party may be held responsible for actions violating Convention principles perpetuated outside of its jurisdiction. In certain circumstances, in fact, states' jurisdiction can extend outside of their territorial jurisdiction[155]. As we will see, the initial assumption is that a ECHR

[151] De Schutter, O. et al. (2012). Supra note 147, p. 1089.
[152] European Community. European Political Cooperation and the Council. 21 July 1986. Declaration on human rights. Meeting of foreign ministers. Available at: https://ec.europa.eu/dorie/fileDownload.do;jsessionid=LK9yPhMLvLLnMQhTQ6vYKWP4cv1pytVXyTfTphQ2Qjn1pL0r0rcs!1139521418?docId=151326&cardId=151326
[153] European Parliament, Council of Ministers, European Commission. 18 December 2000. Supra note 128.
[154] Art.1 ECHR.
[155] Zagrebelsky, V. et al. (2016). Manuale dei diritti fondamentali in Europa. Il Mulino. Bologna., p.38.

contracting party exercises jurisdiction over its own territory. The presumption is however refuted with regard to the extension of jurisdiction in case of extraterritorial exercise of government power by the States parties to the Convention[156].

There has been controversy over the exact meaning of jurisdiction under the Convention, namely whether it should be understood as "authority" or as "power"[157]. The dichotomy can be explained as the choice between the interpretation of jurisdiction as the fact of possessing "judicial, legislative and administrative" authority over the territory in question, and the fact of possessing the power to take "judicial, legislative and administrative" actions within the territory[158]. The troubled and somewhat confused history of extraterritorial jurisdiction under the ECHR is made up of missteps and corrections, such as the Turkish occupation case; the misstep of *Banković* followed by the slow correction in *Issa*, *Ocalan* and *Medvedyev*; the restoration of some semblance of order in *Al-Skeini* and *Jaloud*[159]. Finally, the ECtHR has established that jurisdiction can be understood both as power and authority[160].

The Strasbourg organs of the ECHR have on a number of occasions determined the applicability of the Convention outside of the physical territory of the Contracting States and their respective responsibilities[161]. In the *Cyprus v. Turkey* case of 1975, for example, it was held that a Contracting State may be responsible for the acts of its authorized agent outside its territory, where effective occupation of the northern part of Cyprus was sufficient to establish the jurisdiction of Turkey. The same course of action can be found in the judgement on *Soering v. United Kingdom*. In this landmark case, the Court applied an extensive interpretation of Art.1 ECHR: *Soering* determined not only the extraterritorial application of the Convention, but the fundamental obligation, by State

[156] De Vido, S. S. (2020). Di Autorità, Poteri Sovrani E Iurisdictio: L'incerta Situazione Della Crimea Nei Procedimenti Innanzi A Corti Internazionali, Regionali E A Tribunali Arbitrali. Ordine internazionale e diritti umani, p.804.
[157] Budzianowska, D.C. (2012). Supra note 121, p.54.
[158] Ivi, p.55.
[159] ECtHR, *Loizidou v. Turkey*, Appl. no. 15318/89, Judgment of 23 March 1995; ECtHR, *Cyprus v. Turkey*, Appl. no. 25781/84, Judgment of 10 May 2001; ECtHR, *Banković and Others v. Belgium and Others*, Appl. no. 52207/09, Judgment of 12 December 2001; ECtHR, *Issa and Others v. Turkey*, Appl. no. 31821/96, Judgment of 16 November 2004; ECtHR, *Ocalan v. Turkey*, Appl. no. 46221/99, Judgment of 12 May 2005; ECtHR, *Medvedyev and Others v. France*, Appl. no. 3394/03, Judgment of 29 March 2010; ECtHR, *Al-Skeini and Others v. The United Kingdom*, Appl. no. 55721/07, Judgment of 7 July 2011; ECtHR, *Jaloud v. The Netherlands*, Appl. no. 47708/08, Judgment of 20 November 2014.
[160] *Ilascu v Moldova and Russia* [GC], no. 48787/99, §312, ECHR 2004.
[161] Khaliq, U. (2008). Supra note 18, p.37.

parties to the Convention, to prevent any extraterritorial violations of the Convention rights if it is within their power to do so[162].

The ECtHR's interpretation of the meaning of Article 1 changed considerably over time and especially with the much-criticized *Bankovic* decision in 2001. In the *Bankovic* decision, the Court declared a complaint by the survivors and the surviving dependents of the deceased victims of a NATO bombing in Belgrade inadmissible on grounds of lack of jurisdiction. The Court held that the NATO Member States did not have jurisdiction as they were not exercising effective control over that territory at that time in the sense of "exercising all or some of the public powers normally to be exercised by that Government"[163]. In this case, the ECtHR applied a very restrictive interpretation of "effective control" and used the public international law interpretation of "jurisdiction". As a result, it did not apply Convention provisions extraterritorially in this case. The Court limited itself to a strict literal interpretation of law principles, not attaching enough weight to the purpose and spirit of the Convention as an evolving instrument, as was intended at the moment of its creation. *Bankovic* has been often criticized because it created a perverse incentive for states acting outside their boundaries[164]. Fortunately, this restrictive line of interpretation of Art.1 has not been, and hopefully will not be, followed in the subsequent case law. As a matter of fact, the Court came to an opposite conclusion on a similar case just a couple of years later, in *Issa*, where it focused on the activities of the contracting state, rather than on whether the breach of the Convention took place under its jurisdiction. The conclusions drawn by the Court on *Bankovic* and *Issa* are so contradictory with one another, that the concepts of "state responsibility" and "jurisdiction" seem to have been at least intertwined if not confused by the Court in the *Issa* judgement[165]. The greatest *Bankovic* fallacy is that the notion of state jurisdiction in human rights treaties reflects that notion of jurisdiction in general international law which delimits the municipal legal orders of states[166]. These concepts are not the same, and a consistent application of the strictly territorial jurisdiction in HR treaties would result in absurd consequences, not intended for when the Convention was signed.

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[162] *Soering v United Kingdom*, no.14038/88, §82, ECHR 1989.
[163] *Bankovic and others v Belgium* (dec.) [GC], no. 52207/99, §70, ECHR 1999.
[164] Milanovic, M. (2011). Supra note 118, p.30.
[165] Budzianowska, D.C. (2012). Supra note 121, p.56.
[166] Milanovic, M. (2011). Supra note 118, p.262.

In the following years, ECtHR jurisprudence overcame the much debated decision on *Bankovic*, and in one of the most authoritative cases on the subject of extraterritorial application of the ECHR, *Loizidou v. Turkey*, the Court established that "although Art. 1 sets limits on the reach of the Convention, the concept of 'jurisdiction' under this provision is not restricted to the national territory of the High Contracting Parties"[167], as it recognized State agent authority and control as grounds for jurisdiction in the preliminary objections. Hence, the concept of jurisdiction derived from general international law serves a completely different purpose from that developed by the European Court in *Loizidou* - it sets out limits on the domestic legal orders of states, so that they do not infringe upon the sovereignty of others[168]. Furthermore, in its judgment in *Ilascu v. Moldova and Russia*, the Court further remarked that "the words "within their jurisdiction" in Art. 1 of the Convention must be understood to mean that a State's jurisdictional competence is primarily territorial (...), that the jurisdiction is presumed to be exercised normally throughout the State's territory"[169]. Nevertheless, the use of the words "primarily" and "normally" indicate that this is not an absolute rule. Thus, the ECtHR never closed itself off from the possibility of applying the Convention extraterritorially.

The Court famously ruled on the extraterritorial liability of states under the ECHR in *Al Skeini v United Kingdom*[170]. Gathered as a Grand Chamber, the Court attempted to tie up the loose ends and clarify its inconsistencies in ruling on extraterritorial jurisdiction: the most significant statement of the Court in *Al-Skeini* is that "[w]hat is decisive in such cases is the exercise of physical power and control over the person in question"[171]. Starting from these premises, the Court found that under exceptional circumstances the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq, and therefore exercised control and authority over the deceased. Once determined that a State could exercise extraterritorial jurisdiction when it applied control and authority over a complainant and when it held effective control of an area outside its

[167] *Loizidou v Turkey* [GC], no. 15318/89, § 62, ECHR 1995.
[168] Milanovic, M. (2011). Supra note 118, p.29.
[169] *Ilascu v Moldova and Russia* [GC], no. 48787/99, §312, ECHR 2004.
[170] *Al Skeini and others v United Kingdom* [GC], no. 55721/07, §136, ECHR 2011.
[171] Ibid.

borders, the Court determined "a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention"[172].

One of the most referential case of the recent ECtHR jurisprudence on extraterritorial application of the Convention, *Hirsi and others v Italy*[173], directed the jurisprudence of the Court once and for all towards an extensive interpretation of Art.1. The judgement on *Hirsi* is particularly important to our analysis because it constitutes a fundamental precedent for the extraterritorial applicability of the Convention and is a key finding for the principle of *non-refoulment* in European jurisprudence. The Court ensures stability and coherence to the interpretation of Art.1 because it has to take into account its precedents[174]. We are then reassured on the general ambition of the Court of a broader interpretation of Art.1 ECHR. One possible answer to the inconsistency between the general international law notion of jurisdiction and the one developed by the European Court in *Loizidou* and reaffirmed in later cases, *Bankovic* included, is that *Loizidou* and its progeny are completely wrong and should be overruled[175].

The *Jaloud* judgement offers another perspective on the debated issue of the extraterritorial applicability of the Convention: at §121, the Government of the United Kingdom stressed the interpretation of Art.1 by the Court in the *Bankovic* decision on admissibility. The Government interpreted the above-mentioned Banković decision, in particular its §65, as implying that the notion of "jurisdiction" should not be allowed to "evolve", or "incrementally develop", in the same way as the law in respect of the substantive rights and freedoms guaranteed by the Convention; in their words, the "living instrument" doctrine was inapplicable[176]. However, the Court found that the Netherlands was indeed exercising effective control over the area where Mr. Jaloud met his fate, notwithstanding the designation of "occupying power" of the United States and the United Kingdom by the UN Security Council. In light of the latter cases, it does appear that, after *Bankovic*, the ECtHR has not emphasized the territorial nature of jurisdiction as much as it did previously; the Court uses the notion of protection of human rights to allow the concept of extraterritorial jurisdiction to evolve and develop[177]. Arguably, the

[172] Ivi, §149.
[173] *Hirsi Jamaa and others v Italy* [GC], no. 27765/09, ECHR 2012.
[174] Zagrebelsky, V. et al. (2016). Supra note 155, p.70.
[175] Milanovic, M. (2011). Supra note 118, p.29.
[176] *Jaloud v The Netherlands* [GC], no. 47708/08, §121, ECHR 2014.
[177] Budzianowska, D.C. (2012). Supra note 121, p.37.

concept of jurisdiction is an alive instrument of the Convention, which has itself often been featured as an evolving instrument over its 70 years of history. After having considered the relevant case law of the ECtHR on the extraterritorial applicability of the Convention we can say quite confidently, quoting the Court itself reversing its initial judgement on the interpretation of Art.1 in *Bankovic*, that in fact "Convention rights can be divided and tailored"[178].

These precedents are well-established in the ECtHR's jurisprudence and constitute a clear yet flexible legal framework for applying the Convention extraterritorially. By declaring that its jurisprudence in the application of extraterritorial jurisdiction has much to do with exceptions, and very little with a generalizable principle, the Court seemed to confirm between the lines that there is no definite nexus between a contracting party's jurisdiction and the physical territory of a state. As a matter of fact, following the judgement on *Soering*, it became clear that according to the Court's interpretation of Art.1, contracting parties to the ECHR are under an obligation to prevent any extraterritorial violations of the Convention rights if it is within their power to do so. Moreover, in *Al-Skeini* the Court emphasized that "whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual"[179].

To conclude this section, we have defined the extraterritorial reach of the ECHR and contracting parties' accountability for human rights breaches committed beyond their territorial jurisdiction under Convention provisions. In light of the jurisprudence of the ECtHR, the notion of jurisdiction in this system seems to present autonomy profiles to guarantee fundamental human rights[180]. Thus, any of the contracting states implicated in a violation of Convention rights can be found to be individually responsible for the breach: this applies also to violations committed extraterritorially. Is the European Union, of which its 27 Member States are all contracting parties to the Convention, bound by the same obligation? According to the Draft Articles on Responsibility of States for

[178] See *Bankovic and others v Belgium* (dec.) [GC], no. 52207/99, §75, ECHR 1999; *Hirsi Jamaa and others v Italy* [GC], no. 27765/09, § 74, ECHR 2012; *Jaloud v The Netherlands* [GC], no. 47708/08, §154, ECHR 2014; *Al-Skeini* and others v The United Kingdom [GC], no. 55721/07, §137, ECHR 2011
[179] *Al-Skeini and others v The United Kingdom* [GC], no. 55721/07, §137, ECHR 2011
[180] De Vido, S. (2020). Supra note 156, p.804.

Internationally Wrongful Acts of 2001[181], Article 47(1) provides that "where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act". In the next section, we will briefly consider the possible accession of the European Union to the ECHR, as prescribed by Art. 6 TEU, and possible repercussions in terms of human rights accountability on the European institutions.

2.1.1 The accession of the European Union to the ECHR and possible repercussions in terms of human rights accountability

In this section we will consider the possible accession of the European Union to the ECHR and its repercussions in terms of accountability. In fact, while Member States are evaluated in their actions by not one, but two Courts, the European Union as a whole, although invested of legal personality, is not subject to review for its own foreign policy acts. In this regard, the justiciability gap, considering the current legal provisions for European foreign policy acts ex Art. 24 TEU and 275 TFEU, is undeniable.

We will argue that the answer to this gap rests in the provision enshrined at Art.6 TEU of the Lisbon Treaty. ECtHR jurisprudence on the extraterritorial application of the Convention is well-established and the Court has repeatedly ruled on human rights violations outside the territorial jurisdictions of its contracting parties. The accession of the Union to the Convention will not only make the ECHR a binding instrument for the Union, but will also fill the gaps in Treaty provisions on the protection of human rights and provide justiciability for CFSP acts[182].

The International Court of Justice (ICJ), in assessing the Agreement of 25 March 1951 between the World Health Organisation (WHO) and Egypt[183], held that international organizations are subjects of international law and are bound by general rules of international law, under their constitutive treaties and other international agreements to

[181] United Nations General Assembly. (2001). Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

[182] Smith, K. (2014). Supra note 67, p.98.

[183] International court of justice. 20 December 1980. Interpretation of the agreement of 25 March 1951 between the WHO and Egypt. Advisory opinion. Available at: https://www.icj-cij.org/public/files/case-related/65/6305.pdf

which they are parties[184]. In this respect, not only did the previously discussed Maastricht Principles established guidelines for the extraterritorial obligations of states in matters regarding human rights, but they also affirmed that "states must ensure the availability of effective mechanisms to provide for accountability in the discharge of their extraterritorial obligations"[185].

The meaning of this statement for the European Union will now be discussed. It is clear that the legal system underlying the institutions of the European Union owes a great deal to international law and has the obligation to respect and uphold customs and peremptory norms in its relations with third states. In this sense, Member States and consequently the Union have an obligation to respond, in certain circumstances, to violations of human rights by third states. Where all of the Union's Member States are party to a human rights treaty, they have a legitimate interest in ensuring that third states comply with their obligations under it. If this does not happen, the Union and its Member States, as is the case with all other states, must not aid or assist in the commission of any internationally wrongful acts by another state. Where serious breaches of peremptory norms of international law take place, the Community and its Member States must cooperate together with others to bring to an end, through lawful means, such violations. Regardless of whether there is a right to act or an obligation, the responses must be lawful[186]. But how is lawful determined, speaking of European actions in the context of CFSP? As we have seen, the Lisbon Treaty provides specific provisions for this particular branch of acts, and specifically does not allow for the creation of legislative acts and for the CJEU to have jurisdiction over matters regarding the CFSP. However, as clearly stated in the Maastricht Principles, "States must ensure the availability of effective mechanisms to provide for accountability in the discharge of their extraterritorial obligations"[187].

Art.6 TEU specifically requires the Union to accede to the ECHR. The reasons behind this article will be briefly discussed, introduced by a short overview of the jurisprudence of the two Courts. The relevance of the European Court of Human Rights and its jurisprudence with respect to the Court of Justice of the European Union is essential to investigate this provision.

[184] Khaliq (2008). Supra note 18, p.45.
[185] ETO Consortium. (2013). Supra note 150.
[186] Khaliq, U. (2008). Supra note 18, p.45.
[187] ETO Consortium. (2013). Supra note 150, p.11.

No other "foreign" court has been cited by the Court of Justice of the European Union on as frequent a basis as the European Court of Human Rights[188]. As a matter of fact, some scholars[189] have noted that the CJEU has operated almost as if the EU was already a party of the Convention. The Court of Justice has on a number of occasions referred to judgements given by its sister organization in Strasbourg and has strongly relied on its jurisprudence. It was always clear that the two Courts shared the same system of values and relied on each other's jurisprudence. However, since the entry into force of the TEU as amended by the Treaty of Lisbon, the close relationship between the two courts has been compromised. In fact, as discussed in Chapter 1, the Treaty of Lisbon institutionalized as formally and legally binding on EU institutions the European Charter of Fundamental Rights: this implied a brand-new set of human rights provisions for the European Union which belonged to its own legal system; consequently, new competences were relied upon the CJEU. As a consequence of this fact, where the case law of the ECtHR was duly considered in cases before the Court of Justice in which fundamental rights played a role, that examination has become less extensive post-Lisbon[190].

The reason why it is so important for the European Union to accede as a contracting party to the ECHR lies in the fact that the diminished reliance of the CJEU on the ECtHR could mark the institutionalization of a judiciary gap in the European instruments of protection of human rights. The nature of this gap can be simply stated. In the absence of accession of the EU to the ECHR, in every instance where Member States act directly, or where they give effect to EU measures, their acts can be challenged before the European Court of Human Rights. Yet, where the EU, its institutions, or its bodies, offices and agencies act directly on individuals, groups or corporations, no involvement at judiciary level is possible. The suggestion that this gap could be filled by proceedings brought against the EU Member States collectively must be rejected; the EU certainly has a separate legal personality and has its own responsibility for its acts[191]. Therefore, it can be argued that the answer to this gap rests in the provision enshrined at Art.6 TEU of the

[188] Krommendijk, J. (2015). The use of ECtHR case law by the Court of Justice after Lisbon. The View of Luxembourg Insiders. Maastricht Journal of European and Comparative Law. Available at: https://journals.sagepub.com/doi/pdf/10.1177/1023263X1502200603 pp.1-2.
[189] See: De Witte, B. (2011). The use of the ECHR and Convention case law by the European Court of Justice. In Popelier, P. et al. (eds). "Human rights protection in the European legal order: the interaction between the European and the national courts". Intersentia. 2011. pp. 17-18.
[190] Krommendijk, J. (2015). Supra note 188, p. 2.
[191] Kosta, V., Skoutaris, N. and Tzevelekos, V.P. (2014). Supra note 131, p.1.

Lisbon Treaty. The accession of the Union to the Convention will not only make the ECHR a binding instrument for the EU, but also fill the gaps in treaty provisions on the protection of human rights and provide justiciability for acts related to the Union CFSP, which as mentioned are not justiciable under CJEU following treaty provisions.

The ECtHR in its jurisprudence has repeatedly ruled on human rights violations outside the territorial jurisdictions of its contracting parties, as we have discussed in the previous section. Consequently, the ECtHR is allowed to rule on human rights breaches outside the physical borders of the Convention. By acceding to the ECHR, the Union will finally overcome the lack of justiciability for its foreign policy actions. This way, the ECtHR will become the ultimate organ of control of the compatibility of EU acts with the European system of human rights protection; the provision on accession established by Art.6 TEU, protocol No 14 to the ECHR, introduced in June 2010, has created the necessary legal preconditions for EU accession.

However, things have not run very smoothly. Many obstacles, legal and procedural, stand before this accession. Famously in its Advisory Opinion 2/13[192], the CJEU stated that "the agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms". The reasons for this opinion are numerous. Firstly, the Court stated that the draft agreement does not take into account the specific characteristics and autonomy of EU law as it does not restrict Member States having the possibility to apply higher human rights standards than the EU Charter; problematic, according to the Court, where the EU has fully harmonized the law[193]. Secondly, in blocking the accession of the European Union to the ECHR, the Court of Justice acknowledged that "an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order"[194]. This view casted doubts on the fact that the Court viewed the preservation of

[192] Court of Justice of the European Union. Opinion 2/13. Supra note 132, §183.
[193] Kosta, V., Skoutaris, N. and Tzevelekos, V.P. (2014). Supra note 131, p.45.
[194] Court of Justice of the European Union. Opinion 2/13. Supra note 132, §183.

the sovereignty of the Court itself as carrying greater importance than the safeguarding of European values, to the point of securing it from external impact spheres of jurisdiction that are at the moment precluded to the Court, as in the case of the CFSP[195]. Thirdly and most importantly, the draft agreement on accession would allow the ECtHR to rule on the compatibility with the ECHR of certain acts, actions or omissions performed within the context of the Common Foreign and Security Policy (CFSP). The Court held that the ECtHR, a non-EU body, would have exclusive judicial review of CFSP acts, actions or omissions. This would be in contradiction with the Court's previous finding that "judicial review of acts cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU"[196].

In short, the Court determined that jurisdiction to carry out a judicial review of European Union acts, actions or omissions, especially regarding fundamental rights, cannot be conferred exclusively to an international Court which is outside the institutional and judicial framework of the EU. In the Court's view, to concede exclusive competence to interpret and enforce judgements to an external judge or Court in matters regarding the European judiciary system would "deprive MS judges of their competences […], and the Court itself of its competence in ruling on questions posed by European law and the competence attributed to the Court by the constituting treaties, which are essential to the safeguard and protection of the nature itself of the European system"[197]. To substantiate this view, Opinion 2/13 underlined the recent trend whereby the Court of Justice is increasingly relying on its "own" instrument, the Charter of Fundamental Rights.

Admittedly, the possibility that Charter will eventually sideline the ECHR and the ECtHR altogether is not so far-fetched. The diminished focus on Strasbourg is especially visible in the declining frequency of ECtHR citations[198]. This of course means that the reliance of the CJEU on ECHR provisions might be hindered by Opinion 2/13, and this fact might herald a new era and change the previous practice of extensive "cross-fertilization" and "parallel interpretation" between the two Courts[199]. Title V TFEU on

[195] Mastroianni, R. (2016). Le garanzie dei valori nell'azione esterna e il ruolo della Corte di Giustizia. In "I valori dell'Unione Europea e l'azione esterna" (2016) Ed. by Sciso, E., Baratta, R. and Morviducci, C. G. Giappicchelli Editore. Torino., pp.220-223.
[196] Court of Justice of the European Union. Opinion 2/13. Supra note 132, §254-256.
[197] Ivi, §182.
[198] Krommendijk, J. (2015). Supra note 188, p.13.
[199] Ivi, p.14

the international agreements of the Union gains particular relevance in this Opinion. According to Art.216(2), "Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States". This constitutes a real legal obligation and as a consequence falls into Court of Justice's jurisdiction. The Treaty ascribes a veto power to the Court in case a conflict between Union's obligations following a new international Treaty and the provisions enshrined in the constitutive treaties. The Court has blocked accession to the ECHR following precisely this path[200]. Notwithstanding Opinion 2/13, however, the bigger issue here is, as we had the opportunity to point out, justiciability. Art. 47 of the Charter of Fundamental Rights of the Union on the right to an effective remedy is difficult to square with the exclusion of the Court from CFSP matters, which could conceivably affect the legal rights of individual citizens[201]. One way or another, the Union is bound to find a way to make its CFSP acts reviewable and justiciable.

As per recent developments insofar accession to the ECHR, on 31 October 2019, the then President and Vice-President of the European Commission co-signed a letter to the Secretary General of the Council of Europe in which they declared that the EU was ready to resume negotiations. The Council of Europe and the EU have been working on the preparations for the continuation and finalization of the negotiations, and the next meeting on the issue was scheduled for 24 March 2020 but was postponed due to Covid-19 crisis. An informal virtual meeting was held on 22 June 2020[202], and negotiations formally continued in Strasbourg from 29 September to 2 October 2020[203]. The last negotiation meeting occurred from 2 to 4 February 2021[204]. On this occasion, the Secretariat introduced a compilation of cases where delegates noted a degree of convergence in the case-law of both European courts since 2014 which would appear to alleviate some of the

[200] Tizzano, A. and Adam, R. (2017). Supra note 77.
[201] Cardwell, P.J. (2015). The legalisation of European Union foreign policy and the use of sanctions. Cambridge Yearbook of European Legal Studies, 17 (1)., p.24.
[202] Council of Europe. 22 June 2020. Meeting Report. Virtual informal meeting of the CDDH ad hoc negotiation group ("47+1") on the accession of the European Union to the European Convention on Human Rights. Available at: https://rm.coe.int/cddh-47-1-2020-rinf-en/16809efeda
[203] Council of Europe. 22 October 2020. Meeting Report. 6th meeting of the CDDH Ad Hoc Negotiation Group ("47+1") on the accession of the European Union to the European Convention on Human Rights. Available at: https://rm.coe.int/cddh-47-1-2020-r6-en-/1680a06313
[204] Council of Europe. 4 February 2021. Meeting Report. 8th meeting of the CDDH ad hoc negotiation group ("47+1") on the accession of the European Union to the European Convention on Human Rights. Available at: https://rm.coe.int/cddh-47-1-2021-r8-en-fin-public-version/1680a17af7

concerns that existed at the time when Opinion 2/13 was rendered by the Court of Justice of the European Union[205]. In particular, Item 3 focused on a discussion of the situation of EU acts in the area of the Common Foreign and Security Policy that are excluded from the jurisdiction of the Court of Justice of the European Union[206]. The next meeting is scheduled for 23-25 March 2021. The resumption of the negotiations sends a strong signal about the commitment of the two organizations and their Member States to the fundamental rights that they cherish.

On the one hand, as we have seen, CFSP acts are not justiciable before the judiciary organs of the European Union because they do not translate in legislative acts under Art.24 TEU, where "the adoption of legislative acts shall be excluded". On the other hand, one foreign policy practice that has seen an increase in its utilization in the last decade does entail the adoption of legislative acts and as a consequence is justiciable and can be reviewed by the CJEU. The restrictive measures, or sanctions, introduced by the European Union in the context of the CFSP, their legal value, judiciary review and implications for human rights provisions will be discussed in the next section.

2.2 The sanctioning policy of the European Union in the EHRP framework

In this section, we will move to examine the use of restrictive measures, or sanctions, as one of the most effective foreign policy tools at European disposal in order to achieve its ambitions as a global player. The case of *P. Kadi and Al Barakaat International Foundation v. Council and Commission*[207] will be briefly presented in order to substantiate the exceptional relevance of human rights in the European legal order. A particular emphasis will be laid on this instrument's consistency with European human rights requirements in foreign policy as the main subject matter of this thesis. We will conclude our reasoning by admitting that sanctions as a foreign policy instrument have been increasingly deployed in the last decade by the EU, partly because of their exceptional results in foreign policy. We will stress that human rights considerations when implementing sanctions are extremely precise and consistent with the HR

[205] Ivi, §3.
[206] Ivi, §7.
[207] Case C–402/05 P and C–415/05, P. Kadi and Al Barakaat International Foundation v. Council and Commission [2008] ECR I–6351.

objectives prescribed in the Treaty, to the point that HR considerations at EU level are able to reverse a UNSC resolution.

Sanctions are measures which aim to restrict the economic and other relationships between states, or between states and the international community (including regional organizations)[208]. They are generally considered by the international community as a tool to promote a change or punish a particular behaviour in order to isolate a state. For what concerns the European context, sanctions can be transposed into EU law when implemented by the UNSC or can be autonomously put in force by the EU as a solo initiative. As of 2020, there are over 40 EU autonomous and UN transposed sanctions regimes in place globally[209]. Restrictive measures, or sanctions, have grown to become one of the most important European tools to promote the objectives of the External Action. These include, as provided for by the Treaties, promoting its fundamental interests and security; consolidating and supporting democracy, the rule of law, human rights and the principles of international law; preserving peace; preventing conflicts and strengthening international security. Starting from the 1970s, the EU has formulated its foreign policy according to common values and principles due to the lack of a common European identity[210]. Until 1990s, the EU applied some sanctions to the countries that violated human rights only when the Member States' interests converged to an extent, in some cases like Poland, South Africa and China.

As previously presented, the Maastricht Treaty, in order to give a unified voice to the Union in foreign policy matters, provided for the creation of a Common Foreign and Security Policy and delegated the sanctioning prerogative from the Member States to the supranational institutions at the European level; the experience of the EU adopting sanctions thus dates back to November 1993. The provisions regarding sanctions in the Maastricht Treaty created a link between the political CFSP (under Title V of the TEU) and the legal Community order, which largely remains intact to this day[211]. The extent to which the Union has made use of these instruments in the years following the end of the Cold War, and specifically the post-9/11, has made sanctions a key practice of European

[208] Cardwell, P.J. (2015). Supra note 201, p.25.
[209] Consolidated list of persons, groups and entities subject to EU financial sanctions is available on the European Commission website < https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions_en >. Accessed on 22/11/2020.
[210] King, T. (1999). Supra note 5, p.315.
[211] Cardwell, P.J. (2015). Supra note 201, p.15.

CFSP actions. Today, in the context of the CFSP, sanctions are labelled "restrictive measures" and their adoption is reflected in legislative acts, "Common Positions" before the Lisbon Treaty and "Council Decisions" thereafter[212]: they are the most significant coercive tool available to the European Union in the foreign policy area. As sanctions can be transposed in legislative acts and thus become part of the Union legal order, they are reviewable by the CJEU[213]. The European Union has, over the years, characterized and featured the use of sanctions in order to adapt this instrument to international events and to be consistent with its representation as a human rights promoter in the realm of international relations.

According to the Basic Principles on the use of restrictive measures, emitted by the Council, sanctions should be targeted in a way that has maximum impact on those whose behaviour the Union wants to influence. Targeting should reduce to the maximum extent possible any adverse humanitarian effects or unintended consequences for persons not targeted or Neighbouring countries[214]. In this spirit, the Council subsequently updated the "Guidelines on implementation and evaluation" of sanctions, lastly formalized in 2018. This document states that the EU has adopted a "targeted" approach, meaning that sanctions are designed so as to minimize the impact on civilians while increasing the burden on certain actors in order to achieve a foreign policy objective. Six types of measures are identified: arms embargoes, travel bans, asset freezes, financial restrictions, trade restrictions and diplomatic restrictions[215]. Seven categories of type of crises that triggered the imposition of EU sanctions are laid down: democracy promotion, crisis management, post-crisis management, non-proliferation, terrorism, EU interests and international norms[216]. Notably, the human rights dimension was always taken into account in defining the guidelines for sanctions: particularly, in the words of the then High Representative in 2012, "… whatever we do, we have to respect human rights, fundamental freedoms, due process and the right to an effective remedy in full conformity

[212] Portela, C. (2016). Are European Union sanctions "targeted"?, Cambridge Review of International Affairs, 29:3, 912-929.
[213] Art.275 TFEU.
[214] Council of the European Union. Basic Principles on the use of restrictive measures (Sanctions). Brussels, 7 June 2004. Available at: https://data.consilium.europa.eu/doc/document/ST-10198-2004-REV-1/en/pdf
[215] Giumelli, F., Hoffmann, F. and Książczaková, A. (2020). The when, what, where and why of European Union sanctions. European Security, p.8.
[216] Ibid.

with the jurisprudence of the EU Courts"[217]. The development of the CJEU's role as a human rights adjudicator is not just a function of the coming into force of the Charter with a binding set of EU human rights commitments, but also a consequence of the continued expansion of the scope of EU law and policy as provided for by the Treaties[218].

The primary issue with targeted sanctions has been their compatibility with procedural rights: the right of access to a court, to a fair trial and to a remedy, as provided for by several international human rights Treaties, such as the European Convention on Human Rights, Arts 6 and 13; the International Covenant on Civil and Political Rights, Arts 2(3) and 14; and EU Charter of Fundamental Rights, Art 47. It is evident from the second subparagraph of Article 24(1) TEU that, for what concerns the provisions of the Treaties that govern the CFSP, the Court of Justice has jurisdiction to review the legality of certain decisions as provided for by the second paragraph of Article 275 TFEU. Thus, the Lisbon Treaty provisions preclude procedural and substantive review of CFSP measures except for the legality of restrictive measures[219]. Under Art.275 TFEU, the Court is in fact permitted to review decisions affecting the rights of natural or legal persons in cases where restrictive measures are placed upon them. The fundamental values at the heart of European Foreign Policy, as laid out at Art.21 TEU, have to be respected in every situation, considering the requirements of proportionality. This is why in Declaration 25 attached to the Treaty on Art.75 and 215 TFEU is stated that "for the purpose and in order to guarantee a thorough judicial review, decisions subjecting an individual or entity to restrictive measures, such decisions must be based on clear and distinct criteria. These criteria should be tailored to the specifics of each restrictive measure"[220].

As Cardwell points out, sanctions are both a foreign policy tool and a legal instrument, capable in some circumstances of being challenged in the Court following a legislative process[221]. Sanctions have come to be, in the European system, a somewhat final tool to

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[217] European Parliament. 1 February 2012. Speech by European Union High Representative on the EU's policy on restrictive measures. Available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/127812.pdf

[218] Burca, G. (2013). After the EU Charter of fundamental rights: the Court of Justice as a human rights adjudicator? Maastricht Journal of European and Comparative Law. No. 20(2), pp. 168-184.

[219] Cardwell, P.J. (2015). Supra note 201, p.16.

[220] Declaration on Articles 75 and 215 of the Treaty on the Functioning of the European Union. Signed on 13 December 2007. C326/339. §25. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF

[221] Cardwell, P.J. (2015). Supra note 201, p.3.

enforce its legislative power in foreign policy, able to connect European aspirations of being an effective international player and its huge economic power. Although sanctions seem to reverse the precedent picture of the EU as a normative actor in foreign policy, nevertheless decisions to impose sanctions are significant: sanctions mark the EU out as an actor capable of "doing things" [222]. The pace of utilization and the degree of institutionalization of restrictive measures in European practice indicate that EU Member States have delegated much of their sanctioning authority to Brussels. It can be deduced that the imposition of sanctions does enhance the visibility and profile of the EU as an international actor much more than individual sanctions by the Member States[223]. Sanctions have significantly contributed to the consolidation of the international actorness of the EU; the Union has oftentimes relied on sanctions to play a role in international crises, and this dependence has only increased over time. The practice of sanctions contributes to the consolidation of the autonomy, capability and coherence/cohesion of the EU as an international actor[224].

Furthermore, sanctions have gradually turned out to be the easiest and most effective way for the EU to play a role in the international security field, demonstrated by its willingness to actively engage in the crises emerging in its immediate Neighbourhood, from the social unrest in the MENA region to events in eastern Ukraine. It appears then that the EU has learned how to adjust its policy choices to policy objectives[225].

2.2.1 CJEU jurisdiction regarding sanctioned persons' right to a fair trial

We will now move to investigate CJEU jurisprudence in line with the provision ex Art.275 TFEU in reviewing the legality of restrictive measures against natural or legal persons. As portrayed, sanctions are the only foreign policy act under CFSP provisions which allows for a judicial review by the CJEU. The CJEU is thus empowered to adjudicate challenges brought by natural or legal persons contesting the legality of individual sanctions the European Union imposes in the CFSP context. The right to bring

[222] Carlsnaes, W., Sjursen, H. and White, B. (2004). Contemporary European Foreign Policy. SAGE Publishers. London., p.141.
[223] Giumelli, F., Hoffmann, F. and Książczaková, A. (2020). Supra note 215, p.14.
[224] Ivi, p.4.
[225] Ivi, p.15.

an action before the EU Courts is provided for in the Treaty and it is an expression of the fundamental right to effective judicial protection, enshrined in Article 47 of the EU Charter of Fundamental Rights[226]. In this respect, the EU needs to carefully be consistent with its foreign policy values and objectives, as laid down in Art.21 TEU, and provide legal basis for affecting the economic, social, sometimes fundamental rights of the persons it aims to sanction. In deciding sanctions cases, EU courts have walked a fine line between protecting designated persons and entities from arbitrary designation and overtly interfering with EU foreign policy.

Notably, the *Kadi*[227] case is maybe the most important line of jurisprudence regarding EU restrictive measures, as it raised awareness of the possible human rights violations embedded in sanction policies. It is well beyond the scope of this thesis to analyze the maybe more important feature of *Kadi*, that is the alleged primacy of EU law over a United Nations Security Council resolution. We will focus on the repercussions in terms of the enjoyment of fundamental rights by the claimant, Kadi, and the implications for European External Human Rights Policy brough about by this line of jurisprudence. The basic facts of the Kadi case are as follows: in the UN Security Council Kadi was identified as a possible supporter of Al-Qaida, in the aftermath of 9/11 and the search for an appropriate response of the international community to terrorist threats. Therefore, he was singled out for sanctions, in particular for an assets freeze. The EU transposed this UN sanction by a regulation which Kadi then attacked before the EU Courts, seeking annulment of the latter before the European Court of First Instance (CFI) inter alia on grounds of breach of fundamental rights in the form of respect of property, right to be heard and right to effective judicial review. The CFI fully took into account the international context and appeared to accept a subordinate place of the European legal order in the international. It refused to review the EU regulation because this would amount to a review of the measure of the Security Council. Nevertheless, it examined whether the Security Council had respected *ius cogens*, in particular certain fundamental rights of the applicant. However, the Court did not find an infringement of this standard. In its judgment on appeal, the CJEU pursued a different path. The CJEU unequivocally

[226] Kokott, J. and Sobotta, C. (2012). The Kadi Case – Constitutional Core Values and International Law – Finding the Balance? The European Journal of International Law Vol. 23 no. 4, p.1023.
[227] Case C–402/05 P and C–415/05, P. Kadi and Al Barakaat International Foundation v. Council and Commission [2008] ECR I–6351.

stated that by adopting such an approach, the CFI had erred in law[228]. The CJEU reviewed the lawfulness of the EU regulation transposing the resolution. Its central argument was that the protection of fundamental rights forms part of the very foundations of the Union legal order. Accordingly, all Union measures must be compatible with fundamental rights. The Court reasoned that this does not amount to a review of the lawfulness of the Security Council measures. The review of lawfulness would apply only to the Union act that gives effect to the international agreement at issue and not to the latter as such[229]. Having established that, the review for compliance with fundamental rights was a relatively simple task. The claimant had not been informed of the grounds for his inclusion in the list of individuals and entities subject to the sanctions. Therefore, he had not been able to seek judicial review of these grounds, and consequently his right to be heard as well as his right to effective judicial review and the right to property had been infringed. In sum, in its judgment on appeal, the central argument of the Court was that the protection of fundamental rights forms part of the very foundations of the Union legal order[230]. As a matter of fact, Advocate General Maduro, in a simple opinion permeated by the European human rights and rule-of-law traditions, suggested that whatever the legal instrument through which the sanctions in question were adopted (in this case, a UN resolution), the EU could not unequivocally apply restrictive measures to people within its jurisdiction simply because another international organization, albeit a powerful one, imposed so. The Court held that within the European legal order the supreme laws of the land are the fundamental human rights derived from its own constitutional principles[231].

Once established the primacy of the protection of Human Rights for the Union over any other form of legal acts emitted by any other international organization, the Court continued its reasoning noting that the claimant had not been informed of the grounds for his inclusion in the list of individuals and entities subject to the sanctions. Therefore, he had not been able to seek judicial review of these grounds, and consequently his right to

[228] Case C–402/05 P and C–415/05, P. Kadi and Al Barakaat International Foundation v. Council and Commission [2008] ECR I–6351, §327.
[229] De Búrca, G. (2010). The European Court of Justice and the International Legal Order After Kadi. New York University School of Law. 51 Harvard Int'l LJ 1, pp.44-45.
[230] Case C–402/05 P and C–415/05, *P. Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I–6351, §281 and §303.
[231] Cremona, M., Francioni, F. and Poli, S. (2009). Challenging the EU counter-terrorism measures through the Court. EUI Working Papers. AEL 2009/10. Academy of European Law. European University Institute. Florence., p.39.

be heard as well as his right to effective judicial review had been infringed[232]. Therefore, the CJEU annulled the contested sanction regulation for breach of fundamental rights. In this case, the CJEU operated in a candid although unprecedent fashion: it decided to use the simple but highly effective device of taking the rhetoric of human rights seriously. The judges were obliged "in accordance with the powers conferred on them by the Treaties" to "ensure the review […] of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union legal order"[233]. What we can draw from the proceedings of the Court in this instance is that fundamental rights as enshrined in the European Treaties are not a mere justification for foreign policy or a tool to make use of in times of necessity; its nature is as powerful as any other Treaty provision, so powerful that is able to reverse a UNSC resolution. To substantiate this affirmation, the Court stressed how "it is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the Community"[234].

As some exceptions to the implementation of restrictive measures against targeted individuals on the grounds of human rights are evident at European level, so is the general aim of sanctions. As clearly stated in *Bank Melli v Council*, "the applicant's freedom to carry on economic activity and its right to property are restricted to a considerable degree, on account of the adoption of the contested decision […] However, given the primary importance of maintaining international peace and security, the disadvantages caused are not inordinate in relation to the ends sought"[235]. Here, the Court reiterated the cardinal scope of restrictive measures within the European legal order: although an asset freeze is a restriction on the targeted person's property rights, it is not an absolute deprivation (as it is not necessarily permanent), and it will, in most cases, be a proportionate restriction given the other interests at stake: the maintenance or restoration of international peace and security, suppressing terrorist activity, preventing the proliferation of weapons of mass destruction and so on. The fundamental right of a fair trial, as laid down at Art.47

[232] Case C–402/05 P and C–415/05, *P. Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I–6351, §384.
[233] Ivi, §326.
[234] Ivi, §284.
[235] Case C-390/08, *Bank Melli v Council* [2009] ECR II-3967, §71.

of the Charter of Fundamental Rights of the EU and the CJEU jurisdiction in adjudicating human rights breaches in implementing sanctions is of the utmost importance and shall be maintained. However, the Court has reminded in several instances that the deprivation of civil or social rights of individual as a consequence of Council Resolutions establishing sanctions aims at preserving and fostering the external human rights objectives of the Union and corresponds to the proportionality requirement.

2.2.2 Sanctions as a normative tool for increased leadership in the Neighbourhood

The relationship between European sanctioning regime and the countries part of the Neighbourhood will now briefly discussed. In the last two decades, the sanctioning regime of the European Union has been directed mainly towards sanctioning countries part of the European Neighbourhood Policy on the grounds of human rights breaches[236]. The Union has been said to be particularly uncompromising towards its Neighbours because of its intentions of slowly integrating them into its legal order as the "new" ENP provides for[237]. As mentioned, targeted sanctions are considered to be a more effective way to act directly on human rights violations without being detrimental to the wider population of the country of origin. In practice, in most cases where the EU has acted on human rights grounds in the last decade, its measures have anyway targeted individuals. Sanctions target individuals in a way that is separate from the Union's wider strategy toward their nations.

The last few months of 2020 have seen high-level, prominent debates about sanctions at European Union level. The EU has imposed targeted sanctions in response to fraud and repression in Belarus's August 2020 presidential election and the poisoning in the same month of Russian opposition leader Alexei Navalny, while inching toward restrictive measures against Turkey as well. These events sharpened the backdrop to preparations for the new sanctioning regime[238]. As a matter of fact, talks were already in place about

[236] Portela, C. (2016). Supra note 212, p.919.
[237] Ivi, p.920.
[238] Youngs, R. (14 December 2020). The New EU Global Human Rights Sanctions Regime: Breakthrough or Distraction? Carnegie Europe. Accessed on 11/03/2021. Available at: https://carnegieeurope.eu/2020/12/14/new-eu-global-human-rights-sanctions-regime-breakthrough-or-distraction-pub-83415#comments

the EU falling back on its sanctioning regime with respect to other international actors. For example, already in 2012, the US introduced the Magnitsky Act[239] that allowed the superpower to impose sanctions against human rights violators. However, several MS were said to being openly opposed to the idea of introducing a similar-Magnitsky Act, as not to stir problems with Russia. The new sanctioning regime, adopted after a long road in negotiations at EU level, actively widens the scope of thematic targeted sanctions of the Union. The logic behind such targeted measures is, of course, to react to human rights abuses without punishing the general population. The new regime adopted on 2 December 2020 is set up in a way that could restrict the frequency with which this instrument is used, reflecting the fact that some governments still have reservations[240]. In fact, EU Member States have rowed back from agreeing to a system of qualified majority voting for the regime, which would have allowed a majority of countries representing a majority of the EU's population to approve any new measures; instead, unanimity will be required[241]. The main innovation of the new regime, that is separating measures out from country strategies, will bring greater flexibility and may often helpfully untie tightly drawn rights issues from broader geopolitics. However, in practice the new sanctions regime could widen a disconnect between human rights and other concerns, as sanctions will be imposed without any focus on a country's wider political problems. It can be inferred that the EU's new sanctions regime is unlikely to address structural challenges to human rights and democracy[242], one of the most important foreign policy objectives of the Union.

On this note, it is worthwhile to mention the sanctioning regime the EU has in place since 2014 against Russia. Until the outbreak of the crisis in Ukraine, the EU and Russia had been building a strategic partnership based also on their shared Neighbourhood. However, in recent years, the same issue of the shared Neighbourhood has become a

[239] One hundred twelfth congress of the United States of America. December 14, 2012. Russia and Moldova Jackson–Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012. Available at: https://www.govinfo.gov/content/pkg/BILLS-112hr6156enr/pdf/BILLS-112hr6156enr.pdf
[240] Youngs, R. (14 December 2020). Supra note 234.
[241] Council of the European Union. 7 December 2020. EU adopts a global human rights sanctions regime. Press Release. Available at : https://www.consilium.europa.eu/en/press/press-releases/2020/12/07/eu-adopts-a-global-human-rights-sanctions-regime/
[242] Youngs, R. (14 December 2020). Supra note 234.

major point of friction[243]. In fact, after the unilateral annexation of Crimea on account of Russia, the EU and many other international actors set sanctioning regimes against Russia. EU's restrictive measures against Russia take different forms. Diplomatic measures consist of Russia's exclusion from the G8, stopping the process of Russia's accession to the OECD and the International Energy Agency, and the suspension of the regular EU-Russia bilateral summits. Economic sanctions target exchanges in specific sectors. As of December 2020, EU individual restrictive measures apply to 177 individuals and 48 entities, which are subject to an asset freeze and a travel ban because their actions undermined Ukraine's territorial integrity, sovereignty and independence[244]. Indeed, the critical situation has over the years compelled Eastern Neighbourhood countries to take a stance in this respect, in favor either of the EU or their long-standing Russian Neighbour. In the next Chapter, we will further investigate the recent Eastern Association Agreements and the political weight they acquire in relation to the ever-worsening relationship of the two superpowers.

Therefore, this section reflects on the repercussions of the sanctioning policy of the EU towards its Neighbourhood under a different light and suggests that the use of sanctions by the EU has a secondary effect, namely the opportunity for wider leadership in the European Neighbourhood. In practice, this development has opened up the possibility for 14 non-EU states in Europe to be offered the opportunity to align themselves with the restrictive measures imposed by the EU on a case-by-case basis via a CFSP Declaration[245]. As part of the EU's mission to "share values" with its Neighbours, the EU has since 2007 invited most ENP states in Europe to align with European restrictive measures. The evidence demonstrates that this practice can be seen as a success. From 2007 until 2014, 556 Declarations were transmitted to the third states[246] and the EU is continuing to pursue this practice, which has proven very successful, to this date. The rate of alignment for states that are potential candidate for accession is outstanding, as the Union prescribes so in its accession requirements. What is interesting is that the possibility of alignment with EU sanctions is extended specifically to the

[243] European Parliament. (2021). Factsheet on EU-Russia relations. Available at : https://www.europarl.europa.eu/ftu/pdf/en/FTU_5.6.3.pdf
[244] Ibid.
[245] Cardwell, P.J. (2015). Supra note 201, p.18.
[246] Ivi, p.32

countries part of the Neighbourhood, which have no immediate reason for ratifying them. This is a clear expression of what we have tried to portray in the previous Chapter, that is the potential of European leadership in foreign policy, its power to act normatively thanks to its human rights provisions; in this case, restrictive measures condemning human rights abuses in third countries. In brief, the European sanctioning regime and its political repercussions in the Neighbourhood are two-fold: on the one hand, countries part of the European Neighbourhood are the most affected by European sanctions; on the other hand, sanctions directed to third countries can have the effect of bringing together the EU and many (if not all) countries part of the Neighbourhood.

In this section the issue of sanctions as a possible obstacle in terms of European human rights objectives, as affecting the rights of the sanctioned individuals, has been discussed. The conclusion is that thanks to the reviewing practice of the CJEU, the sanctioning regimes deployed by the EU as a foreign policy tool do not affect its human rights objectives. Rather, sanctioning policy turns out to be an instrument of attraction for Neighbourhood countries, in order to align themselves to European policymaking. However, many issues stand in the way of the Union as an international actor able to strike a balance between its global ambitions and the human rights requirements provided for by the Treaties. To quote Jack Donnelly, "if variations in the treatment of human rights violators are to be part of a consistent policy, human rights concerns need to be explicitly and coherently integrated in the broader framework of foreign policy"[247]. In the next section we will consider the European requirements of coherence and consistency and investigate if and how they are met in the context of the sanctioning policy.

2.3 Legitimacy, coherence and consistency in implementing external human rights objectives

In this section we will consider the requirements of legitimacy, coherence and consistency in European foreign policy, in particular regarding the human rights dimension of the sanctioning regimes put in place by the Union. In Chapter 1, we have concluded that, although a specific clause for a European External Human Rights Policy is not provided for in the Treaty of Lisbon, human rights run through European foreign policy provisions

[247] Donnelly, J. (1982). Human Rights and foreign policy. World politics. Vol.34. No.4, p.574.

as a "silver thread". It is safe to say that the promotion of human rights is clearly an important and well-established, cross-pillar foreign policy objective[248]. Andrew Williams has argued that the European Community, early on, adopted human rights as an external objective in an attempt to boost its legitimacy as an international actor[249]. Taking the "moral higher ground" is a way to acquire a sense of purpose and justify the EU's international influence. Following the same reasoning, Gerrits infers that normative power should be primarily seen as legitimate in the principles being promoted. If normative justification is to be convincing or attractive, then the principles being promoted must be seen as legitimate, as well as being promoted in a coherent and consistent way[250]. If the Union wants to present a viable alternative for a new "ethical foreign policy", the reasons behind its every foreign policy act must be legitimate, in order to attract third countries into its normative sphere.

Legitimacy to act externally in the sense of promoting EU values and principles, which include the human right objective, can be found looking at the provisions at Art.2, 3(5) and 21 TEU. Union institutions have repeatedly claimed that the EU strives to be the leading global actor in the universal promotion and protection of human rights[251]. Being the EU founded upon the principle of conferral, its competences derive from the intentions of the Masters of the Treaties, that is, its Member States. By looking at the provisions enshrined in the Lisbon Treaties, we can infer that a European External Human Rights Policy is legitimate in the sense that it is prescribed by the Treaties.

Hillion argued that the Court's jurisdiction in relation to the CFSP is not as limited as an initial reading of the post-Lisbon Treaty arrangements might suggest, especially since the Treaty has provided for the Charter of Fundamental Rights to become a binding instrument of EU law[252]. He asserts that although there are limits to what the CJEU is able to do in terms of the substantive contents of the CFSP, the Court has gained jurisdiction over constitutional principles including respect for fundamental rights, the

[248] Smith, K. (2014). Supra note 67, p.103.
[249] Williams, A. (2004). EU Human Rights Policies: A Study in Irony. Oxford University Press. Oxford., p.171.
[250] Gerrits, A. (2009). Supra note 11, p.12.
[251] Pech, L. and Grogan, J. (2020). Supra note 21, p.328.
[252] Hillion, C. (2014). A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy. In Cremona, M. and Thies, A. (eds). "The European Court of Justice and External Relations Law". Hart Publishing, p. 66.

principle of sincere cooperation and the requirement of consistency[253]. Furthermore, the Court is not the only European organ capable of ensuring coherence and consistency with the EHRP framework. The legislative and executive organs of the EU, the Commission, the Council, and the European Parliament, are more active than the Court itself in promoting consistency and coherence with Treaty objectives in external human rights matters[254]. In fact, the Council has a specialized body, the Working Party on Human Rights (COHOM), which focuses on international affairs directly related to human rights; in addition, the Council publishes an EU annual report on human rights and democracy in the world. Other institutions are also particularly active in this field: for example, the High Representative of the EU for Foreign Affairs and Security Policy and the European Commission published a joint communication document, an Action Plan on Human Rights and Democracy (2015–2019), titled "Keeping human rights at the heart of the EU agenda", and on 20 July 2015, the Council adopted a new "Action Plan on Human Rights and Democracy" for the period 2015–2019[255]. Hence, the EU legislative and executive organs complement and boost the protection of human rights in the EU's external relations and contribute to improving coherence and consistency in European External Human Rights Policy. The new Action Plan 2020-2024 aims to respond to the newly arisen challenges in the global political scenario: the pushback against the universality and indivisibility of human rights and backsliding on democracy must be addressed[256]. The main purpose of the new Action Plan is to identify priorities and focusing on implementation in view of changing geopolitics, the digital transition, environmental challenges and climate change and in so doing maximising the EU's role on the global stage by expanding the human rights toolbox, its key instruments and policies. The new international scenario calls for increased EU leadership in the field of human rights. Interestingly, a section of the action plan is dedicated to ways of enhancing coherence and consistency and break down mishaps between internal and external policy areas[257].

Gerrits provides us with a perfect definition of consistency that we will apply to European External Human Rights Policy: consistency of principles comes from the extent

[253] Ibid.
[254] Pech, L. and Grogan, J. (2020). Supra note 21, p.328.
[255] Council of the European Union. 20 July 2015. Supra note 135.
[256] Joint communication to the European Parliament and the Council. Supra note 30.
[257] Ibid.

to which differing principles and practices to promote them are uniform, both within and without the promoting entity – and are applied uniformly[258]. Although the conception of human rights as universal and inseparable appears to be the same, attention to fundamental rights such as those enshrined in the Universal Declaration of Human Rights is reserved to the field of External Action, whereas the internal level is more focused on economic and social rights. Member States are more inclined to discuss aspects concerning such civil rights when evaluating third states' behavior, rather than their own[259]. If the legitimacy of the foreign policy of the Union is founded upon its Treaties and the values and principles they aim at promoting, notably human rights, the European establishment must be consistent and respect them both internally and externally. Furthermore, consistency is not just a requirement to keep up the good reputation of the EU as a human rights adjudicator but it is clearly provided for by the Treaties: as per Art.13 TEU, "The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions". Even more, the most quoted TEU article establishing human rights principles in external relations, Art.21 TEU, has a specific section dedicated to consistency of European External Action: "The Union shall ensure consistency between the different areas of its External Action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect"[260].

Lack of consistency is one of the main issues in the long-standing criticism of the EU's actions in the field of human rights and democracy[261]; in fact, the objectives of the EU are not always compatible in practice, leading to inherent problems of inconsistency[262]. According to European practice, in order to closely monitor the requirements of

[258] Gerrits, A. (2009). Supra note 11, p.13.
[259] Babayan, N. and Viviani, A. (2013). Supra note 17, p.14.
[260] Art. 21(3) TEU.
[261] See Abrisketa, J. et al. Report on the assessment of consistency in the prioritization of human rights throughout EU Policies. FRAME Deliverable No. 12.2 (2015). Available at: http://www.fp7-frame.eu/wp-content/uploads/2016/08/24-Deliverable-12.2.pdf
[262] Keukeleire, S. and Delreux, T. (2014). The Foreign Policy of the European Union. Palgrave Macmillan, p.26. These authors refer to four types of inconsistency: horizontal, institutional, vertical and interstate inconsistency.

coherence and consistency, the European Parliament must be informed at every stage of the development of external actions put in place by the Council, which is the main actor involved in the drafting of international agreements[263]. This became clear after Case C-263/14, *Parliament v. Council*, where the requirement of coherence and consistency was considered to be pivotal to the final decision on annulment on the signature and conclusion of the Agreement between the European Union and the United Republic of Tanzania[264].

A useful point of discussion when considering coherence and consistency of European External Action is the debate on the use of sanctions as a powerful instrument of the CFSP. Although Giumelli points out to how the practice of sanctions contributes to the consolidation of the autonomy, capability and coherence/cohesion of the EU as an international actor[265], the respect for the sanctioned person's human rights casts doubts on its effective coherence with the principles to be adopted in foreign policy as of Art.21 TEU. Moreover, the intrinsic nature of sanctions as negative measures puts the external human rights objective of the Union, that is primarily positive, into question: "it must focus especially on positive measures" since "the use of sanctions should be considered only if all other means have failed"[266].

As Marantis foresaw in 1994, one of the main issues associated with restrictive measures is that they are usually implemented in response to violations of political or civil rights, thus leading to a narrow interpretation of human rights and disregarding the equally important economic, social and economic rights of the sanctioned individuals. Imposing sanctions would penalize the population and would be viewed as an "imperialistic" or "moralistic" policy on behalf of the EU[267]. Furthermore, isolating countries which may need aid and support to achieve their transition towards democracy and respect for human rights may lead to greater regional instability. To this date, sanctions are a debated issue in European foreign policy, as they represent the negative side of European External Human Rights Policy. Howorth adds up to this reasoning

[263] Art. 218(10) TFEU.
[264] Case C-263/14, *Parliament v. Council (Tanzania)*, [2016] EU:C:2016:435
[265] Giumelli, F., Hoffmann, F. and Książczaková, A. (2020). Supra note 215, p.4.
[266] European Commission. 23 February 1994. Report on the implementation of the Resolution of human rights, democracy and development. COM(94) 42 final.
[267] Marantis, D. J. (1994). Human Rights, Democracy and Development: the European Community Model. Harvard Human Rights Journal. vol.7, p.8.

stressing that the EU still needs to move away from traditional hard power tools, since influence derives more from multifaceted cooperation and connectedness[268]. As was explicitly laid down by Manners, the Union finds itself to be a post-modern actor of foreign policy, influencing the global arena not through the use of force and coercion, but through externalization of its norms. Influence should be seen less in terms of sanctions and punitive conditionality. The EU is in a stronger moral position when it focuses on its soft power imperatives in foreign policy as established in its constitutive treaties, rather than respond to crises through traditional hard power instruments. This is why, for a long time, many Member States preferred that the EU stayed outside the traditional great-power game altogether. The Union should concentrate on positive rather than negative measures, they argued; it should use soft rather than hard power and should seek solutions to international problems through multilateral regimes rather than through bilateral pressure[269]. The foreign policy tool of sanctions has evolved over the years, bearing in mind these inferences, and nowadays is fixed on the more discrete instrument of targeted sanctions, explored in the previous section.

Notably, the increased utilization of targeted sanctions in the last decade demonstrate a certain degree of coherence/cohesion to EU policies in its capacity as an international actor. The chronological overview of sanctions shows an over-time increase in asset freezes and travel bans compared to a moderate rise in arms embargoes and trade restrictions, alongside the constant usage of financial restrictions and diplomatic sanctions[270]. This reflects the conviction that targeted sanctions involve less collateral damage, as indicated by the "EU Guidelines" on the population of the country in question, and the EU risks less in terms of annulment before the CJEU[271].

Once presented these arguments, we can turn back to the original question on whether the use of restrictive measures is consistent with the image of the EU as a normative power, presented in Chapter 1. European practice in employing sanctions, together with

[268] Howorth, J. (2010). The EU as a Global Actor: Grand Strategy for a Global Grand Bargain? Journal of Common Market Studies 48, no. 3, pp. 455–74.
[269] Lehne, S. (14 December 2012). The role of sanctions in EU foreign policy. Carneige Europe. Available at: https://carnegieeurope.eu/2012/12/14/role-of-sanctions-in-eu-foreign-policy-pub-50378.
[270] Giumelli, F., Hoffmann, F. and Książczaková, A. (2020). Supra note 215, p.15.
[271] Council of the European Union. 4 May 2018. Sanctions guidelines – update, p.8. Available at: https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf

the Basic Principles and the Guidelines tell us that the behaviour of the EU seems to be inspired predominantly by norms and not by interests.

This perspective would suggest that the adoption of sanctions is justified by norms and values rather than by particular interests that the EU holds. Furthermore, sanctions are one of the few foreign policy acts upon which the CJEU has jurisdiction to determine - ex Art.275 TFEU - whether the human rights of the sanctioned individual or group of individuals have been negatively affected, and rule accordingly. The Court is "to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union". Henceforth, natural or legal persons are entitled to contest the legality of *any* EU restrictive measures adopted in the context of the CFSP. Respect for fundamental rights in this area is confirmed by the provisions at Art. 275 TFEU. These provisions allow the Court to exercise judicial control over restrictive measures adopted in the context of CFSP and thus to guarantee that fundamental rights are respected when implementing these measures.

To conclude this section, we can draw two conclusions: first, sanctions have contributed to the consolidation of the EU's position on the international stage, with the number thereof gradually increasing over time. Second, the way in which sanctions have been used and adjusted over time are strong indicators for more developed autonomy, coherence and consistency on the part of the EU as international actor. As we have drawn from Gerrits, coherence of principles comes from the extent to which differing principles and practices to promote them can be seen to be sound and non-contradictory[272]. A provision regarding consistency for the institutional framework of the Union is clearly stated at Art. 13 TEU, resumed in its external policy objectives ex Art. 21(3), and, for the sake of our analysis, is reaffirmed in the principles establishing the European Neighbourhood Policy[273], which we will investigate in the next chapter.

Conclusions

[272] Gerrits, A. (2009). Supra note 11, p.12.

[273] Gallo, D. (2016). I valori negli accordi di associazione dell'Unione Europea. In Sciso, E., Baratta, R. and Morviducci, C. (eds). "I valori dell'Unione Europea e l'Azione Esterna". G. Giappichelli Editore. Torino, p.142.

In this chapter, we have inferred that international human rights treaties are not imprisoned by territorial jurisdiction or state sovereignty, and that their standards are to be applicable extraterritorially under certain circumstances, outlined in the Maastricht Principles on Extraterritorial Obligations. In this respect, the attention has been directed towards the line of jurisprudence of the ECtHR in adjudicating on the extraterritorial responsibility of contracting parties; it has become evident that in its practice the ECtHR gives precedence to the main purpose of the Convention, the protection of human rights, rather than to out-of-date Westphalian notions of territorial sovereignty. In its history, the ECtHR has been quite successful in indicating the course of development of international standards for human rights protection and in this case has succeeded in providing stable guidelines on how extraterritoriality should be understood.

We have presented the issues of coherence and consistency of European actions in foreign policy as adjudicated by the two European Courts: the ECtHR and the CJEU. The above matters of discussion contribute to our point in deciphering European actions in foreign policy: although treaty provisions make sure to maintain human rights and fundamental freedoms on top of EU external policy objectives, the case law by ECtHR and CJEU tells us a different story. Contradictions in Union's good intentions and Member States actions are to be found in almost every side of EU legal order but especially in foreign policy, because of its intrinsic feature as a *lex specialis*[274]. The CJEU guarantees fundamental rights in the Union, relying on the very own European instruments of protection of Human Rights, the Charter, and in so doing it is influenced by national courts and by the European Court of Human Rights. On the other hand, the CJEU has not played and cannot play an important role regarding protection of human rights in the EU's external relations because of a lack of jurisdiction ex Art.24(1) TEU. The justiciability gap for what concerns CFSP acts has been outlined, and it has been argued that the solution to this gap resides at Art.6 TEU, which provides for the accession of the Union to the ECHR. Although accession has been blocked by the Court of Justice on the grounds of lack of compatibility with the EU legal order, Art.6 TEU is a useful instrument to indicate the significance of human rights protection and promotion in the European system.

[274] Smith, K. (2014). Supra note 67, p.110.

Furthermore, we have provided an overview of how sanctions policy contributes to defining the international actorness of the EU in the EHRP framework. Inconsistencies, between European declared human rights objectives in foreign policy and its ambitions as a global player, are undeniable. However, the Union has provided clear guidelines on the use of sanctioning regimes, carefully tailored its restrictive measures in order to be respectful of the rights of the sanctioned individuals and provided justiciability for these measures before the CJEU. The way in which sanctions have been used and adjusted over time is a strong indicator for improved coherence and consistency on the part of the EU as international actor. If we benchmark EU behaviour to the expectations of the normative power Europe literature portrayed in Manners, we can confirm that the EU is normatively driven in its sanctioning practice by posing human rights at the center of its motives; it is safe to say that human rights have grown to be a necessary requirement for the Union to act normatively in foreign policy. On another note, the extensive use of targeted sanctions regimes has demonstrated that the EU is able to meet some of its Treaty-based goals in the CFSP context, while respecting its fundamental values and principles on human rights. Resulting from its proven normative power and achieved results, the sanctioning practice thus presents itself as the most effective foreign policy tool of the CFSP.

In the last section we have introduced the subject matter of the next Chapter, that is how ECtHR and CJEU jurisprudence influences the Union's relationship with third parties. We will then restrict the scope of our analysis to the interactions between the European External Human Rights Policy and the European Neighbourhood, the latter having received special attention by the literature.

CHAPTER 3

THE EUROPEAN NEIGHBOURHOOD POLICY: EUROPEAN EXTERNAL HUMAN RIGHTS POLICY AND INSTRUMENTS IN A CONTESTED NEIGHBOURHOOD

Introduction

The EU has been a leading actor in the promotion of human rights since the end of the Cold War. Considering that the EU is one actor among many promoting universal human rights, it is not singular, but the way the EU pursues the human rights objective could be viewed as being the *rara avis*. The EU's approach is, in fact, uniquely based on legal texts: the European Treaties and the human rights clauses in international agreements[275].

Exporting EU values has been a recurrent theme of the rhetoric of the ENP since its early days[276]. In this Chapter, we will investigate the European Neighbourhood Policy (ENP) as the flagship policy of the EHRP, designed to promote a ring of friends[277] around its borders through increased prosperity, stability and security. As such, it is linked to the priorities set out in the Treaties, which at Art.8 TEU emphasize the importance of a stable Neighbourhood for the EU and refers back to the European founding values ex Art.3(5) TEU and the principles the EU aims to export in the wider world ex Art.21 TEU. Consequently, the ENP will be presented in light of the human rights features which distinguish it as a frontline policy in the context of the European External Human Rights Policy. The birth and development of this policy will be approached with a special focus on the human rights tools and instruments that contribute to the European goal of protection and promotion of human rights in foreign policy.

We will argue that the European Union stands firm on its human rights principles, projecting them onto the international scene in its capacity of normative power. On this note, the label of normative power that Manners gave to Europe will be considered under the light of the soft power instruments the Union makes use of in relation to its Neighbouring countries to the East and the South. Regarding an instrumental perspective,

[275] Smith, K. (2014). Supra note 67, p.67.
[276] Poli, S. (2016). The European Neighbourhood Policy: values and principles. Reutledge. London. UK., p.11
[277] European Commission. 5-6 December 2002. Romano Prodi, President of the European Commission. A Wider Europe - A Proximity Policy as the key to stability "Peace, Security And Stability International Dialogue and the Role of the EU" Sixth ECSA-World Conference. Jean Monnet Project. Brussels. Available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_02_619

the ENP provides an excellent case study on the use of soft power in EU external relations law[278]. Furthermore, we will consider the extent to which the EU applies regionalism to its foreign policy considerations. The EU, being itself the result of a regional political and economic approach makes sure to support actively common solutions to common problems and the ENP is an excellent example of regionalism. However, in the last decade, and especially after the 2015 review of the ENP, it was made clear that regional integration, especially in the challenging Neighbourhood, did not achieve the expected results. Therefore, we observed a rearrangement of the goals of this policy in favor of more tailor-made, bilateral relationships with Neighbourhood countries.

In the context of bilateral relationships, the instrument of Human Rights Conditionality and in particular Human Rights Clauses (HRCs) included in agreements with ENP countries, will be considered in their functions of soft power measure. Their effectiveness in implementing the human rights objective will be proven, and critiques to the implementation of negative conditionality through HRCs, affecting the normative image of the EU, will be dismissed. The last section of this Chapter will be dedicated to a brief overview of the recent Eastern Association Agreements and their particularities for what concerns the evolution of HRCs post-2014 crisis with Russia.

In this Chapter we will demonstrate the potential for effectiveness of the ENP through the instrument at its disposal, to conclude that the EU has indeed the means to pursue its broader EHRP objectives in the Neighbourhood.

3.1 A "ring of friends": the European Neighbourhood Policy

In this section, the European Neighbourhood Policy will be presented. We will investigate the reasons behind the creation of this policy focused on such a specific region. We will start with an overview of this policy and continue in our analysis by considering its reviews and its current functioning mechanisms and objectives.

On the verge of the success of the 2003-04 enlargement, the same policy ideas and instruments that proved so successful at integrating post-soviet countries in the European system, inspired the creation of the ENP. In the intentions of the drafters, this policy

[278] Van Elsuwege, P. (2020). The EU and its Neighbours. In Wessel, R. A. and Larik, J. (eds). "EU external relations law. Text, cases and materials." Hart Publishing. London., p.437.

would have had the goal of creating a "ring of friends"[279] outside the borders of the new enlarged Europe. Thus, the policymaking format adopted for the ENP is not entirely new[280]: the objectives of the ENP are inspired by the success of the fifth European enlargement, labelled by Zielonka as an "impressive exercise in empire building"[281].

The underlying idea is that the more EU Neighbours replicate EU values, the safer and more secure European borders will be[282]. We can safely say that exporting EU values to Neighbouring countries is the main goal of the ENP policy, and that this is a fundamental feature of the Normative Power Europe. However, Neighbourhood countries are not usually disposed to have the same commitments as candidate Member States mainly because of their different levels of integration with the *acquis communautaire*; the possibility of accession is not foreseen for most of these countries. As a consequence, the ENP aims at creating a special relationship with those neighbourhing countries to the East and the South that are not included in the enlargement process[283]. The European Council of 17-18 June 2004, which welcomed the Commission's proposal for a European Neighbourhood Policy, reiterated the importance the Union attached to strengthening cooperation with its neighbours and expressly stressed that the Union felt it important that this was "on the basis of partnership and joint ownership and building on shared values of democracy and respect for human rights"[284].

This policy was first created with the aim of strengthening the prosperity, stability and security of Europe's difficult and challenging Neighbourhood. In fact, several concerns were raised when discussing the post-2004 enlargement security issues at the border of the enlarged EU. The original proposition of a policy towards the EU's Neighbours was linked to the idea of reinforcing sub-regional cooperation, especially in creating an "Eastern dimension". Some Member States[285] stressed the importance of including the

[279] Prodi, R. 5 December 2002. Supra note 277.
[280] Tulmets, E. (2006). Is a soft method of coordination best adapted to the context of EU's neighbourhood? In Cremona, M. and Sadurski, W. (eds). "The European Neighbourhood Policy: A Framework for Modernisation?". European University Institute. Biada Fiasolana. Italy, p.6
[281] Zielonka, J. (2007). Europe as Empire: The Nature of the Enlarged European Union. Oxford University Press. Oxford.
[282] Poli, S. (2016). Supra note 276, p.12.
[283] Van Elsuwege, P. (2020). Supra note 278, p.447.
[284] European Commission. 29 September 2004. Proposal for a Regulation of the European Parliament and of the Council laying down general provisions establishing a European Neighbourhood and Partnership Instrument. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004PC0628&from=EN
[285] In particular, Italy, France and Spain.

Southern Neighbour as well, with which the Union had already initiated cooperation in 1995 with the Barcelona Process. Finally, in 2004, the ENP was officially launched with the larger aim of integrating both the East and the South. As previously mentioned, the original policy ideas and instruments of the ENP were adapted from the experience of enlargement. In particular, the discourse focused on common values, which replicates accession conditions, and on the concept of partnership complemented by the notion of conditionality. Policy discourses on the ENP were clearly constructed around three main issues – security, stability, and prosperity[286].

As mentioned, the initial concept of a European Neighbourhood Policy was mainly based on the idea of security interdependence and regional cooperation aimed at integrating the diverse countries part of the European Neighbourhood. Through this policy, the EU wished to create stable and prosperous Neighbours to ensure its own security. This approach is still valid and can be derived from the 2016 Global Strategy[287]. The first draft of the ENP launched in 2004 was certainly too ambitious in its objectives and implicitly assumed that Neighbouring countries would unconditionally adhere to European interference in the region; according to Zielonka, this new policy was either naive or merely rhetorical[288]. The ENP blatantly showed vagueness of objectives and methods to achieve them during the Arab Spring. The international events led to a first review of the policy in 2011, that introduced the "more for more" principle, meaning that additional reforms implemented by partner countries would result in additional funding and support by the EU[289]. The second review took place in March 2015. By then, it had become clear that the ENP had its biggest flaw in considering the Neighbourhood a single entity and defining it in its nature of European Neighbourhood. On the contrary, the countries part of the ENP are part of different regional contexts, different social and cultural heritage. It became clear that they cannot be arbitrarily grouped together and treated the same way. This is why the 2015 review introduced additional changes

[286] Prodi, R. 5 December 2002. Supra note 277.
[287] European External Action Service. June 2016. Shared vision, common action: A stronger Europe. A global strategy for the European Union's Foreign and Security policy. Brussels: European External Action Service. Available at: http://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf
[288] Zielonka, J. (2018). Counter-revolution. Liberal Europe in Retreat. Oxford University Press. Oxford, p. 75.
[289] Cremona, M. and Meloni, G. (2007). The European Neighbourhood Policy: a framework for modernization?. EUI Working Paper LAW No. 2007/21., p.8.

reflecting the growing flexibility and differentiation of the ENP with an increased focus on tailor-made approaches for each Neighbouring country[290].

It is a generally accepted notion that EU Neighbours do not have a membership perspective, either because they are not interested in the first place for political reasons, or because their economy and governance is so fundamentally different from the European Union that the required degree of harmonization is, at best, a vision for the distant future. Hence, it became clear that a more differentiated approach was called for[291]. In fact, only five ENP partner countries – Morocco, Tunisia, Georgia, Moldova and Ukraine – are indicated as partners wishing to pursue deeper relations with the EU[292]. The rest of the countries doesn't seem to perceive the ENP as the most attractive framework for cooperation in the region and prefer relying on other international actors.

The 2015 review effectively acknowledged that the ENP had failed in its goal of building a ring of well-governed states around the EU. Most countries covered by the ENP are more unstable today than they were a decade ago. Violence and instability have, tragically, spilled over into the EU itself, which is the very risk the ENP was intended to avert[293]. Instead of the envisaged "ring of friends", Europe is encircled by a "veritable ring of fire"[294]. For instance, it has been argued that the ENP itself was the pretext, if not the cause, of the tense standoff with Russia over Ukraine[295]. It seemed like this policy had brought the EU little or no increased influence while complicating efforts to achieve a new strategic balance in Europe. That is why the 2015 review calls for more "local ownership" and "differentiation" between Neighbourhood countries[296], as well as a more focused development of regional strategies, as to provide first-hand involvement of Neighbouring countries within each other policies. Europeans have learned, to their cost, that outside efforts to impose human rights and democracy will not succeed unless both

[290] Van Elsuwege, P. (2020). Supra note 278, p.449.
[291] Openmediahub. The European Neighbourhood Policy. Accessed on 02/12/2020. Available at: https://openmediahub.com/eu-basics/european-neighbourhood-policy/
[292] Chmielewska, A. and Fabbri, F. (2016). What role for the reviewed ENP in the broader EU external action? 06 Euromed Survey, p.73.
[293] Leigh, M. (18 November 2015). New Policies Urgently Needed for EU Neighbourhood. Accessed on 13/12/2020. Available at: https://www.gmfus.org/blog/2015/11/18/new-policies-urgently-needed-eu-Neighbourhood
[294] Zielonka, J. (2018). Supra note 288, p.76.
[295] Leigh, M. (18 November 2015). Supra note 293.
[296] Joint communication to the European parliament, the Council, the European economic and social committee and the Committee of the regions. 18 November 2015. Review of the European Neighbourhood Policy. JOIN(2015) 50 final.

rulers and citizens genuinely wish to embrace EU values. The change has to come from within, and that is why the 2015 review of the ENP called for a more active involvement of partner countries.

The new ENP is therefore centered around the following key notions: fostering economic and political stability; promoting differentiated degrees of cooperation and rapprochement, resulting in a stronger EU engagement with the partners keenest on upgrading such relations; introducing a more pragmatic policy-making on the basis of common interests related to concrete and pressing issues for partner countries in order to ensure their compliance; and promotion of universal values enshrined in the treaties of the EU and its Charter of Fundamental Rights, the UDHR and the ECHR.

We will now move to consider the legal basis provided for the ENP by the Treaties. As of today, the ENP applies to Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestine, Syria, Tunisia and Ukraine. The legal basis for this policy can be found at Art.8 TEU, Title V of the Treaty on European Union on External Action, Articles 206-207 TFEU on trade arrangements and 216-219 TFEU on international agreements. One first consideration about the Lisbon provision on ENP, Art.8 TEU, is its location in the TEU among the common provisions, and not next to the enlargement provisions. This indicates the will of separating the two policies from one another, notwithstanding the strong connection of the ENP principles and objectives to those of the enlargement[297]. Art.8 TEU is formally separated from the External Action provisions, fact that establishes ENP relative independence. However, the ENP is strongly reliant on the External Action organ *par excellence*, the European External Action Service. The ENP is, as in the case of the CFSP, a "special competence" of the EU, and it is thus to be intended not to simply fall within the mandate of the CFSP, but as an "umbrella policy" which aims to coalesce all aspects of EU external relations in a coherent voice, encompassing both EU and Member States external policies[298], while consistently referring back to the EHRP framework. In fact, the Lisbon Treaty institutionalizes the special relationship entertained by the Union with the Neighbourhood[299]. Art.8 sets a specific objective for the Union, that is "the Union shall

[297] Comelli, M. and Pirozzi, N. (2013). La politica estera dell'Unione Europea dopo Lisbona. Osservatorio di Politica Internazionale. Istituto Affari Internazionali, No. 72, p.19.
[298] Van Elsuwege, P. (2020). Supra note 278, p.440.
[299] Ivi, p.441.

develop a special relationship with neighbouring countries"[300]. The EU can therefore not choose not to have a Neighbourhood policy[301]. Most importantly to our analysis, the relationship must be "founded on the values of the Union", thereby referring back to Art. 3(5) and 21 TEU and injecting these provisions into the relationship with the Neighbourhood[302]. The ENP is then, following treaty provisions, based on democracy, the rule of law and respect for human rights. The latter, as we have investigated in the previous chapter, runs through European External Action as a silver thread, and the ENP is no exception: human rights form a cardinal requirement for the Union to engage with its Neighbourhood. We can confidently infer that the ENP treaty provisions reflect EHRP objectives.

As mentioned, following the 2015 review, the ENP has evolved into a chiefly bilateral policy between the EU and each partner country. Notwithstanding the extensive use of bilateral dialogue and a tailor-made approach for each Neighbourhood country, the ENP includes and is complemented by these two regional cooperation initiatives to the East and to the South. In fact, in 2008 and 2009, a few years following the ENP's inception, EU Neighbourhood policies were divided into regional flanks, notably the Eastern Partnership (EaP) and the Union for the Mediterranean (UfM)[303]. Through the ENP, the EU reformulates the objectives of the Partnerships, widens their scope and revisits some of their provisions with a view to guiding and enhancing the partners' compliance, as a means to achieve the ENP objectives.

The Eastern Partnership (EaP) was formed to "upgrade" the EU's relations with most of its Eastern neighbours: Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine, covering 6 post-soviet states. The EaP was agreed in 2008 and inaugurated in 2009. It is a strategic and ambitious project based on common values and rules, mutual interests and commitments, as well as shared ownership and responsibility[304]. The Union for the

[300] Art.8(1) TEU.
[301] Hillion, C. (2014). Anatomy of EU norm export towards the Neighbourhood. The impact of Art.8 TEU. In Van Elsuwege, P. and Petrov, R. (eds). "Legislative approximation and application of EU law in the Eastern Neighbourhood of the European Union: towards a common regulatory space?". Abingdon. Routledge., p.34
[302] Smith, K., (2014). Supra note 67, p.110.
[303] Poli, S. (2016). Supra note 276, p.12.
[304] European Parliament. Resolution of 12 March 2014 on assessing and setting priorities for EU relations with the Eastern Partnership countries (2013/2149(INI)). P7 TA(2014)0229. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014IP0229&from=EN

Mediterranean (UfM) builds on the previous Euro-Mediterranean partnership. The EU tried to create a Mediterranean regional identity from scratch and attempted to apply the Union model of functional cooperation to the construction of peaceful relations in the Mediterranean region[305]. However, it was precisely in this region that the ENP showed its underlying weakness. Regionalism was overpowered by bilateralism which quickly took its place as most effective way to promote reforms in partner countries. Other concerns relate to the presence of external powers in this region, other international actors that challenge EU regulatory action. As if this was not enough, internal consensus at EU level on what priorities to pursue in the region is far from being achieved.

In this section, we have discussed the relevance of the ENP for the EHRP of the Union, its initial ambitious but somewhat vague objectives and the subsequent reviews of 2011 and 2015, that led the ENP to downsize its goals in the region and shift from a regional approach to a mainly bilateral approach.

3.1.1 Regional integration in the footsteps of accession negotiations

After having introduced the ENP and its evolution over the years, in this section we will focus on regional cooperation as a primary foreign objective of the EU in its Neighbourhood and on the methods and instruments the Union is making use of in order to achieve it. The promotion of regional cooperation, or regional integration, is clearly an EU foreign policy objective that stems directly from its own internal identity[306]. While other international actors might encourage regionalism, their efforts simply cannot match the legitimacy and clear relevance of an EU strategy to do so. This is an area where the EU's normative power, the attractiveness of its model and its norms, reinforces its pursuit of the objective. However, as Bendiek and Kramer note, the EU's strategy-based inter-regionalism and bilateral partnerships do not follow a clear paradigm. It is not clear what connections exist between inter-regional relations and bilateral partnerships[307].

As mentioned briefly in the previous section, the objectives at the heart of the European Neighbourhood Policy are those, roughly adapted, of the enlargement process.

[305] Smith, K. (2014). Supra note 67, p.77.
[306] Ivi, p.93.
[307] Bendiek, A. and Kramer, H. (2010). The EU as a strategic international actor: substantial and analytical ambiguities. European Foreign Affairs review, Vol.15 No.4, p.461.

In fact, after 2004, the enlargement policy was put on hold and replaced by the EU Neighbourhood Policy, but Europe's proclaimed aims remained the same[308]. Regionalism has always been the preferred course of action by the EU. No other international actor applies the same policies to groups of countries to the same extent. The EU has always preferred to deal with third countries collectively in order to encourage the countries grouped regionally to cooperate with each other. The EU does so by externalizing the methods and strategies adopted for the Union itself: the European *acquis communautaire*, which played a chief role in the enlargement process, and which has accompanied us since the beginning of this thesis, has found its way in the External Action of the EU; in the case of the ENP, we can affirm that the *acquis communautaire* has been externalized normatively.

The ENP original proposal, the so-called Wider Europe, had its objectives in the development of subregional cooperation between Neighbourhood countries, in order to coordinate their policies and actions and prevent conflicts and disruption in the vicinity of the EU. However, over the years the Union has started a process of building bilateral relations through the ENP, rather than providing assistance in regional dialogue and cooperation, as this policy was initially thought for. This is because of the extremely heterogeneous set of countries this policy covers. It is simply unthinkable to have the same policies and strategies covering this diverse group of countries. A bilateral approach, based on cooperation and association agreements, has proven to be more successful at accommodating the particularities of each ENP country and its individual goals when engaging with the EU.

For the Commission, the fifth enlargement represented the EU's "most successful foreign policy"[309]. On the wake of this success, the Neighbourhood policy offered a chance to prove that the EU has the capacity to establish stability and security at its external borders and to answer expectations in its Neighbourhood. Official speeches on enlargement and the ENP clearly insist on EU's ability to promote its norms and cultural values to generate attraction through persuasion as well as to mobilize its internal

[308] Zielonka, J. (2018). Supra note 288, p.75.
[309] Communication from the Commission. 12 May 2004. European Neighbourhood Policy. Strategy paper. COM/2004/0373 final. Available at: http://www.partnership.am/res/General%20Publications_Eng/Strategy_Paper_EN.pdf

resources and policies to reach compliance[310]. The wording used in the Commission's proposals on the ENP underlines EU's attractiveness for third states. As the ENP cannot make recourse to the powerful leverage of non-accession, it has to rely on European coherence of principles and actions, on the Union's legitimacy as an international actor, on its power to irradiate norms of behaviour.

The similarities between the ENP's common values and the accession conditions are particularly striking[311]. Neighbouring countries have to respect "commitments to shared values" relatively similar to the EU's accession criteria: "(...) that is respect for human rights, including minority rights, the rule of law, good governance, the promotion of good neighbourly relations, and the principles of a market economy and sustainable development as well as to certain key foreign policy goals"[312]. The objectives of stability and prosperity are clearly inspired by the EU's pre-accession policy, but the similarities do not stop here: both policies are horizontal in nature in the sense that they do not belong to any of the EU's specific competences[313]. From a legal perspective, the soft law instruments developed during the enlargement process has been adapted to the ENP in its capacity of a very successful enlargement policy. The true innovation of the ENP's policy is its legal and political construction, in particular its use of soft law instruments to attain a coherent external policy for the Union as a whole[314].

The course of action of the EU in developing closer relationship with the Neighbourhood entails the issuing of Action Plans, implemented for each Neighbourhing country. This way, the Union establishes a list of specific priorities for each country; the EU is then able to work closely with the country's authorities and cooperate in order to mobilize joint resources for a mutual benefit. On the one hand, the EU is able to intervene on the social fabric of the country and validate its role of an international peacekeeper[315];

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[310] Ferrero-Waldner, B. 2 June 2006. Speech by the European Commissioner for External Relations and European Neighbourhood Policy. The EU, the Mediterranean and the Middle East: A Partnership for Reform. SPEECH/06/341. Available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_06_341

[311] Tulmets, E. (2006). Supra note 280, p.5.

[312] Communication from the Commission. 12 May 2004. Supra note 309.

[313] Van Elsuwege, P. (2020). Supra note 278, p.442.

[314] Van Vooren, B. (2012). EU external relations law and the European Neighbourhood Policy: a paradigm for coherence. Abingdon. Routledge., p.178.

[315] United Nations Peacekeeping. 29 September 2020. UN and EU sign agreement to enhance cooperation and strengthen response in peace operations. Accessed on 15/12/2020. Available at: https://peacekeeping.un.org/en/un-and-eu-sign-agreement-to-enhance-cooperation-and-strengthen-response-peace-operations

on the other hand, the Neighbourhing country gains mainly economic benefits and funding for social and cultural advancement. Action Plans defining the short and medium-term objectives for political, economic and legal reform constitute the key instrument of the ENP. Although, as precised, the ENP initially aimed at creating an integrated, secure Neighbourhood, universalism gave way to a more effective case-by-case approach as established by the 2015 review.

In the absence of accession perspective, the upgrading of bilateral relations was devised as a major carrot for the ENP countries[316]. Some countries strongly opposed the Commission's idea of "European Neighbourhood Agreements" since grouping together countries under the same umbrella was never completely accepted by Neighbourhood partners. A more individualistic approach, called for unanimously, led to relying on more classical bilateral agreements. In particular, the Association Agreement concluded with Ukraine includes provisions for a "gradual rapprochement and close and privileged links"[317]. Similarly, the Association Agreement with Moldova and Georgia refer to "political association and economic integration" based on "close links"[318]. These agreements represent by far the most extensive and comprehensive cooperation opportunities offered to non-candidate countries. However, this is as far as the Union can go. The Neighbourhood provisions in the TEU, formally separated from those on enlargement, make sure that these countries could never cross the borders of the EU. Either because of geographical reasons, political reasons or simply too different cultural and social values, their perspective on accession is, at the moment, a mere vision for a distant future. For these reasons, the ENP, its ideals for a peaceful Neighbourhood, its soft power instruments, that make this policy an admirable effort in externalizing the *acquis* and a flagship policy in the broad EHRP, face incredible shortcomings that will be briefly presented.

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[316] Van Elsuwege, P. (2020). Supra note 278, p.450.

[317] European Union, its Member States and Ukraine. Association Agreement. Adopted 21 March 2014, entered into force 1st September 2017l. Brussels. Available at: https://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf

[318] European Union, its Member States and Georgia. Association Agreement. (adopted 27 June 2014, entered into force 1st July 2016). Brussels. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22014A0830(02) ; European Union and the European Atomic Energy Community and Member States and Moldova. Association Agreement. (Adopted 27 June 2014, entered into force 1st July 2016). Brussels. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0830(01)&from=EN

As mentioned, the ENP first relies on a logic coming from enlargement which originally aims at including third states entirely and not only partly into EU's internal and external policies. One cannot expect similar commitments from associate or partner countries than from candidate countries. Secondly, due to the negative experience with sub-regional approaches in enlargement and in the Euro-Mediterranean Partnership, the method adopted in the ENP nowadays mainly builds on bilateral relations. Action Plans tend to forget the role of sub-regional considerations at the heart of the European project of its policy for the Neighbourhood, that is integration, cooperation and conflict prevention between neighbours[319]. As a result of this "patchwork policy" reinforcing bilateral relations in combination with already existing sub-regional approaches, the ENP slowly takes the shape of a "policy with variable geometry"[320]. Thirdly, although the EU is making recourse to negotiated norms and to a soft method of coordination, the asymmetrical and conditional approach still remains.

The original objective at the heart of the ENP is the creation of a stable, secure Neighbourhood by supporting regional and sub-regional cooperation between partner countries. Regional integration in this complicated region has walked the steps of the enlargement process, the latter being one of the most effective foreign policy of the EU. However, since the carrot of accession is missing from the ENP design and could never be proposed to Neighbouring countries, this regional approach has been proved poorly effective and has opened the way for a more practical bilateral approach between the EU and partner countries. Bilateral agreements are based on Action Plans that focus on one country at a time in order to concentrate on individual particularities to promote accurate, and as a consequence more effective, reforms. The ways through which the Union promotes reforms in the field of human rights in ENP countries will be the subject matter of the next section.

[319] Cremona, M. and Meloni, G. (2007). Supra note 289, p.34.
[320] Tulmets, E. (2007). Policy adaptation from the enlargement to the neighbourhood policy : a way to improve the EU's external capabilities? Politique Européenne 2007/2, n°22, p.55.

3.1.2 Tools and instruments aimed at the external promotion of human rights

As previously discussed, human rights are a core foreign policy objective for the European Union. In the 2012 Council communication on a EU Strategic Framework and Action Plan on Human Rights and Democracy, democracy, human rights and the rule of law are said to "underpin all aspects of the internal and external policies of the European Union"[321]. We have previously described human rights as the silver thread that runs through each and every European external policy. In this context, the ENP present itself and its provisions as perfectly framed in the EHRP.

The ENP is funded primarily through the European Neighbourhood Instrument (ENI), which pledged €15.4 billion for the period 2014-2020[322]. The ENI has replaced the previous European Neighbourhood and Partnership Instrument (ENPI) that operated from 2007-2013. The ENI is divided into four types of actions: bilateral programmes, i.e., direct cooperation between the EU and individual Neighbourhood countries; regional programmes, i.e., actions that address the entire eastern or southern Neighbourhood, respectively; programmes covering the entire EU Neighbourhood at once, such as the Neighbourhood Investment Facility (NIF), which supports the creation of water, power, and transport infrastructure; and cross-border cooperation between individual EU Member States and Neighbouring countries[323].

Aside from the ENI, Neighbourhood countries benefit on a case-by-case basis from the Development Cooperation Instrument (DCI), which supports actions to reduce poverty; the European Instrument for Democracy and Human Rights (EIDHR), which supports the rule of law, democratic governance, freedom and fundamental rights; and the Instrument contributing to Stability and Peace (IcSP), which is used to respond to crisis situations. Among these instruments, the most effective is arguably the EIDHR, the European instrument for democracy and human rights[324]. Launched in 2016, the EIDHR

[321] Council of the European Union. 25 June 2012. EU Strategic Framework and Action Plan on Human Rights and Democracy. 11855/12, p.1.
[322] EEAS. European Neighbourhood Policy (ENP). Accessed on 23/12/2020. Available at : https://ec.europa.eu/regional_policy/en/policy/what/glossary/e/european-neighbourhood-investment
[323] Openmediahub. Supra note 291.
[324] European Parliament and Council of the European Union. 11 March 2014. Regulation 235/2014 establishing a financing instrument for the promotion of democracy and human rights worldwide, OJ [2014] L 77/85.

replaced the earlier European Initiative for Democracy and Human Rights and builds on its achievements[325]. The first pillar of the EIDHR consists of supporting, developing and consolidating democracy in third countries by enhancing participatory and representative democracy, in particular by reinforcing an active role for civil society, and by improving the reliability of electoral processes, in particular by dispatching EU observation missions. The second pillar aims at enhancing respect for human rights and fundamental freedoms, strengthening their protection, implementation and monitoring, mainly through support for relevant civil society organizations, human rights defenders, and victims of repression and abuse[326]. The Instrument was adjusted in 2014 to cope with new demands and realities. Useful as political statements, human rights dialogues, clauses and sanctioning decisions may be, perhaps the EIDHR makes the most tangible difference of all. Primarily, it is a financial instrument through which aid can be disbursed where it is maximally effective, even where no established relationship exists[327]. The EIDHR has so far given support to groups and individuals on every continent. Importantly, it can be deployed without the consent of the governments of the countries concerned. By making use of this instrument, the EU has extended generous assistance to NGOs and civil society actors standing up for democracy and human rights around the world.

As an international actor relying mainly on soft power, the EU plays the international relations game through soft measures, such as political dialogue and development aid. These facts make the EU a unique subject in international relations. This happens not only thanks to its objectives in foreign policy, where human rights are considered hierarchically on top of the EU priorities, but also in its way of pursuing them: attraction rather than coercion, diffusion of norms and standards rather than pressure and intimidation.

In the 2016 European Global Strategy, Federica Mogherini, the then HR, reminded the international community that less and less international actors are investing in human rights[328]. As repeatedly reiterated by European talks and actions, the key to an effective

[325] De Waele, H. (2017). Supra note 48, p.122.
[326] Ibid.
[327] The EIDHR had a budget of 1.3 million for the period 2014-2020. The selection of projects funded under the EIDHR can take place through a single country call for proposals (specific to one country, covering local projects) or take the form of direct support to human rights defenders through ad hoc grants (when quick intervention through small and targeted actions is needed).
[328] European External Action Service. June 2016. Supra note 287.

foreign policy with long-term benefits is sustainable security: to improve national security is necessary to invest in human rights abroad. This is the assumption underlying every action of the European Union in foreign policy.

The European Neighbourhood is the perfect environment where the EU could demonstrate the effectiveness of a foreign policy approach based on human rights. In fact, in the revised ENP 2011 document, it is stated: "The EU [...] will insist that each partner country's reform process reflects a clear commitment to universal values that form the basis of our renewed approach"[329]. This means that the universality of values claimed in the document justifies the EU's imposition of certain values, countering the criticisms on the EU's imposition of its own model. Similarly, in the 2015 review, we read that "the consultation confirmed the very strongly held view that the EU should uphold and promote universal values through the ENP"[330]. The Union made sure to reiterate its chief foreign policy objective in both reviews, that is the commitment to human rights in the context of its foreign policy actions directed to the Neighbourhood.

In 2015, the Union took on responsibility to "promote and defend the universality and indivisibility of all human rights both at home and in partnerships with countries from all regions", acknowledging that the previous instruments and methods had been inadequate. The EU will continue to "engage with all partners in an inclusive dialogue on human rights and democracy issues, including on areas where experiences may differ"[331]. This is a focal point for our analysis of the protection and promotion of human rights by the European Union in its Neighbourhood. The EU stands firm in its leading role as a human rights defender in the international arena, and operates accordingly in its Neighbourhood, one of the most important regions for the current global context, to prove that the human rights approach to foreign policy is both functional and effective. The 2015 review has focused European attention in the Neighbourhood once and for all on human rights. Since then, some results have been achieved, but much still needs refinement. In the next section, one of the most effective instruments deployed by the EU and aimed at achieving

[329] Joint communication to the European parliament, the Council, the European economic and social committee and the Committee of the regions. 25 May 2011. A new response to a changing Neighbourhood. COM(2011) 303 final.
[330] Joint communication to the European parliament, the Council, the European economic and social committee and the Committee of the regions. 18 November 2015. Supra note 296.
[331] Ibid.

the European human rights objective in the Neighbourhood, human rights conditionality, will be investigated in its development and current form.

3.2 Legal basis for international agreements and the role of human rights conditionality

In the course of this thesis, human rights implications in the broader External Action of the European Union have been outlined. Although no specific provision on an External Human Rights Policy can be found in the treaties, its legal *raison d'être* runs through each and every provision on the External Action. In the previous section, the main tools and instrument directed to the protection and promotion of human rights in the Neighbourhood have been considered. The most important of those will be analyzed in the current section. Human rights conditionality is indeed the most effective tool at EU disposal in order to achieve compliance by third countries with human rights requirement when signing an international agreement.

Since the 1969 Vienna Convention on the Law of Treaties, the power of concluding international agreements was given to state entities, following the peremptory norm *pacta sund servanda*. The European Union, officially recognized as an international entity having legal personality by the Treaty of Nice, as determined in Chapter 1, acquired the conferred competence of concluding international binding agreements. Specifically, the competences of the Union in concluding international agreements are to be found at Art. 206-208 and 217-218 TFEU. With regard to our subject matter, agreements stipulated within the boundaries of the ENP are regulated by Art. 8 TEU. From treaty provisions, it is clear that agreements concluded on the basis of Article 8 TEU may cover all Union competences, including those found in the TFEU, and that the general treaty-making procedures laid down in Article 218 TFEU will apply[332].

The long road of the inclusion of human rights conditionality in ENP agreements began with the 1993 Copenhagen criteria, which introduced the concept of conditionality in the broader context of accession and membership. The 1994 Essen Summit coupled negative conditionality, as justified in international law by Art. 60 of the 1969 Vienna

[332] Lang, A. and Mariani, P. (2014). Supra note 59, p.46.

Convention[333], to positive conditionality, whose aim is to encourage reforms in third countries through additional benefits in light of a potential enlargement of the Union.

The principle of conditionality found its way in the ENP and was integrated in European bilateral agreements with Neighbourhood countries through the instrument of human rights clauses. Its purpose was to accomplish the European human rights objectives in foreign policy, as prescribed by the EHRP. Notably, a peculiar way in which the integration of the EHRP in EU external competences manifests itself is through the concept of "human rights conditionality". This concept denotes that bilateral and multilateral agreements with third countries and international organizations of whatever type (partnership, association, cooperation) are predicated upon a full respect for human rights; once the treaty partners fail to live up to that commitment, the agreement will be suspended or terminated[334].

The question might arise on whether the negative side of conditionality is consistent with the international image of the EU as a normative power in foreign policy. In 2002, Manners claimed that the Normative Power Europe (NPE) discourse is based on the claim that the EU is normatively different as it promotes the values of peace, democracy, human rights and the rule of law in the world both through constituting a "virtuous example" and through conditionality[335]. Conditionality, in this case, reinforces the normative action of the European Union, as it institutionalizes its human rights requirements through legal texts. The EU sets a "virtuous example" for countries wanting to be in business with it and, by weighing its values and principles against its huge economic power, puts pen to paper for anyone else to see what is considered "normal behaviour". Such a claim is empowering for the Union because it enables the EU to define what is normal for others[336]. Referring to the NPE debate, Bicchi contends that "the EU aims at promoting regionalism as the 'normal way' for neighbouring countries to address issues of common interests and at establishing a standard of proper behaviour around which actors' expectations would converge"[337]. With regard to the EU's Neighbourhood, she claimed

[333] As per Art.60(1) of the Vienna Convention, "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part".
[334] De Waele, H. (2017). Supra note 48, p.119.
[335] Manners, I. (2002). Supra note 34, p.253.
[336] Ibid.
[337] Bicchi, F. (2006). 'Our Size Fits All': Normative Power Europe and the Mediterranean. Journal of European Public Policy. Special Issue 13 (2)., p.202.

that the EU is the actor setting the benchmark of good behaviour in the region. In other words, the ENP sets political and economic benchmarks for EU's Neighbours. Following the same course of action of the enlargement negotiations, this method is complementary to the EU's classical conditionality approach: while enhancing coordination between the Member States on the policy to follow, it aims at socializing Neighbouring countries to the EU's norms, values, and standards by constantly pointing at their own political responsibilities through a process of "naming and shaming" with reports and peer pressure processes[338].

The human rights conditionality approach has proven so effective in the European practice because it is based on the framework of multilateralism[339]. The advantages in pursuing a multilateral human rights conditionality are two-fold. First, conditionality appears more "legitimate" when it is applied by the Union as a whole rather than by one Country alone. Moreover, as the Union itself is founded on the values that it promotes abroad, legitimacy to institute conditionality is more unambiguous. Second, the group effect of the Union is "politically safer" since it also shields the individual Member States from the responsibility of applying negative conditionality measures alone, and from being individually targeted by the states which have been the objects of these measures.

However, the uneven application of conditionality on the base of the political and economic weight of the third country reflects an arbitrary approach based mainly on the varying national interests of EU Member States. This fact leads to questioning the EU's normative intensions and diminishes European credibility in Neighbouring countries[340]. As a matter of fact, the struggle between interests and values is particularly evident in the Neighbourhood, where strategic partners are often offered lighter conditionality measures and are less likely to suffer from repercussions from EU side than less strategic partners. On the other hand, if economic or strategic interests were the primary concern for the Union's external relations, then there would have been no need or desire to develop such a far-reaching and innovative External Human Rights Policy. In fact, if the EU renounced to pursue its EHRP through the use of conditionality, its capacity of international economic superpower would not suffer from third country reluctance in engaging with it,

[338] Tulmets, E. (2006). Supra note 280, p.5.
[339] Bouris, D. and Schumacher, T. (2017). The revised European Neighbourhood Policy. Continuity and change in EU foreign policy. Palgrave Macmillan. London., p.76
[340] Ivi, p.77

which stems from the obligation to adhere to human rights conditionality norms. While human rights conditionality may sometimes interfere with other foreign policy considerations, "the EU is none the less at the front of efforts to make it illegitimate to violate human rights and conduct undemocratic politics"[341]: without its external human rights normative intentions, the EU would not be legitimate in pursuing its foreign policy objectives.

Conditionality as presented in this thesis will be intended as a soft power measure. However, much debate in the literature contends this view[342]: the negative side of conditionality has often been described as a hard power instrument hindering the image of the European Union in the international arena, affecting its very normative essence[343]. In fact, when the "more for more principle" was introduced in the reviewed 2011 ENP, allowing for the development of positive conditionality, the "less for less" became equally valid. This exercise in negative conditionality is described by Hyde-Price as disruptive for the very essence of the EU as a normative power, acting as an "instrument of collective hegemony"[344]. From this concept stems the idea of the EU as a "civilizing power" with neo-imperialistic intentions towards its Neighbourhood rather than a "civil power", as we depicted it in Chapter 1. Because of the strict obligations of conditionality, the ENP often fails to be perceived as an attractive framework for cooperation by Neighbourhood countries. On the one hand, for some partner countries the costs of conditionality largely exceed the benefits offered under the ENP. Moreover, many Southern Neighbourhood partner countries receive unconditional economic and political support from other international and regional actors, pursuing their quest for influence in the region. Furthermore, some partner countries prefer not to fully engage in the ENP in order to maintain their bargaining position with the EU and other regional and international actors[345]. Although the ENP includes the use of negative conditionality, such as withdrawal of aid and sanctions, we claim that its overall approach has been predominantly positive in that political and economic incentives have been provided

[341] Smith, K. (1998). Supra note 67, p.274.
[342] See for example: Kochenov, D. The ENP Conditionality: pre-accession mistakes repeated. In Delcour, L. and Tulmets, E. (eds). (2008). "Pioneer Europe? Testing EU foreign policy in the Neighbourhood". Baden-Baden. Nomos, p.116.
[343] See for example: Hyde-Price, A. (2006). Supra note 14, p.227.
[344] Ibid.
[345] Chmielewska, A. and Fabbri, F. (2016). Supra note 292, p.73.

through the various ENP tools and instruments in order to provide supports for undertaking reforms in Neighbourhing countries. Human rights conditionality is then claimed to be a positive, effective, soft power measure that is consistent with the European EHRP and helps achieving a bargaining position towards a political and human rights dialogue in the Neighbourhood.

In the next section, the factual application of human rights conditionality to international agreements, human rights clauses, will be further investigated in its current form and practice.

3.2.1 Human Rights clauses as a soft measure to ensure compliance

The EU has built its reputation as a global player on the premises that its normative power would be a good enough foreign policy weapon and attract more and more countries into its sphere of influence. Through irradiation of its norms and values, the EU cruises in the realm of international relations relying on soft power instruments, such as political dialogue and development cooperation.

The EU's practice has evolved from rhetorical statements to standard Human Rights Clauses (HRCs) in more than 120 international agreements and to cross-referencing of agreements containing HRCs[346]. Although earlier "programmatic principles" and the "basis clauses" introduced human rights to the agreements, they were not considered to be "essential to the accomplishment of the object or purpose of the treaty"[347] as HRCs are now considered to be. A shift towards including HRCs in international agreements occurred in the 1990s, following the earlier trend of linking foreign policy to human rights, as discussed in the first Chapter, and reflecting the growing European sentiment towards introducing conditionality to development aid and democratic reforms.

In the Neighbourhood, this process was also linked to the disintegration of the Soviet bloc and the European Declaration on the Recognition of New States. This is why a special focus is owed in this thesis to the latest Eastern Association Agreements, which paved the way for inclusion of HRCs demanding respect for provisions of the UN Charter,

[346] Leino, P. (2008). The Journey towards All that is Good and Beautiful: Human Rights and 'Common Values' as Guiding Principles of EU Foreign Relations Law. In EU Foreign Relations Law: Constitutional Fundamentals, p. 263.
[347] Art. 60(3)(b) Vienna Convention on the Law of Treaties

the Helsinki Final Act and the Charter of Paris, "especially with regard to the rule of law, democracy and human rights[348]". Although references to international instruments of protection of human rights vary depending on the country or region concerned, the UDHR is considered a central feature of the standard HRC, and together with the UN Charter is viewed as a testament to the universality of the human rights principles promoted through the European clauses. In addition to the UDHR, the Eastern clauses make references to the ECHR, the Helsinki Final Act, and the Paris Charter of the OSCE. Most HRCs in Euro-Med agreements refer only to the UDHR in their essential element clause[349]. With respect to the European legal order, the reference to the ECHR is the only instrument that creates legal binding obligations. For what concerns the political meaning and the practical effects of the HRCs, these clauses state that the agreement is based on (an assumption of) respect for democratic principles and fundamental rights[350]. These instruments help the European Union presenting a common approach towards the Neighbourhood and indicates the EU's universality approach, faithful to the principles extract from Art.21(1) and 21(2)(c) TEU[351].

In the first generation of human rights clauses, the non-compliance clause would allow contracting parties to suspend the agreement, fully or just in part, in case of a serious breach of human rights. This system was refined over the years by adding the possibility for a contracting party to take "appropriate measures" if another party fails to fulfil an obligation under the agreement. Of course, because the EU is always at the frontline of soft measures and dialogue, consultations should in any case precede an invocation of the non-compliance clause, and the negative measures shall be revoked as soon as the reason for their adoption has disappeared[352]. As a matter of fact, what is most important to the EU is not to compromise the goals of the treaty in the first place, in order not to let it collapse in its entirety. Targeted actions against fundamental violations of human rights leave intact other treaty partners' advantages and have proven to be the most effective

[348] Fierro, E. (2003). The EU's Approach to Human Rights Conditionality in Practice. Kluwer International. The Hague. NL. pp. 71-80.
[349] The essential element clause of the Euro-Med Agreements with Israel and Tunisia make no references to any international documents.
[350] De Waele, H. (2017). Supra note 48, p.119.
[351] Art.21 TEU.
[352] Ibid.

instrument in order to both give effect to the agreement provisions and prevent human rights violations, as previously tackled.

The functions of the HRCs are usually linked to the non-execution clause, which provides *inter alia* for the possibility of suspending the agreement in case of a breach of its essential elements. The need for such an intervention mechanism is exemplified by general norms of international law to reprimand a contracting party to a bilateral agreement. As a matter of fact, in European HRCs, the rationale of Art. 60 of the Vienna Convention is found in the non-execution clause, part of the standard HRC[353]. It should be noted that Art. 60 of the Vienna Convention operates subject to a treaty's specific provisions applicable in the event of a breach of agreement, that is subject to the non-execution clauses. Recent Association Agreements include the "Bulgarian" version of this clause; as opposed to the "Baltic" clause providing for immediate suspension in case of a breach of an agreement[354], the Bulgarian clause places an emphasis on consultation by allowing for appropriate measures to be taken, whereby an immediate suspension would only be possible in cases of "special urgency". The option for suspension, within the possibility of taking "appropriate measures" in case of a breach, appears as the last stage[355]. Exceptional cases allowing for the immediate suspension of the agreement would therefore include all breaches of human rights, democratic principles and all other essential elements incorporated in the Eastern HRCs.

Beside inevitable debate on the negative side of the HRCs, it is relevant to remind that the main reason behind the creation of HRCs is to express the shared commitment to human rights and democracy, and EU institutions have long acknowledged the importance of complementing the negative/sanction approach with positive/creating conditions for positive engagement[356]. This has been part of a trend in political active measures, providing "contextual support" for the positive function of HRCs[357]. The

[353] Art. 60(4) of the Vienna Convention.
[354] Fierro, E. (2003). Supra note 348, p. 218.
[355] Art. 478 of EU-Ukraine AA; Art. 455 of EU-Moldova AA; Art. 419 of EU-Georgia AA.
[356] Fierro, E. (2001). Legal Basis and Scope of the Human Rights Clauses in EC Bilateral Agreements: Any Room for Positive Interpretation? 7 E.L.J. 41, p. 67.
[357] Ibid.

Commission views HRCs as "instruments for the implementation of positive measures", increasing the "visibility of [EU] initiatives"[358].

In this section, HRCs as an instrument of the European External Human Rights Policy have been discussed. It is undeniable that the deployment of this instrument has proven effective towards the European goal of exporting human rights standards in the Neighbourhood. The negative side of this instrument, in the form of the non-execution clause, and its repercussions on the image of the EU as a normative power have been tackled. The conclusion has been drawn that the positive side of human rights conditionality exceeds its negative side, since the EU is mainly interested in entertaining relations with ENP countries based on common views of human rights and democracy, and it is very unlikely to halt cooperation through the use of negative conditionality.

3.2.2 Recent developments in Association Agreements

In this section, the recent developments in Association Agreements for what concerns the development of HRCs will be outlined. For many years now, the EU has been actively implementing human rights conditionality in its international relationships. HRCs even crop up in complex multilateral conventions[359].

As previously mentioned, the EU has obtained the conferred competence of concluding Association Agreements with partner countries ex Art. 217 TFEU. Since 1995, the Union is obliged to include HRCs in its international agreements. For over two decades HRCs have been incorporated in the international agreements of the European Union. It is therefore not surprising to find such clauses in the new generation of Association Agreements (AAs) concluded with Ukraine, Georgia and Moldova in 2014. There are a number of reasons why these particular HRCs deserve further attention. Firstly, the Eastern AAs should be analyzed within a specific policy narrative. They are a "new generation" of bilateral instruments in the EU Eastern Neighbourhood, conceived within the ENP. The Eastern AAs are the first post-2014 ENP agreements, concluded in

[358] European Commission. Commission implementing decision of 18 August 2020 on the annual action programme in favour of the European Neighbourhood Instrument (ENI) South countries for 2020. C(2020) 5737 final, p. 7.

[359] See for example: Cotonou Agreement. Signed in Cotonou on 23 June 2000, Revised in Luxembourg on 25 June 2005, Revised in Ouagadougou on 22 July 2010.

the Eastern Neighbourhood in an atmosphere of hostile relations with Russia. This created a new emphasis on the issue of sharing common values.

From the moment of its inception, the ENP incorporated the concept of value promotion as an indirect means of achieving security and stability[360]. Democracy and human rights promotion have featured as "shared values" on the basis of the enlargement experience[361]. This "value dimension", which has been referred to as a significant development introduced by the ENP in contradistinction to previous EU policies[362], matured over the years and reached its maximum post-2014 with Eastern Neighbours. What is the purpose of the HRCs in AAs with ENP countries? One might argue that it creates a direct link between EU values and trade policy. However, an even more convincing rationale might lie in the political context of the drafting of the Eastern AAs. This is the case for the latest AAs with Eastern Neighbours concluded in the aftermaths of the 2014 crisis with Russia.

As mentioned in the previous section, the negative function of the HRCs in the context of human rights conditionality is considered a last resort. In the EU immediate vicinity, blatant violations of human rights and democratic principles have never led to the suspension mechanism under the essential element clause[363]. In the EU's Neighbourhood, among strategic actors of today's international events, HRCs provide a strategic legal basis for using trade restriction to achieve political objectives, and that is why they are usually labelled as "political clauses". The EU's bias on applying negative measures depends on the likelihood of success of sanctions as a less disruptive approach in place of the extreme suspension of the agreement. This can be explained by the fact that almost every country in the Neighbourhood is said to be a strategic partner to the EU, and a loss in negotiation power, due to the suspension of the agreement, would only result in the loss of strategic power in the region. Negative conditionality in general has been criticized due to the flexibility and the political expediency inherent in its application[364]. It is hence

[360] Ghazaryan, N. (2014). The European Neighbourhood Policy and the Democratic Values of the EU. A Legal Analysis. Hart Publishing Ltd. London. UK, pp. 23-33, 73-84.
[361] Council of the European Union. 29 January 2003. Cover note from the President to the delegations. Copenhagen European Council 12-13 December 2002. Presidency conclusions. Enlargement. Available at: https://www.consilium.europa.eu/media/20906/73842.pdf
[362] Bosse, G. (2007). Values in the EU's Neighbourhood Policy: Political Rhetoric or Reflection of a Coherent Policy? 7 E.P.E.R. 38, p. 39.
[363] Ghazaryan, N. (2014). Supra note 360, p. 175.
[364] Fierro, E. (2003). Supra note 348, p. 113.

understandable that the EU prefers to exercise leverage in the process of concluding the agreement, while refraining from its suspension after it has been adopted. The disadvantages are not only on the side of the affected country, but also on European side. Suspending trade with WTO members can be particularly problematic, let alone the impunity and the social repercussions on the population.

As well as being the first post-ENP agreements, the Eastern AAs were the first post-Lisbon agreements in this region. All three agreements use the novel combination of Art.31(1) and 37 TEU and 217 TFEU as a joint legal basis[365]. Although the Commission suggested only Art.217 TFEU (together with the relevant provisions of Art. 218 TFEU) as a legal basis for the Georgian and the Moldovan AAs, the latter followed the Ukrainian example which already used the novel combination noted above.

The specific circumstances of the EU-Ukraine agreement should be highlighted here: the political chapters were signed separately in March 2014, where the CFSP legal basis was viewed as necessary. Its component on the Deep and Comprehensive Free Trade Agreement (DCFTA) was signed in June at the same time as the rushed signing of the Georgian and Moldovan agreements in spite of these countries' shortfalls in fulfilling the political criteria set out in the ENP documents. The signature of the AAs in the Eastern Neighbourhood was viewed by Russia primarily as an expression of the EU's incursion in Russia's historic and geographic spheres of influence. The AAs imply "special, privileged links" whereby the party "must, at least to a certain extent, take part in the [Union] system"[366]. This shows a process of gradual integration in the European system by the contracting parties. The extent of the cooperation is confirmed in the preamble, in which the countries are defined as "European" and their "European choice" acknowledged. The preambles of the Eastern AAs echo the ENP's and the Lisbon Treaty's orientation towards value promotion[367]. Although certain distinctions are noted, the agreements have in common the rhetoric on shared values "at the heart of political association and economic integration" or as the basis of cooperation. Unlike the Georgian and Moldovan AAs, the Preamble of the EU-Ukraine agreement emphasizes the essential

[365] Van Elsuwege, P. (2020). Supra note 278, p.450.
[366] *Meryem Demirel v Stadt Schwäbisch Gmünd* (12/86). ECR. 3719, §9.
[367] See: European Union, its Member States and Ukraine. Association Agreement. Supra note 317; European Union and the European Atomic Energy Community and Member States and Moldova. Association Agreement. Supra note 318; Art. 21 TEU.

element clause and links progress in cooperation, *inter alia*, to the respect for common values, which has been described as "strict conditionality"[368]. Such a view is supported by a further addition to the preamble in which many values - such as democratic principles, the rule of law, good governance, human rights and fundamental freedoms - are listed.

Most interestingly, the Eastern AAs make more extensive reference to the UN Charter, OSCE documents, the Universal Declaration of Human Rights (UDHR) and the European Convention of Human Rights (ECHR) than do previous Neighbourhood agreements: these references to human rights treaties constitute the standards of human rights clauses for ENP agreements. While the Eastern HRCs do have a clear normative scope, it has been argued in general that a broad normative framework causes uncertainty regarding the precise standard being promoted. Conversely, the inclusion of a phrase on "other human rights instruments" could be considered a positive evolution, allowing the HRC normative basis to be updated in line with the emerging practice. Such an approach can be found in the Ukrainian AA, where the HRC refers to "other relevant human rights instruments" in addition to those mentioned above, thus rendering the list open-ended[369]. This is not the only aspect of the Ukrainian HRC that stands out from its counterparts. The variations between the Ukrainian AA and the Georgian and Moldovan AAs demonstrate the flexible and somewhat arbitrary nature of this distinction. Ultimately, judging by their normative framework and the list of essential elements, it can be concluded that the Eastern clauses impose more onerous obligations than other agreements in the Neighbourhood. The reasons for this particularity could be found, as mentioned, in the peculiar political context they were signed in. The institutionalization of a closeness of values and principles between these countries and the EU had the double meaning of signing their definitive independence from Russian and mark a new era of cooperation, where the emphasis was placed on sharing common (European) values.

Although no Association or Cooperation agreement was signed between the European Union and Belarus, being part of the eastern partnership since 2016 makes the country

[368] Van der Loo, G., Van Elsuwege, P. and Petrov, R. (2013). The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument. 9 EUI Working Papers, p. 3.
[369] European Union, its Member States and Ukraine. Supra note 317.

sensible to repercussions in matter of human rights and fundamental freedom[370]. As of now, Belarus is suffering an arm embargo and sanctions on people and entities[371]. It is clearly stated that the level of participation and consequently the number of investments from the EU that Belarus will receive strongly depends on the country's respect for the principle of human rights and fundamental freedoms. This is a useful indicator of the political leverage the EU is making use of through the deployment of human rights conditionality in the context of its EHRP.

In this section, the latest AAs with Eastern partners have been taken into consideration in their innovations. Stronger ties with these countries have been drawn in order to secure European influence in the Eastern Neighbourhood. The extensiveness of cooperation with Ukraine, in particular, marks the will by the EU to sever the long-standing Russian dependence in the region and link economic cooperation to common values. To this end, the concluded HRCs with Eastern Partners are the most demanding in terms of human rights requirements and reference to international instruments of protection of human rights. Of all AAs with Neighbour countries, these clauses have the goal of clarifying the shift in sentiment post-2014 crisis and the following adherence of Eastern Neighbouring countries to European values.

Conclusions

In this Chapter, the ENP has been outlined as one of the main areas of action of the EU where the features of the European EHRP presented in the precedent Chapters are most visible. As mentioned, the ENP was launched as not solely a CFSP instrument, but rather a "cross pillar" policy of the External Action[372]. Its main aim is to foster closer relations and "share values" with all the states bordering the EU and was built on the success of the fifth enlargement, thus opening to an externalization of EU values in conformity with the multi-faceted EHRP.

[370] Council of the European Union. 7 May 2009. Joint Declaration of the Prague Eastern Partnership Summit. Prague. 8435/09 (Presse 78). §1. Available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/107589.pdf

[371] European Council. 25 February 2021. Press Release. Belarus: EU prolongs sanctions for a year. Accessed on 11/03/2021. Available at: https://www.consilium.europa.eu/en/press/press-releases/2021/02/25/belarus-eu-prolongs-sanctions-for-a-year/

[372] Tulmets, E. (2007). Supra note 320, p.55.

Over the years, the ENP has shown vagueness of objectives, although very noble ones, and unreadiness to face the challenges of the unstable region it covered, the Neighbourhood. That is why it underwent not one but two reviews: the first one post-Arab Spring, in 2011, and the second one post-2014 crisis with Russia, in 2015.

Notably, while continuing to defend the relevance of EU values and chiefly human rights in establishing relationships with the Neighbourhood, the 2015 Review engages partner countries in increased cooperation in light of a more tailor-made approach. The emphasis shifted from regionalism to bilateralism as a more effective policy to encourage partner countries to undertake political reforms[373].

To the present day, the ENP is defined as a European policy aimed at the use of a soft method of coordination in EU's external relations to enhance bilateral relations with third countries. This contradicts the first policy propositions on the Neighbourhood, which aimed at developing a sub-regional integration and cooperation in the EU's vicinity. As a result, the current methods and strategies adopted towards the Neighbourhood complement and enhance the conditionality approach put in practice by the Union and neglect the sub-regional dimension of EU's Neighbourhood.

In the context of bilateral relations with Neighbourhood countries, extreme importance is laid on the use of human rights conditionality as a tool to promote human rights universality, in accordance with the values and principles laid down in the European Treaties. The language of shared values implies universality of EU values to avoid accusations of neo-colonialism and civilizing power towards its Neighbourhood. The presumption of universality of the values promoted by the EU is supported by references to various international and regional human rights protection instruments and documents in ENP agreements, chiefly Association Agreements. However, the notion of values being "shared" with certain autocratic Neighbours appeared to discredit the EU and undermine the authority and legitimacy of ENP human rights conditionality.

The issue of negative conditionality and its possible repercussions on the normative image of the EU has been discussed. The attention has been brought to the extremely cautious use of this instrument and the fact that Europe is far more likely to target its restrictive measures rather than suspend wholly the agreement. The EU is well aware of the importance of obtaining a bargaining position on the issues of human rights in the

[373] Smith, K., Supra note 67, p.78.

Neighbourhood and is extremely unlikely to sever ties with its strategic partners. The relevance of the EHRP in the Neighbourhood, endangered by the possibility of negative conditionality, remains therefore intact. It is then beyond doubt that human rights conditionality employed in establishing bilateral relations with Neighbourhood countries is yet another field in which the objectives of the EHRP are not only respected but participate to building the international actorness of the EU as a normative power which finds its legitimacy in the human rights principles it promotes abroad.

In the next Chapter, we will proceed with a more in-depth consideration of inconsistencies and shortcoming of the European EHRP in the Neighbourhood. The normative image of the EU as an actor in international relations finds its authority in the successful practice of the EHRP, since its legitimacy as an international actor, as we have seen in Chapter 1, stems from the projection of its founding values - democracy, rule of law and human rights - onto the international scene. This is why it is so important for the goal of this thesis to focus on the contradictions and successes of the EHRP in the strategic framework of the Neighbourhood. Here, the Union can fully fulfil its EHRP goals and realize itself as a political superpower, dismissing the precedent critiques that defined it a “political dwarf”.

CHAPTER 4

CRITICISM AND CONTEMPORARY CHALLENGES FOR EUROPEAN EXTERNAL HUMAN RIGHTS POLICY IN THE NEIGHBOURHOOD

Introduction

As previously outlined, the EU foreign policy discourse revolves around the notion of the External Human Rights Policy, which in turn builds up the legitimacy of the European Union as an international actor. Today, the global liberal order is being contested, and all the factors of this crisis point at a weakening of the potential of European Foreign policy. Some of these have a profound impact on the effectiveness of the human rights-driven European foreign policy and mainly consist of challenges in the Neighbourhood. These challenges relate to the external management of migration, especially from the Southern Neighbourhood; the lack of diplomatic resolutions with regard to the humanitarian issues in Syria; the MS uncoordinated response to the post-revolutionary chaos in Libya; the internal political turmoil in many of the European countries that led to the rise of populist parties and their disruptive presence among European institutions; lastly, Brexit, the most evident signal of a deeply rooted distrust in European potential as an international actor.

In this Chapter, we will proceed to analyze the most evident contradictions and shortcomings at the heart of the European External Human Rights Policy, and we will focus on the Neighbourhood as the region where such limitations are most evident. The European Neighbourhood Policy, introduced in its policies and instrument in the previous Chapter, could be the one field for the EU to establish itself as an influential global player by using the EHRP provisions as the foundation of a consistent and coherent approach to the foreign policy challenges faced in the region. As proved in the previous chapters, in fact, the ENP has the potential to respond to the newly arisen challenges while keeping the EHRP at the forefront of European action in the region. However, several obstacles, both exogenous and endogenous, stand in the way.

Coherence and consistency are, as specified in the previous Chapter, a fundamental requirement for the establishment of the Union as an influential actor in the Neighbourhood. And yet, it is precisely in this region that the most evident inconsistencies of the European EHRP can be found. Gebhard conceptualizes coherence and consistency

in the ENP at three interrelated levels. Institutional coherence covers inter- and intra-institutional dimensions within and between the European institutions involved in decision-making: the Council, the Commission and the EEAS. At horizontal level, the principle concerns the coherence between the EU's external and internal policies, the policy objectives and instruments[374]. Vertical coherence pertains to the need for European and Member States policies to complement and strengthen each other, as laid down at Art.24(3) TEU. All of these layers of coherence within the multi-level European system will be taken into consideration with respect to the EHRP provisions in the Neighbourhood. Notably, we will consider the issues in human rights double standards and the internal/external gap as they continue to affect the legitimacy, credibility and effectiveness of European EHRP[375]. In fact, the EU maintains human rights double standards between its internal and its external policies[376], and seems to turn a blind eye to human rights violations in strategic Neighbourhood countries when at the same time condemning them in less strategic partner countries.

These are indeed worrying factors contributing to the weakening of the Union in an already trembling global turmoil, and if not vigorously addressed, they will eventually steal the legitimacy to act as an international global player away from the EU, condemning it to be forever labelled as the "political dwarf" of today's global order. In today's global turmoil, "unity in diversity" sounds like a meaningless motto[377], and the EU lacks a distinct identity that pushes people, citizens and not, to trust the European institutions.

4.1 EHRP legal uncertainties and inefficiencies in decision-making system at European level

This section will begin by admitting that in its foreign policy making, solidly based on fundamental values, the respect for human rights, rule of law and democracy, the EU is in theory bulletproof[378]. As discussed, the EU derives its legitimacy to act in international

[374] Gebhard, C. (2011). Coherence. In C. Hill and M. Smith (eds). International Relations and the European Union, Oxford: Oxford University Press, pp. 101-127.
[375] Smith, K. (2014). Supra note 67.
[376] Williams, A. (2004). Supra note 245.
[377] Zielonka, J. (2015). Disintegrazione. Come salvare l'Europa dall'Unione Europea. Laterza. Bari., p.35.
[378] Von Bogdandy, A. and Bast, J. (2010). Principles of European Constitutional Law. 2nd edition. Oxford: Hart Publishing, p. 22.

relations from its conferred competences. In particular, the competence of exporting its values abroad, provided for at Art.21 TEU, make it an admirable international actor, as it hierarchically poses the values of human rights before its economic interests. The question we will try to answer in this section is whether the EU is actually equipped with the right tools to implement its EHRP objectives ex Art.21 at horizontal level. In fact, many examples in the complex European decision-making system disclose a generalized lack of coherence among European institutions in matter of what objectives to pursue and how to pursue them, resulting in inconsistent actions in practice.

The deficiencies we will proceed to analyze in this Chapter are largely explained by the fact that the EU lacks a general competence in the field of human rights[379]. In spite of the broad set of objectives laid down at Articles 3(5) and 21 TEU, these provisions do not confer new competences on the EU. The normative effect of Articles 3(5) and 21 TEU is limited: the restraints deriving from the EU Treaties hinder the possibility for these provisions to be capable of providing a sufficiently strong legal basis for EU action aimed at promoting and protecting human rights. In this view, to entrust the EU with "full" global human rights powers would require further Treaty amendments[380].

The triangle peace-security-human rights, while often being disregarded by other international actors, stands pivotal in European foreign policy making. The recently developed expressions of general skepticism towards this concept could perhaps convey the message that human rights constitute a luxury that society cannot fully afford to the current moment in time. They have to be temporarily be set aside in order to pursue other objectives which are perceived as overriding, such as national and international security or economic interests. On the contrary, the European response to the newly arisen international challenges needs to show, one way or another, that society cannot afford to disregard human rights protection. Such a behaviour would be in blatant contradiction with the European idea of a human rights-based approach to foreign policy. Nevertheless, as mentioned, exogenous factors threaten not only the effectiveness of a European EHRP, but the liberal global order itself, and even European institutions seem to perceive the threats to European normative action in foreign policy. As the previous High Representative for Foreign Affairs and Security Policy Federica Mogherini pointed out

[379] De Waele, H. (2017). Supra note 48.
[380] Velluti, S. (2016). The Promotion and Integration of Human Rights in EU External Trade Relations. 32(83) Utrecht Journal of International and European Law 41., p.46.

in her speech on the European Global Strategy, "we live in times of existential crisis, within and beyond the European Union. Our Union is under threat. Our European project, which has brought unprecedented peace, prosperity and democracy, is being questioned"[381]. Donald Tusk, the previous president of the European Council, reiterated that "[t]he challenges currently facing the European Union are more dangerous than ever before in the time since the signature of the Treaty of Rome"[382].

As a consequence of international events, such as the irresponsible behaviour of President Donald Trump as the representative of the country founder of the current global liberal order[383], the EU finds itself alone as the protector of a system of global governance institutions, as well as the contested defender of universal human rights ideals[384]. As Ivan Krastev of the Institute for Human Sciences recently observed, the EU now faces the possibility of becoming "the guardian of a status quo that has ceased to exist"[385]. With its emphasis on soft power, its preference for legal solutions, and its enthusiasm for multilateral diplomacy, the EU is having trouble adjusting to a multipolar world increasingly ruled by power politics[386].

If the Union had a solid backbone and a fully functioning policymaking strategy in its foreign policy, these challenges and critiques would be affecting its international image, but the Union itself would not be put into question as an international entity itself. However, especially after Brexit came about, the European machine of foreign policymaking and norm exportation has suffered more than expected. The rise of populist movements within Member States is only one of the repercussions of this growing

[381] European External Action Service. June 2016. Supra note 287.
[382] European Council. 31 January 2017. Press Release. "United we stand, divided we fall": letter by President Donald Tusk to the 27 EU heads of state or government on the future of the EU before the Malta summit. Available at: https://www.consilium.europa.eu/en/press/press-releases/2017/01/31/tusk-letter-future-europe/
[383] Landler, M. 08 May 2018. Trump Abandons Iran Nuclear Deal He Long Scorned. The New York Times. Accessed on 16/01/2021. Available at: https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html
[384] Sjursen, H. (2015). Normative Theory: an Untapped Resource in the Study of European Foreign Policy, in K. E. Jørgensen, A. Aarstad, E. Drieskens, K. Laatikainen and B. Tonra (eds). The SAGE Handbook of European Foreign Policy., pp. 196-214.
[385] Krastev, I. (24 October 2019). How liberalism became 'the god that failed' in eastern Europe. The Guardian. Accessed on 11/03/2021. Available at: https://www.theguardian.com/world/2019/oct/24/western-liberalism-failed-post-communist-eastern-europe
[386] Lehne, S. (2017). Supra note 269.

sentiment[387]. The reasons behind the weakening of the European policy and strategy machine can only be explained by the long list of shortcomings and consequent powerlessness of European institutions for what concerns their actions in foreign policy. The Union is slowly losing its authority in the international relations game. The EU has been criticized for its foreign policy making on the grounds of its "capability-expectations gap", mainly due to the absence of hard power instruments at European disposal, but we argue that the lack of specific competences at European institutional level, the shortcomings in justiciability for its CFSP acts and the lack of a comprehensive EHRP compose the major reasons behind these criticisms. That is why it is of the utmost important for the EU to improve effectiveness of its EHRP first of all at European level. The best way to promote the European EHRP and make it more effective is coordination[388]. Coordination is needed at both horizontal and vertical level in the European system. In fact, without synergy on the political level, foreign policy effectiveness is weakened due to competing authorities and diverging policies which might be exploited by third countries[389].

The underlying logic of European institutional structure consists in an intentional dispersion of decision-making power both horizontally and vertically. Such dispersion was initially envisaged to prevent the emergence of a predominant actor or institution[390]. Indeed, this logic has clear repercussions on the functioning of the European foreign policy-making system. The innovations of the EU foreign policy-making construction were considered strategic features of the Lisbon Treaty[391]. Thanks to this restructuring the EU should have finally achieved a more united and powerful voice in the world, and a more effective apparatus for supporting it[392]. Yet, it is a widespread opinion that the results of the post-Lisbon amendments to EU foreign policy have so far been poor. Not only is the European Parliament ruled out of the decision-making process, but, as Art. 24

[387] Zielonka, J. (2018). Supra note 288.
[388] Lambrinidis, S. (2020). The Positive Narrative on Human rights. In Westlake, M. (eds) "The European Union's New Foreign Policy". Palgrave McMillan. London. UK., p.36.
[389] Orenstein, M. and Kelemen, D. (2017). Trojan Horses in EU Foreign Policy. JCMS 2017 Volume 55. Number 1. pp. 87–102.
[390] Tizzano, A. and Adam, R. (2017). Supra note 77.
[391] Piris, J. C. (2012). The Future of Europe: Towards a Two-Speed EU? Cambridge. Cambridge University Press.
[392] Fabbrini, S. (2014). The European Union and the Libyan crisis. International Politics, 51(2), pp. 177–195.

TEU clarifies, "the Court of Justice of the European Union shall not have jurisdiction with respect to these [foreign policy] provisions," unless the foreign policy decisions infringe upon fundamental principles and rights the EU should respect[393].

Under the Lisbon Treaty, EU external policies are formulated through a legislative system characterized by imperfect bicameralism[394]. It is possible to conceive the governmental authority in EU External Action as shared between the European Council, the Council of the EU, the High Representative and the Commission[395]. We will now shortly consider the responsibilities of the different European Institutions regarding European actions in foreign policy, with a specific reference to EHRP provisions in the Neighbourhood. Primarily, the lack of an effective principle for organizing the multiple separations of powers in EU external policies constitutes a lack of horizontal coordination. This lack is reflected in the role of the HR as chair of the Foreign Affairs Council but not the European Council. The consequence is the intrinsic impossibility of coordinating heads of states and governments[396]. The HR has a dual loyalty to face: it is a member of the Commission and at the same time the Commissioner for External Relations and chairs the Foreign Affairs Council[397]. The HR enjoys extensive decision-shaping powers in developing a joint approach, coordinate and supervise the work of the Commissioner for Trade, Development, Humanitarian Aid and European Neighbourhood Policy; however, personification of powers doesn't necessarily translate in coordination. As a matter of fact, when there is lack of consensus among MS, the HR shall remain silent[398]. Moreover, the relationship between the president of the European Council and the President of the Commission are not clearly defined in the Lisbon Treaty[399]. Potentially, the president of the European Council could play a significant leadership role on foreign policy. Yet, the first two presidents, Van Rompuy and Tusk, mostly limited themselves to bilateral and multilateral high-level meetings[400]. The Commission's role,

[393] Ivi, p.179.
[394] Ivi, p.187.
[395] Amadio Vicerè, M.G. (2016). From Brussels, with Love? A comparative institutional study of values and principles in the foreign policy of compound democracies. In Sciso, E., Baratta, R. and Morviducci, C. (eds). I valori dell'Unione Europea e l'azione esterna. G. Giappicchelli Editore. Torino.
[396] Smith, K. (2014). Supra note 67.
[397] Amadio Vicerè, M.G. (2016). Supra note 395, p.37.
[398] Thym, D. (2011). The Intergovernmental Constitution of the EU's Foreign, Security & Defence Executive. Cambridge University Press., p. 256.
[399] Amadio Vicerè, M.G. (2016). Supra note 395, p.38.
[400] Lehne, S. (2017). Supra note 269.

on the other hand, is weaker than in the other areas of integration, but as it controls many of the Union's most potent External Action instruments, it has real influence. This is particularly relevant in dealing with third countries that have a strong structural relationship with the EU, such as candidates for enlargement or partners in the Neighbourhood Policy[401].

There is one institution that, since the entry into force of the Lisbon Treaty, has increased its powers in the context of foreign policy, the European Parliament. The European Parliament, in fact, assumed a prominent role in the conclusion of international agreements[402], as the only directly elected institution of the EU, and increasingly claimed competences and influence on EU foreign policy[403]. The Treaty of Lisbon increased the powers of the national parliaments and the EP simultaneously in relation to the Common Foreign and Security Policy[404] and involved increased cooperation between national parliaments and the EP. Although not provided with legislative competences regarding foreign policy acts, the EP has advisory competencies; its budgetary power also provides the EP with indirect leverage, which has successfully led to other institutions taking human rights and democratic dimensions into account[405].

With regard to the rising influence of the European Parliament in matters relating to the External Action, it is worthwhile to focus on the formation of strong populist parties within MS, parties that made it to fill the ranks of the European Institutions. Populist movements making up the European Parliament have oftentimes not pronounced themselves on possible strategies and outcome to increase the effectiveness of European External Action, but simply criticized EU activities and actions with respect to major global challenges, such as the crisis in Ukraine and in Syria. The wave of populism inside the EP is a major factor of concern: when the criticisms come from within, the whole system is put into question and loses authority, and this is, in the writer's opinion, the biggest issue facing European foreign policy at the moment. The EU is stronger when united, and lack of coherence among European institutions adds up to structural

[401] Ibid.
[402] De Waele, H. (2017). Supra note 48, p.16.
[403] Barbé, E., and Herranz-Surrallés, A. (2008). The power and practice of the European Parliament in security policies. In D. Peters, W. Wagner, & N. Deitelhoff (eds)., The parliamentary control of European security policy (pp. 77–108). Oslo, Norway: ARENA, p.193.
[404] Corbett, R., Jacobs, F., and Shackleton, M. (2016). The European Parliament (9th ed.). New York: John Harper Publishing.
[405] Keukeleire, S., and Delreux, T. (2014). Supra note 259, pp. 61-93.

impediments to the ability of operating effectively in the Neighbourhood: incoherent voices from within the democratic representation of Europe lead to incoherent policies on the External Action, and especially in the contested Neighbourhood, where it is most necessary for Europe to present itself with a united voice in order to be taken seriously as an influential international actor.

For our analysis, the European Union's Special Representative for Human Rights is an embodiment of the EU's abiding commitment to fundamental values, enshrined in the Treaties since 2009[406]. The tasks of the Special Representative for Human Rights are to enhance the effectiveness and visibility of EU human rights policy. This additional figure encompassed human rights issues once and for all within the Union's main objectives in its foreign policy. Since 2012, the Special Representative has supported the Union in achieving its human rights objectives, by giving the declaration of intents at Art.21 TEU a body and a face and by being strictly connected to the European External Action Service.

From this brief overview, we can draw that the lack of an efficient system of shared competences and a lack of horizontal coordination affects the External Action of the Union, its EHRP and consequently its international image.

As a matter of fact, the External Action of the Union is directly related to many dimensions of the existential crisis[407] the EU is currently experiencing and that are "putting European integration at risk"[408]. In this respect, one has only to think of the dramatic growth, between 2014 and 2017, of applications for asylum from areas in the European Neighbourhood where recent crises have occurred, namely from Ukraine[409] as well as from Libya and Syria[410]. These factors all point out at the relevance of the Neighbourhood for European foreign policy making: if the EU will be able to reaffirm

[406] Westlake, M. (2020). The European Union's New Foreign Policy. Springer International Publishing. Palgrave Macmillan, p.33.
[407] Menéndez, A. J. (2013). The existential crisis of the European Union. German Law Journal, 14(5), pp. 453-525.
[408] Fabbrini, S. (2016). Beyond disintegration: Political and institutional prospects of the European Union. In B. Vanhercke, d. Natali, & d. Bouget (eds)., Social Policy in the European Union: State of Play. Brussels: European Trade Union Institute and European Social Observatory., p.13.
[409] Connor, P. 2 August 2016. Number of refugees to Europe surges to record 1.3 million in 2015. Pew Research Centre. Available at: https://www.pewresearch.org/global/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/
[410] Frontex. (2018). The central Mediterranean route. Accessed on 02/02/2021. Available at: https://frontex.europa.eu/we-know/migratory-routes/central-mediterranean-route/

itself and its normative appeal in this region, then its international image as a human rights-driven normative actor will be restored.

Once having broadly outlined the main inefficiencies at interinstitutional level, we will now move to mention the additional lack of coherence that affects the External Human Rights Policy, which can be found among the ENP provisions themselves. In fact, there is consensus in the literature about a lack of horizontal coherence between key ENP objectives. Notably, when facing an interests-vs-values dilemma, the EU prioritizes the former in the context of the ENP[411]. In other words, there is a lack of coherence among the different values the EU aims to export. Gstöhl notes that especially economic and political values can be at odds[412]. The Union faces the general problem of how to prioritize among the disparate values the ENP wants to export. By analyzing the diversified ENP action plans, Börzel and Van Hüllen argue that the EU "sends one message with one voice but pursues conflicting goals"[413]. They hold that the EU is characterized by substantive inconsistency rather than a lack of internal cohesiveness[414]. The literature is overwhelmingly critical of the horizontal incoherence of the EU's policies towards the Neighbourhood as it appears that the different ENP objectives and instruments at EU disposal do not mutually reinforce each other[415].

On this note, adding further confusion to the already complex decision-making process at EU level, it deserves mentioning that since the turn of the last century, instead of treaty-making, the EU increasingly resorts to non-binding agreements in establishing relationships with third countries[416]. Neither the traditional legislative procedure derived from Article 218 TEU nor a *lex specialis* applies here. The scarce case law reveals that the Council calls the shots, authorizing the Commission to initiate negotiations where necessary[417]. The non-institutionalized nature of these agreements has mainly covered agreements with Neighbourhood countries. As a matter of fact, the ENP has seen an

[411] Blockmans, S., Kostanyan, H., Remiziov, A., et al. (2017). Assessing European Neighbourhood Policy. Perspectives from the Literature. Rowman and Littlefield International, London. CEPS, Brussels.
[412] Gstöhl, S. (2016). Theorizing the European Neighbourhood Policy. Routledge studies in European foreign policy. Routledge. Brussels.
[413] Börzel, T.A. and Van Hüllen, V. (2014). One voice, one message, but conflicting goals: Cohesiveness and consistency in the European Neighbourhood Policy. Journal of European Public Policy, Vol. 21, No. 7, pp. 1033-1049.
[414] Ibid.
[415] Blockmans, S., Kostanyan, H., Remiziov, A., et al. (2017). Supra note 411.
[416] De Waele, H. (2017). Supra note 48, p.16.
[417] Ivi, p.17

increase in the use of foreign policy instruments not directly envisaged by the treaties, such as Action plans, Partnerships, Agendas. What these instruments have in common is a non-legally binding nature and a relative immunity to the usual dispute over competences that characterizes the system of EU external relations. They do possess an ability to stimulate change in the existing relationships between the EU and its partners[418]. This turn is mainly due to previous criticism of the EU's pursuit of policies which did not recognize or adapt to popular needs and demands, that have predictably produced considerable disenchantment with the EU, particularly its claim to be a "normative power" committed to human rights and democracy[419]. The reason why the Union turns to this course of action is simply stated. Since its creation, the ENP has been widely criticized for its bureaucratic and technocratic approach, aiming to reproduce the success of the enlargement in a completely different political and security context. For this reason, the fields for cooperation have been often said to be detached from the regional political reality. The wide scope of the ENP, designed in this fashion in order to safeguard the different interests of the EU Member States, prevented it from addressing specific needs of the partner countries. Logically, better coordination of the ENP actions and initiatives with the EU's foreign policy priorities would make the policy more streamlined, strategic and coherent[420]. However, the use of non-binding agreements in this environment facilitates the Union to take immediate and effective action and to avoid the extremely complex decision-making process in institutionalizing agreements.

Based on a commonly shared notion, foreign policy "consists of the external actions taken by decision-makers with the intention of achieving long-range goals and short-term objectives. Action is constrained by the perceived circumstances of the state on behalf of which the decision-makers are acting"[421]. In the case of the European Union, both long-range goals and short-term objectives are very clearly defined in the Treaties. However, European actions are constrained by the lack of clearly defined interinstitutional dynamics. This causes inefficiencies and shortcomings when it comes to implement those

[418] Hillion, C. (2008). The EU's Neighbourhood Policy towards Eastern Europe. In A. Dashwood & M. Maresceau (eds)., Law and Practice of EU External Relations: Salient Features of a Changing Landscape. Cambridge: Cambridge University Press. pp. 309-333.
[419] Abbott P. and Teti, A. (2017). EU Policy Impact and Public Perception in the Mena Region. Arab Transformations Working Paper 11. Aberdeen. University of Aberdeen, p.58.
[420] Chmielewska, A. and Fabbri, F. (2016). Supra note 292, p.73.
[421] Reynolds, P. (1994). An introduction to International Relations. 3rd Ed. Pearson Educational Limited. New York. USA.

very objectives. The above statement describes the EU's policy-making inefficiency framework, as well as the fragile institutional and operational ground on which common approaches to foreign policy issues have been formulated. This is also one of the main reasons why the EU has to resort to "unofficial" agreements with ENP countries.

For the above formulated reasons, it is plausible to argue that the inconsistent application of EU values and principles generally derives from a horizontal dispersion of decision-making power. Within this dispersive institutional system, EU foreign policy making system cannot but bring to the surface contingent and divergent positions and be the cause of inefficiencies and stalemates that impede a coherent application of European principles and values[422]. The post-Lisbon creation of a permanent president for the European Council and the strengthening of the competences of the High Representative, taking on the functions of the Vice President of the Commission, contributed to providing continuity and improve the coordination of the European agenda in foreign policy. However, this did not translate in a more consistent action by the European institutions[423].

Nonetheless, comparing the results obtained in the post-Lisbon era, horizontal consistency seemed to have been taken more seriously than vertical consistency, concerning the relationship between the Union and its MS[424]. In the next section, we will further discuss the complex relationship between MS national foreign policy objectives and the common objectives of the Union, the clashes and lack of vertical coordination that result in a less proactive approach to core values and principles of the Union. This results in disorganized and contradictory responses in the field of foreign policy on the part of MS, that oftentimes prefer taking their own initiative and establish bilateral relations with Neighbourhood countries. This is one of the main reasons behind the inconsistent application of the European EHRP.

4.2 Norms, interests and bilateral agreements concluded by Member States and Neighbour Countries

Despite their differences, EU Member States have agreed in the 1970s that the general *modus operandi* in the field of EU foreign policy requires broad consensus, and this

[422] Amadio Vicerè, M.G. (2016). Supra note 395, p.46.
[423] Tizzano, A. and Adam, R. (2017). Supra note 77.
[424] Ibid.

widely shared organizing principle has been codified in EU treaties and across all policy areas as the ambition of achieving increased coherence among the involved actors[425]. However, the "special competences" that refer to the External Action pose a substantial question mark to European Member States effective coordination in implementing common foreign policy actions.

Vertical consistency is in primary law ensured by the Article 24 TEU: "The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations"[426]. Nonetheless, vertical inconsistency and its negative impact on the EU's effectiveness in the Neighbourhood has been proven in several studies. For example, Parkes and Sobják illustrate that the lack of a coherent approach among the Member States towards Russia affects the EU's ability to speak with one voice in the Eastern Neighbourhood[427]. In the Southern Neighbourhood, Koenig points out the lack of vertical consistency during the first phase of the Libyan crisis, when France immediately and unilaterally recognized the Transitional National Council (TNC) as the sole legitimate representative of the Libyan people[428].

Incontestably, the ENP needs to demonstrate its relevance first and foremost to European states. This may appear a tame statement, but it is at the heart of the problem, as EU institutions and EU Member States have spent the past ten years going about their own business. For historical and geographical reasons, European states have a collection of often diverging interests and relationships in the broad EU Neighbourhood. The ENP's ambitious vision to transform the Neighbourhood into a "ring" of well-governed prosperous countries was sufficiently vague and agreeable to Member States that did not

[425] Gebhard, C. (2011). Supra note 374, p. 103.
[426] Art.24 TEU.
[427] Parkes, R. and A. Sobják (2014). Understanding EU Action during 'Euromaidan': Lessons for the Next Phase. PISM Strategic File, No. 5 (41), Polish Institute of International Affairs. Warsaw.
[428] Koenig, N. (2013). The EU and the Libyan Crisis: In Quest of Coherence? IAI Working Paper No. 11, IAI Istituto Affari Internazionali. Rome.

want to share the specifics of their relations with individual nearby countries[429]. This has weakened the EU potential for a common approach in the region, and Member States have taken the upper hand, oftentimes swimming against the European EHRP common approach. In this context, it is important to shed a light on the powerful contradictions between norms and interests. As we know, the EU has a strong normative aim in implementing foreign policy decision, fueled by its founding values and principles that translate in the broader concept of a European External Human Rights Policy. The dichotomy between norms and interests constitutes an important part of the criticism directed at the EU: in many cases, the interests of EU Member States precede the Union's normative aims.

In the case of the ENP, the EU's security interests have been pursued together with the Union's claim to represent and project universal norms and values as well as best practices[430]. However, this general course of action has often been contradicted by Member States' behaviour, especially in relation to the Neighbourhood: the support provided by the Member States to autocratic regimes of the Southern Neighbourhood for the sake of maintaining security and stability in the region and pursuing their economic or energy interests is frequently criticized by many analysts[431]. This reflects an arbitrary approach based mainly on the varying national interests of EU Member States, leads to questions about the EU's normative intensions, and diminishes the EU's credibility in Neighbouring countries[432].

As mentioned, the human rights discourse in European foreign policy has been characterized by inconsistencies at European institutions level that result in fragmented and scattered actions in practice. Many believe that in a world of hard-power politics, foreign policy must focus first of all on security and economic benefits. This generalized disenchantment with the traditional European human rights rhetoric and a strong disbelief in the effectiveness of the EHRP framework can be similarly observed when contemplating Member States stances with regard to the European common approach to

[429] Balfour, R. (18 November 2015). Making the Most of the European Neighbourhood Policy Toolbox. German Marshall Fund of the United States. Available at: https://www.gmfus.org/blog/2015/11/18/making-most-european-neighbourhood-policy-toolbox
[430] Bouris, D. and Schumacher, T. (2017). Supra note 339, p.65.
[431] Del Sarto, R. A., and Schumacher, T. (2005). From EMP to ENP: What's at stake with the European Neighbourhood Policy towards the Southern Mediterranean? European Foreign Affairs Review, 10(1), pp. 17–38.
[432] Bouris, D. and Schumacher, T. (2017). Supra note 339, p.65.

the Neighbourhood. While EU foreign policy is theoretically based on the sovereign equality of all members, size does matter. Bigger countries usually take the lead in foreign policy decisions, but their contribution to the common approach is often inconsistent and weak, since they assign primacy to their national foreign policy[433]. Playing a prominent role on the international stage is part of the national identities of countries like France, Germany, and the UK, and partly also Italy and Spain[434]. Among EU Member States, these countries have the deepest historical ties with Neighbourhood countries and prefer to conduct their own agenda in the region, rather than disappear in the common European approach. As a matter of fact, this would leave national expectations unsatisfied, especially in light of the recent turmoil caused by the migration crisis and the sovereigntist and populist involution in many MS.

The case of the ENP is particularly striking for what concerns MS involvement. The ENP is described as a policy aiming at regional integration and cooperation, but in Chapter 3 we described how it actually mainly works through bilateral agreements between the EU and the partner country. This confused proposition induces MS to take their own initiatives in this region, depending on their economic, social or border necessities. This fact produces an intense grade of confusion at EU level, especially because different MS will adopt different approaches towards Neighbourhood countries.

The Southern Neighbourhood in particular has drawn much attention from the literature during and after the migration crisis: EU Member States' interests increasingly get in the way of the European EHRP towards the Southern Neighbourhood countries[435]. This issue was already taken into account in the 2015 Review. The document proposed to enhance ownership of both EU and Member States in what some saw as a risk of a re-nationalization of the ENP[436]. Countries like France or Spain have always conducted their own agendas towards certain former colonies in the MENA region, and other Member States, for instance, Germany, Italy and Denmark, have rushed to articulate new bilateral relations with Southern Neighbours. Needless to say, such strategies seldom complement

[433] Lehne, S. (2017). Supra note 269.
[434] Ibid.
[435] De Olazábal, I. (2019). On the Insufficiencies and Dark Side of the Principle of Differentiated Bilateralism. European Institute of the Mediterranean. 42PapersIEMED., p.24.
[436] Witney, N. and Dennison, S. (2015). Europe's Neighbourhood: Crisis as the new normal. European Council on Foreign Relations. Available at: https://ecfr.eu/publication/europes_neighbourhood_crisis_as_the_new_normal/

each other. After all, the EU is still a very much divided actor in the Mediterranean[437], as exemplified by the case of Libya, where France and Italy have confronted each other pursuing agendas serving their own national interests, or with Morocco, where Spain and France pursued different foreign policy strategies[438].

Where does the European EHRP find its place in this awfully puzzled reality? The shifting boundaries[439] in MS solo initiatives dealing with the Neighbourhood present the EU with never ending hassles. We have seen in recent times how the EU has endured incommensurable hardship facing the difficult task of having to combine national, European, and international human rights standards with the opposing political objective of a restrictive refugee and migration policy towards the Southern Neighbourhood. This conflictual situation between normative aims and political interests represents a serious challenge for the EU credibility as an international actor and, for our analysis, puts the existence itself of the European EHRP directly into question.

It is worthwhile reminding once again the legal value of Art.21 TEU. This article, referred to in several areas of European External Action, together with Art. 3 TEU on the exportation of European values in the wider world, obliges the Union to promote the rule of law and the universality of human rights in every area of its External Action. The EU has an international legal personality and is bound to these objectives by the Charter of Fundamental Rights, as well as by its founding Treaties. In contrast, there are strong political incentives to relocate migration control to EU third countries, and thus circumvent European legal requirements[440]. The tensions between legal requirements and political interests are currently culminating in the allegation that the detention of persons seeking protection in Libya violates relevant obligations under the European Convention on Human Rights, the Geneva Convention, and the Charter of Fundamental Rights of the European Union[441]. In this respect, a complaint was filed before the ECtHR in spring 2018. The aim was to investigate the legal responsibility behind the actions of the Libyan Coast Guard, which is financially supported by Italy and the EU. A condemnation in this sense would undermine the legitimacy of European foreign policy in the Neighbourhood

[437] Panebianco, S. (2012). L'Unione Europea "potenza divisa" nel Mediterraneo. Milano: Egea.
[438] De Olazábal, I. (2019). Supra note 435, p.27.
[439] Bendiek, A. and Bossong, R. (2019). Shifting boundaries of the EU's Foreign and Security Policy. SWP Research Paper. German Institute for International and Security Affairs. Berlin., p.5.
[440] Ibid.
[441] Ibid.

and dismantle the whole concept of an EHRP. If Libyan forces regularly violate human rights norms that the EU is expected to promote in its External Action, Italy is not legally authorized to support them. Moreover, the aiding and abetting of a breach of law in a third country was a clearly foreseeable consequence of the aid provided[442]. If the Libyan authorities are dependent on external aid, which is provided also by the European Union and its Member States, is the EU indirectly responsible for human rights violations?

In 2012, the ECtHR issued a ruling in a case against Italy that is decisive for accountability within externalized practices of migration control: the *Hirsi* ruling, already discussed in Chapter 2, which prohibits European authorities from directly refusing refugees at sea. In May 2018, another case was brought against Italy for its support of the Libyan Coast Guard. A condemnation of Italy directly questions the EU's credibility and co-responsibility in Libya. Furthermore, in June 2019, renowned experts in international law lodged a preliminary case with the International Criminal Court (ICC) against persons responsible in the EU. The allegations concern the EU's responsibility for crimes against humanity in the context of its migration policy in the southern Mediterranean[443]. If the prosecutors were to open an official investigation before the ICC, individual criminal liability of government officials in the EU would be conceivable for the first time[444]. How can this be consistent with the obligations in terms of protection and promotion of human rights, clearly stated in EU legal texts? The situation builds up to another level of complexity when we think of the huge amount of informal cooperation and non-binding agreements the Union has been making use of in its relations with Neighbourhood countries in the last decades. Informal cooperation between individual EU states and countries of origin and transit has been the norm for decades when it comes to migration control[445]. For example, many Maghreb states work bilaterally with France, Spain, and

[442] Wintour, P. (8 June 2018). "UN Accuses Libyan Linked to EU- Funded Coastguard of People Trafficking. Libyans Associated with Italy's Deal to Reduce Migration Also among Six Placed under Sanctions". The Guardian. Accessed on 24/02/2021. Available at: https://www.theguardian.com/world/2018/jun/08/un-accuses-libyan-linked-to-eu-funded-coastguard-of-people-trafficking

[443] Bendiek, A. and Bossong, R. (2019). Supra note 439, p.6.

[444] Ivi, p.8.

[445] Cassarino, J.P. (2010). Readmission Policy in the European Union. Study for the Committee on Civil Liberties, Justice and Home Affairs. Accessed on 24/02/2021. Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/425632/IPOL-LIBE_ET(2010)425632_EN.pdf

Italy because of their economic and historical ties[446]. On this matter, the Union itself does not miss an opportunity to draft non-binding agreements which do not need to be justified to a critical public: between 2004 and 2014, the Union signed non-binding agreements with a total of 17 third countries on the readmission of illegal immigrants[447]. However, this was not the envisioned path to follow. In fact, the informalization of European foreign policy takes place outside EU decision-making procedures[448]. A more acceptable approach is to establish binding agreements under EU law, which as a rule must be approved by the EP. Moreover, since the entry into force of the Amsterdam Treaty in 1999, the control of irregular migration has become an explicit EU competence[449]. The fact that MS keep entertaining bilateral relations with Neighbourhood countries on their own could be confronted by the CJEU, which could establish a Union competence under Article 4(3) TEU and Article 3(2) TFEU: these treaty provisions prohibit Member States from concluding agreements with third countries that derogate from EU law[450]. However, legal scholars increasingly share the view that the CJEU is reluctant to confront Member States when it comes to international migration policy[451].

Having taken a glance at discrepancies in MS actions in the Southern Neighbourhood, we will now dedicate a brief introduction to the Eastern Neighbourhood. In the Eastern Neighbourhood, Russia's influence is a strong factor both for the Neighbours themselves in complicating their relations with the EU and dividing their own societies in some cases, and for the EU and its Member States, who have historically diverse relations with Russia[452]. On another note, it is worrisome that countries which are Neighbours of both the EU and Russia believe they must choose between strengthening ties with Europe and being loyal to Moscow[453]. The crisis in Ukraine can well demonstrate violation of vertical

[446] Bendiek, A. and Bossong, R. (2019). Supra note 439, p.6.
[447] Ibid.
[448] European Commission. (July 2019). The EU Facility for Refugees in Turkey. Factsheet. Available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/frit_factsheet.pdf
[449] In the Treaty of Lisbon, this competence was consolidated in Article 79(3) TFEU.
[450] Chamon, M. (2018). Implied Exclusive Powers in the ECJ's Post-Lisbon Jurisprudence. The Continued Development of the ERTA Doctrine. Common Market Law Review 55, no. 4, pp. 1101–41.
[451] Bendiek, A. and Bossong, R. (2019). Supra note 439, p.6.
[452] Cremona, M. and Hillion, C. (2006). L'Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy. EUI Working Paper LAW No. 2006/39, p.25.
[453] Solana, J. (2015). European Foreign Policy and its challenges in the current context. In "The search for Europe. Contrasting approaches". Bbva OpenMind initiative. Acemoglu, D., Alesina, A. and Bickerton, C.J. (eds)., p.401.

consistency of CFSP[454] as provided for by Art. 24 TEU and represents a good example of EU foreign policy fragmentation. EU Member States were divided due to geographic position, historical experience or economic dependence on Russia. Notwithstanding the harsh sanctioning regime put in place by the EU against Russia after the event in Crimea, the European spirit of loyalty and mutual solidarity has been violated in many ways by the MS, including weapons supply to Ukraine and Russia. For example, the United Kingdom criticized planned sale of helicopter ship Mistral to Russia by France, however itself sold to Russia sniper rifles, ammunition, drones and laser technology worth of 84 million pounds[455]. The UK, France, Germany, the Czech Republic, Austria, Italy, Greece and Cyprus delivered arms to Russia while Finland, Poland and Lithuania supplied arms to Ukraine. Czech Republic even delivered to both sides[456]. In this case, as pointed out by Mitchell A. Orenstein and Daniel R. Kelemen, the EU developed a strong sanction mechanism against Russia, but failed to prevent divergent national policies[457]. The EU thus suffers from a widely spread fragmentation and disaggregation in its foreign policy, mainly because European institutions are unable or unwilling to prevent Member States in the pursuit of their own policies. In other words, the common foreign policy is common to the degree of Member State willingness and mutual interests.

It may seem that the above-mentioned examples are only product of specific historical conditions, but with growing populism affecting the European peoples and the rise of radical parties promoting the creation of anti-EU governments, competing national interests may eventually result in a paralysis of European decision-making system. For what concerns the Neighbourhood, extreme challenges both to the South and the East are urging MS to act independently of European Institutions. This causes fragmented and uncoherent responses, that have repercussion on the international credibility of the EU as an international actor. Moreover, MS oftentimes act not taking into consideration the

[454] Filipec, O. (2017). (In)efficiency of EU Common Foreign and Security Policy: Ukraine, Brexit, Trump and beyond. Slovak Journal of Political Sciences. Volume 17. No. 3 – 4, p. 283.
[455] Elgot, J. (2014). Britain Sells £84m Of Arms To Russia And Still Has 271 Export Licenses, Despite Crimea Crisis, Huffington Post, 5. 3. 2014, Accessed on 13/01/2021. Available at: https://www.huffingtonpost.co.uk/2014/03/05/russia-arms-trade_n_4901787.html?guccounter=1
[456] Gallina, N. 2015. European countries exporting arms to Russia and to Ukraine, Euromaidan Press, 8. 3. 2015. Accessed on 13/01/2021. Available at: http://euromaidanpress.com/2015/03/08/European-countries-exporting-arms-to-russia-and-to-ukraine/
[457] Orenstein, M. A. and Kelemen, D. R. (2017). Supra note 389.

declared values and objectives of the Union's foreign policy, and this results in norm contestation and the inescapable clash between values and interests.

In the current Neighbourhood context, the Union certainly faces as difficult an environment as it did before the Arab Spring, not least in the renewed activism of its very own Member States, making it harder for the EU to exercise leverage, particularly by exercising conditionality[458]. MS then more than what we wish to believe tend to exercise their state power by individually dealing with third states, sometimes even going behind the back of the organization they helped to build and whose values and principles they decided to commit to. This of course is a major symptom of vertical inefficiencies and this behaviour must put to an end. Norm contestation and critiques directed to the ill-functioning machine of European foreign policy contributed to an increasing distrust in European institutions, not only at international level, but especially and most distressingly at internal level. Such a fragmented leadership constellation is likely to result in an unconsistent EHRP[459]. In fact, the various institutional and national leaders often operate at cross-purposes. When Member States fail to achieve unanimity, the EU simply vanishes as a relevant actor. Even when initiatives are launched, they often lack sufficient follow-up, and declarations frequently take the place of action. All of this exacerbates the EU's collective action problem. In fact, no other factor explains the chronic underperformance of EU foreign policy more than inadequate leadership[460].

The euro-zone and the refugee crises have seemingly contributed to further politicization and eroded shared beliefs and solidarity among EU Member States[461]. As a result of the current contestation, it has been argued that mainstream politicians increasingly involute in nationalist propaganda, which in turn prevents Europe from playing "the role of defending those values that Europe prizes"[462]. Populism is perceived as one of the main antagonists to the process of European integration. The silver thread that unites populist movements is the request of devolution of power from Brussels to national governments. Be it because the refugee crisis mainly involves countries that are

[458] Achrainer, C. (9 January 2014). An Erring Mediterranean Policy. DGAP Advancing foreign policy. Standpunkt 1. Available at: https://dgap.org/en/research/publications/erring-mediterranean-policy
[459] Bendiek, A. and Bossong, R. (2019). Supra note 439, p.8.
[460] Lehne, S. (2017). Supra note 269.
[461] Johansson Nogués, E., Vlaskamp, M.C, and Barbé, E. (2020). European Union Contested. Foreign policy in a new global context. Springer Nature Switzerland AG 2., p.2.
[462] Waever, O. (2018). A Post-Western Europe: Strange Identities in a Less Liberal World Order. Ethics & International Affairs, 32(1), pp. 75–88.

part of the ENP, this region saw an increase in attention by the literature in recent years, and it is now the ultimate test field for European foreign policy making, allowing the international organization to reject once and for all its epithet of "political dwarf" and prove to the international community that a foreign policy approach based on human rights is not only possible but effective and successful. Something every voice can agree on is that the EU needs to envisage new policy solutions in its Global Strategy, with a more coherent geographical scope for the Middle East and North Africa, a multilateral approach and more ambitious political aims. Better coordination between the EU and the Member States would allow for swifter diplomatic solutions and conflict resolution actions with a broader and more coherent perspective, keeping the inclusive criteria and other important lessons learned from the ENP[463].

The challenges faced in the Neighbourhood also present new driving forces for improvement of EU foreign and security policy capacities, mechanisms and patterns. Hopefully, a new challenging environment will lead to improvements and contribute to greater sense of community among EU Member States. This "window of opportunity" shall be used for filling gaps of EU External Action, enhancing horizontal and vertical consistency and finding new ways of cooperation with old partners[464]. The European EHRP cannot continue to be a mere declaration of intent, a matter of secondary importance for which its Member States are unwilling to relinquish one iota of their sovereignty[465]. Tasking each Member States or groups of Member States with small objectives to achieve in foreign policy could be a solution to make European action more cohesive and less dispersive, under the motto "mutual trust built on mutual actions"[466]. Only acting in such a fashion, will European multilateral diplomacy be a model for the future of world politics.

In this section, we found that the inconsistencies in the Neighbourhood Policy can be found not only at horizontal level, but also and most disruptively at vertical level, where Member States take their own initiative at the expenses of an ideal common approach. This phenomenon is particularly evident in the Neighbourhood and contributes to a loss of credibility of the Union as a foreign policy actor. Another issue to bear in mind is the

[463] Chmielewska,A. and Fabbri, F. (2016). Supra note 292, p.77.
[464] Filipec, O. (2017). Supra note 454, p.294.
[465] Solana, J. (2015). Supra note 453, p.421.
[466] Ibid.

very little compliance of Member States with the EHRP common approach. As outlined, Member States seem to care only on the surface for the exportation of the European vision of universal human rights. When it comes to interests, those are usually prioritized: the principle of consistency with European values is very often not considered by Member States when conducting their agenda in foreign policy.

Inefficiencies in the European EHRP come from within. At Member States level, it is necessary to secure political and party systems in order to ensure political stability favoring cooperation at the EU level. Diverging attitudes and clashing interests may simply result in institutional paralysis; a new rise of Euroscepticism and nationalistic populism is a challenge not only for Member States but for the very EU institutional landscape in general. In the field of the External Action, intergovernmental institutions are fragile due to unanimous voting and may be easily paralyzed. In this context, individual initiatives by Member States supply additional confusion and fragmentation to European External Action in the Neighbourhood, jeopardizing its normative action and fueling norm contestation. In the next section, we will focus on yet another issue at the heart of criticism directed to European action in foreign policy, that has its most evident realization in the Neighbourhood: double standards and internal-external incoherence.

4.3 Double standards and internal-external incoherence

In the previous sections, we have discussed how inconsistencies at both horizontal and vertical level jeopardize the effectiveness of European Foreign Policy and focused on the European Neighbourhood as the region where these inconsistencies are most noticeable and produce the most disruptive effects for the unity and credibility of the EU as an international actor. In brief, the inefficiencies in decision-making system at European level induce Member States to conduct their own agendas in the region, that often prioritize interests over the values behind the EHRP. In this context, national interests are perceived as more relevant than common interests, and national foreign policy more effective than the common foreign policy. It goes without saying that these actions translate in divisive rather than cohesive approaches, where Member States oftentimes take very different stances regarding international events or engaging with different countries. Going deeper into the discrepancies of the effective implementation of the EHRP, we face the issues of double standards and internal/external incoherence, which

will be outlined in this section. We will consider if and how human rights principles find their place in the ENP as a legitimate requirement in European conditionality policy, or if the Union only uses it as a justification for its international ambitions as a global player. We confirmed that the promotion of human rights is clearly an important and well-established, cross-pillar foreign policy objective. The EHRP, although not provided with a specific section or article in the Treaties, finds its *raison d'être* at Art.21 TEU, which establishes the universality and indivisibility of human rights and fundamental freedoms as principles that guide the Union's action on the international scene. In the second section of that provision, consolidation and support for democracy, the rule of law, human rights and the principles of international law are listed as objectives of EU External Action. The substance of the EHRP is integrated in the Union's substantive external policies - figuratively, a silver thread running through it all. In a more idealistic vein, the EU's promotion of human rights can be seen as an expression of identity and legitimacy.

Art. 8, defining the legal basis for the ENP, also encapsulates a normative shift in the EU's policy towards its Neighbours. The article refers to the promotion of "the values of the Union", and not the shared values or common values referred to in previous ENP documents[467]. This makes the ENP objectives more coherent with the general obligations of the EU to uphold its values in the wider world ex Art. 3(5) TEU. Yet, in practice, the impact of Art. 8 is limited, especially when considering that it was hardly mentioned in the latest two reviews of the ENP[468]. At the heart of the matter lies the accusation that the Union pursues respect for human rights in a much more energetic and rigorous way externally than internally; that it turns a blind eye to gross violations of fundamental rights that take place within the Member States themselves, but ordinarily accepts nothing of the kind from its treaty partners[469]. Cases in point have been the shocking treatment of Roma minorities in countries like France and Italy, or the facilitation of CIA "black sites" by countries like Poland and Romania - all left unaddressed by the Union's institutions, bodies and agencies at domestic and supranational levels[470]. The EU, in other words, displays a "Janus-face", professing to adhere to a standard that it does not live up to

[467] Hillion, C. (2014). Supra note 334, pp.13-21.
[468] Blockmans, S., Kostanyan, H., Remiziov, A., et al. (2017). Supra note 411, p.144.
[469] De Waele, H. (2017). Supra note 48, p.122.
[470] Ibid.

itself[471]. While the revised ENP could have addressed a number of shortcomings in the domain of coherence and consistency, this has not been the case, as the EU has continued applying its double standards[472]. The upshot is a tragic spinelessness vis-à-vis countries such as Hungary and Poland, actively eroding the rule of law, but let off the hook for much too long, after repeated threats and warnings[473].

Examples of double standards can also be found in the European 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[474].

We have discussed in the previous section that the asylum and refugee crisis that erupted in the mid-2010s added a number of undignified episodes to this series. While the majority of Member States did try to find solutions in all sincerity, human rights of third country nationals were repeatedly, and sometimes entirely consciously, trampled upon, with incidents ranging from the unilateral closure of borders and denial of rights, forced returns in violation of the *Dublin* rules, detention under atrocious conditions in numerous patently unsuitable locations, or shady deals with international partners with an eye to radically stemming the flows[475]. Journalists, NGOs, dissenting politicians and other activists rightly condemned what they considered an appalling betrayal of European values on European soil.

In this context, the EU Courts seemed to forget the values they were supposed to uphold. Although as indicated in Chapter 2, they have been engaging in judicial review for compliance with fundamental rights for decades now, such review often seems artificially numb, as it still only relatively rarely leads to an annulment of the acts concerned, with the notable exception of *Kadi*. The CJEU's sudden blocking of the road towards ECHR accession has been equally confounding. There are many perceived advantages in EU accession to the ECHR. A formal linking of the EU and ECHR could

[471] Fierro, E. (2003). Supra note 348, pp.77.
[472] Bouris, D. and Schumacher, T. (2017). Supra note 339, p.65.
[473] De Waele, H. (2017). Supra note 48, p.123.
[474] Kochenov, D. (2008). Supra note 334, pp. 105.
[475] De Waele, H. (2017). Supra note 48, p.123.

be seen as underlining EU concern with human rights, and also eliminate charges of double standards, based on the criticism that whereas the EU requires all of its Member States to be parties of the ECHR, it is not itself a party[476].

Incontestably, the efficacy of any sort of rule is undermined when it is not applied consistently: third countries cannot be expected to subscribe to European human rights benchmarks, if they are the only party expected to live up to them. In essence, it amounts to an exercise in hypocrisy when treaty partners are held accountable, while internally, one is reluctant to let barking be followed by biting, or even abstains from barking at all[477]. Put differently, if fundamental rights are not taken seriously on EU's soil, the EU's credibility in the Neighbourhood is bound to diminish as well. The core issue is that the EU demands to Neighbourhood countries specific standards of human rights, usually through conditionality clauses in Association Agreements, yet seemingly ignores serious human rights violations within its own borders. If the criteria imposed on recipients of European human rights conditionality are based on rules that are clearly defined, shared among the Member States, and coherently applied by the Union as a whole, their "compliance pull" is said to be strong. Alternately, if "internal/external gap" become perceptible in the actor state-target state relationship, conditions will fail to exert the same leverage[478]. This again goes to show that the Union has to align its internal and external human rights policies more closely, preferably along the lines of the highest common denominator, in order to counter accusations of insincerity[479]. To stake any credible claim to being the forerunner of an "ethical foreign policy", the EU and its Member States need to act accordingly. Unless the compliance of all EU Member States with the European EHRP framework, the provisions laid out in the founding treaties and international human rights treaties is exemplary, the Union is exposing itself to further accusations of double standards[480].

The internal and external dimensions of the European human rights policy can be regarded as "two sides of the same coin". In other words, the external dimension of human

[476] Douglas-Scott, S. (2011). The European Union and Human Rights after the Treaty of Lisbon. Human Rights Law Review. Human Rights Law Review 11:4. Oxford University Press. Oxford., pp. 658.
[477] De Waele, H. (2017). Supra note 48, p.122.
[478] Schimmelfennig, F., Engert, S. and Knobel, H. (2003). Costs, Commitment and Compliance: The Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey., JCMS, 41/3, pp. 495-518.
[479] De Waele, H. (2017). Supra note 48, p.124.
[480] Khaliq, U. (2008). Supra note 18, p.456.

rights policies is implemented through the internal institutions and practices. The coherency between internal and external policies reflects the "universal and indivisible character of human rights"[481]. Therefore, as the EU's role increases in international arena, the need for a coherent approach in human rights issues with regard to the external relations becomes inevitable[482]. Hillion is not alone arguing that the discrepancy between internal and external practices of the EU with regard to human rights could damage the EU's credibility[483]. In a similar vein, Lerch and Schwellnus consider the incoherence between internal and external approaches of the EU on the issue of "minority protection" and conclude that incoherence damages the EU's normative power in the field of human rights[484].

Once outlined the issues in the internal/external gap and determined the confounding inconsistencies between European external requests when dealing with third countries and the internal gaps in human rights protection and promotion, we can discuss the double standards in dealing with different third countries. There is ample proof that the Union does not deal with its treaty partners in the same manner, and that some countries are unfairly treated as more equal than others[485]. Such inconsistencies can be explained by political or economic interests which require European institutions to turn a blind eye to fundamental rights records. In the past, this has particularly held true for relations with a host of Asian, African and Middle Eastern nations. By consequence, human rights clauses are not invoked as strictly and structurally as one might expect.

Concerning the ENP countries, as precised in Chapter 3, the EU includes human rights clauses in the agreements which require the implementation of human rights standards in return for advantageous trade related arrangements. These mechanisms also include the establishment of links with the civil society through various monitoring mechanisms. However, the Union is criticized for ignoring values when the interests are at stake in some cases. Nevertheless, theoretically, protection of human rights still remains one of

[481] Alston, J., Philip, H. and Weiler, H. (1998). An 'Ever Closer Union' in Need of a Human Rights Policy, EJIL, 9, pp. 658-723 ; European Union External Action (2016) "Human Rights and Democracy". Available at: https://eeas.europa.eu/topics/human-rights-democratisation/414/human-rights--democracy_en
[482] Ibid.
[483] Hillion, C. (2013). Enlarging the European Union and deepening its fundamental rights protection. SIEPS European Policy Analysis, vol.11, pp. 1-16.
[484] Yazgan, H. (2017). European Union's human rights policy: an analysis from external relations perspective. ADAM AKADEMİ, 7/1, p.54.
[485] De Waele, H. (2017). Supra note 48, p.124.

the main themes of the EU accession process and relations with third countries and especially the Neighbourhood[486]. Inconsistencies in the EU's human rights conditionality in the context of its External Action are certainly no novelty: the application of limited sanctions in reaction to electoral violations in Togo and the disinclination to react half as decidedly in response to serious human rights abuse in China, for reasons of commercial, political and strategic interests, is but one example. To that end, one cannot exclude the possibility of double standards in the Union's human rights conditionality in the context of the ENP[487].

The European Parliament itself issued a resolution criticizing the EU for ignoring human rights violations in its Southern Neighbours[488]. Accordingly, the EU accepted the presence of dictatorships in order to maintain stability in the region and avoid the religious groups to take over the power[489]. Therefore, the impossible dichotomy between the interests and values of the EU was evident with regard to these countries. As mentioned, a majority of scholars argue that coherence is a major factor contributing to the effectiveness and credibility of the EU[490]. Börzel and Van Hüllen conclude that the inherent tensions between ENP objectives hamper the effectiveness of the ENP to promote democratic change through the EU's Neighbourhood reform agenda[491]. Another case in point when discussing double standards refers to the aspects inherent to the essential element clause. The failure to use it against, for example, Israel, means that the Union loses further credibility when the clause is invoked for similar or lesser violations by other states. Accusations of double standards are particularly harmful to the Union's credibility in this regard, which is essential to legitimate its international actorness in the EHRP spectrum. This does not mean that essential elements clauses are of little or no use, but each principle in the clause could be defined more clearly so that all parties understand

[486] Douglas-Scott, S. (2011). Supra note 476.
[487] Zalewski, P. (2004). Supra note 73, p.30.
[488] European Parliament. Resolution of 10 March 2011 on the Southern Neighbourhood, and Libya in particular, including humanitarian aspects. 2012/C 199 E/18. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011IP0095&from=EN
[489] Häusler, K. and Timmer, A. (2015). Human Rights, Democracy and Rule of Law in EU External Action: Conceptualization and Practice. European Yearbook on Human Rights., pp. 231-246.
[490] See for examples: Schumacher, T. (2012). Conditionality, differentiation, regionality and the 'new' ENP in the light of Arab Revolts. in E. Barbé and A. Herranz-Surrallés (eds). The Challenge of Differentiation in Euro- Mediterranean Relations: Flexible Regional Cooperation or Fragmentation, London and New York: Routledge, pp. 142-158; Balfour, R. (2012), "EU Conditionality after the Arab Spring", IEMed Euromesco series, No. 16, European Institute of the Mediterranean, Barcelona, June.
[491] Blockmans, S., Kostanyan, H., Remiziov, A., et al. (2017). Supra note 411, p.144.

what they actually mean and when it is likely to be relied upon in case of violations of the principles the clauses referred to[492]. Another fundamental objection that was raised in the past by several quarters on the respect for human rights, and to which a specific reply has yet to be given, relates to the use of double standards in the assessments of internal coherence with HR principles[493], which is absolutely detrimental to the overall consistency of the EU's legal system. If it is true that all the EU States share the same set of values (those mentioned at Art. 2 TEU), then it is also true that the respect for these values cannot be measured in those sectors that are unaffected by European legislation[494]. For candidate States, on the contrary, the control of the respect for these values during the accession process (and, even more so, during the pre-accession stage) is much more pervasive because it involves the entire domestic order of the applicant State and is carried out through the use of highly discretionary powers[495]. A special example in this sense is represented by the case of Turkey, which has repeatedly applied for accession since the 90s. As it tends to identify the double standards, of which it accuses Brussels, as expressions of Islamophobia and exclusionism on the part of the Union, a large section of the Turkish political élite have their doubts as to Turkey's prospective EU vocation. Such views, naturally, do not leave the strength of the Union's human rights conditionality untouched: the shared suspicion that the Union would like to exclude Turkey from membership on "civilizational" grounds casts serious doubt on the credibility of the EU's conditionality policies and, in consequence, reduces Ankara's incentives to comply with EU human rights criteria[496]. In this regard, one can speak of a general skepticism in Turkey towards the EU's human rights policies[497]. Such skepticisms can be explained by the inconsistencies in the application of the EU's human rights policy both among membership applicants and between applicants and Member States. Citing another case in point, the parliamentarians from the EaP countries in particular have primarily addressed bilateral issues rather than engaged in multilateral cooperation in the field of human rights. Moreover, the use of negative conditionality in excluding Belarus

[492] Khaliq, U. (2008). Supra note 18, p.457.
[493] De Witte, B. (2003). The Impact of Enlargement on the Constitution of the European Union. in M. Cremona (eds). The Enlargement of the European Union, Oxford: OUP, pp. 238-39.
[494] Art.7 TEU.
[495] Blanke, H., and Mangiameli, S. (2013). Supra note 84.
[496] Zalewski, P. (2004). Supra note 73, p.32.
[497] Turkes, M.S. (2011). Human Rights in the European Union's Foreign Policy - Universal in discourse, flexible in practice. RECON Online Working Paper 2011/2021, p.10.

- citing lack of free and fair elections - while welcoming Azerbaijan into human rights talks was criticized as a double standard by the EU[498].

Bearing in mind the need for consistency between internal and external dimensions of the human rights policies, it is obvious that internal problems might have repercussions in the external dimension of EU's human rights policies. Currently, this inconsistency mainly stems from the human rights practices within the EU. As a matter of fact, recent developments including the rise of far-right political parties carry the risk of jeopardizing the EU's human rights regime. Populist rhetoric used by these parties on refugees, Islam, enlargement countries and cultural differences[499] contradicts with the general discourse of the EU as a human rights actor. Presently, the refugee crisis has become a new challenge for the EU's human rights regime and both Member States and the EU itself have been exposed to various criticisms. The refugee agreement concluded with Turkey, aiming to restrict the flow of refugees to the EU, and the reactions of some EU Member States to the migration crisis put the human rights practices of the EU into question. This crisis exacerbated the incoherence between the internal and external dimensions, and it may reinforce the debate on the approach to the Southern Neighbourhood. Therefore, the EU's handling of the refugee crisis carries utmost importance for its human rights policy.

Disheartening criticism notwithstanding, there is no denying that fundamental rights in the Union did come a long way. As remarked, in the early beginning of European integration, none of the Treaties made any reference to the concept of human rights, let alone outline a system for their protection. The present could not be more different, with the EU finally disposing of its own "Bill of Rights"[500] in the form of a Fundamental Rights Charter that applies categorically to its institutions, bodies and agencies, as well as to the Member States when implementing Union law[501]. Moreover, should a Union accession to the ECHR be realized after all, an exceedingly high internal level of protection could be established, in stark contrast with the earlier minimalism. Of course, what we can gather from these points is that the EHRP is still a work in progress, especially in the European Neighbourhood, fact that opens the floor to criticism and points at countless

[498] Kostanyan, H. and B. Vandecasteele (2015). Socializing the Eastern neighbourhood: The European Parliament and the EuroNest Parliamentary Assembly. In S. Stavridis and D. Irrera, (eds). The European Parliament and its International Relations, London: Routledge, pp. 220-233.
[499] Yazgan,H. (2017). Supra note 484, p.10.
[500] De Waele, H. (2017). Supra note 48, p.125.
[501] Art 51(1), Charter of fundamental rights.

inconsistencies, both at internal and external level. Exogenous factors do nothing but increase the European confounding approach to human rights. As depicted in this section, the Union is still a long way from a coherent and consistent application of its human rights provisions through the External Human Rights Policy in the Neighbourhood.

Conclusions

In this Chapter, we have considered the actions of the EU in the spectrum of the EHRP in the Neighbourhood, to find that a surprising or not so surprising lack of coherence permeates this policy. The principal claim we tried to highlight is that there are gaps within both consistency and capacities of EU Neighbourhood Policy and that newly arisen challenges within and beyond Europe may result in further unsteadiness of the founding values of EU Common Foreign and Security Policy, causing additional inefficiency and underperformance[502]. In this chapter, we focused on the Neighbourhood as the region where EU inefficiencies at policymaking level are most evident, be it because of exogenous factor, but mainly and most importantly to our analysis, because of endogenous factors. In fact, the global turmoil we are witnessing is just one of the elements to consider, when investigating EHRP inefficiencies in the Neighbourhood. The most important factors contributing to the frustration of European performance as an agent of change and a promotor of human rights in the Neighbourhood come from within the interinstitutional structure. As a matter of fact, it is arguable that EU's performance in the candidate, Neighbouring and third countries with regard to promoting human rights provide a framework to assess the EU as an international actor[503]. It has been argued that the EU has in theory the ability, but at times lacks the necessary political will, to promote its EHRP through pressure and dialogue within the ENP framework and with the instruments it has at its disposal. Although Member States unity is oftentimes missing and national interests frequently take precedence, the potential impact of European collective action should not be underestimated.

The EU, as remarked, has indeed come a long way in the field of the protection and promotion of human rights, both internally and externally. However, mishaps and setbacks due to the actual (mis)implementation of its broad EHRP precepts leave us

[502] Filipec, O. (2017). Supra note 454, p.285.
[503] Yazgan,H. (2017). Supra note 484, p.56.

stunned. Although there exists a broad consensus, at EU level, on which objectives to pursue, and over the years the instruments have been created in order to pursue them, the Union seems to lack the necessary unity to finally put them in practice. This is clearly perceivable in the Neighbourhood: the ENP has been displayed in this work as a frontline policy in the context of the EHRP as it promotes the same policy objectives at the heart of the enlargement process, which are in turn the same values and principles that constitute the very *acquis communautaire*. The ENP thus represents an irreplaceable tool to define the Normative Power Europe as it is specifically designed to externalize the *acquis* normatively. Notwithstanding the exceptional potential and the remarkable instruments this policy was created with, disaggregation in Member States foreign policy decisions, an extremely perceivable rhetoric/action gap, double standards at internal/external level and the never-ending values vs. interests battle keep undermining the effectiveness of European EHRP in the Neighbourhood. It has been stated, over and over in this thesis, that human rights principles and values have grown to become the reason for legitimacy of the European Union as a foreign policy actor. If the EU cannot find proper ways to implement its self-proclaimed objectives in its own Neighbourhood, its credibility and legitimacy will suffer to the point where its normative action will be void and meaningless.

CONCLUSIONS

The European External Human Rights Policy has grown to become a cornerstone of European foreign policy and of its own identity as an international actor. Although the EHRP does not entail a specific treaty provision, it runs through European foreign policy provisions as a silver thread. As a consequence, European foreign policy is based and finds its legitimacy on the founding values on which the Union itself was built, and specifically on human rights.

The goal of this work was to apply the EHRP framework to the European Neighbourhood Policy in its instruments and practice, in order to assess whether the EU is equipped with the right tools to apply the EHRP objectives consistently.

This work traced, throughout the European integration process, the evolution of human rights from a founding value and principle into the underlying justification for EU's legitimacy to act as a foreign policy actor. The EHRP, its objectives and priorities have been outlined and we attempted to present the extent to which they have been pursued within the broader European External Action and especially in the ENP.

In order to reach the conclusion that too many inconsistencies and incoherent practices stand in the way of a successful application of the EHRP in the Neighbourhood, we started our analysis with a critical evaluation of the EHRP and its objectives. First of all, we began by examining the relevance of human rights objectives within the European legal order and within the European judicial framework for human rights protection.

The EU has been a leading actor in promoting human rights objectives through its foreign policy since the Cold War. The preference for soft power instead of hard power, as well as the reticence to use negative measures, became part of the international actorness of the EU. Bearing in mind that the EU's approach is also uniquely based on legal texts, we defined the EU as a normative power, using the words of Ian Manners. The success of the fifth enlargement marked the Union as an international actor able to act normatively on the international scene by exporting the values and principles included in its *acquis communautaire*. This encouraged the Union to lay out a new policy, the European Neighbourhood Policy, which in its first draft was specifically designed to externalize the values and principles at the heart of

the European identity. This actively proved that the European EHRP has become a feature of the international image of the EU.

Our first analysis aimed at demonstrating the lack of justiciability within the European judiciary system for acts included in the External Action of the Union and to what extent this can harm the international image of the Union as reliant on the EHRP framework. We proved that the lack of jurisdiction suffered by the CJEU in matters relating to the External Action actively hampers the successful realization of a EHRP, as human rights violations perpetuated extraterritorially might be left unaddressed by the Court. As a matter of fact, the legal provisions on the External Action of the Union have been described as presenting pitfalls. An inherent justiciability gap over CFSP acts actively demonstrated a normative failure to take into account MS or Union institutions' responsibility for foreign policy acts involving human rights violations occurring outside of the physical borders of the Union. Concerning this undeniable justiciability gap, it has been affirmed that this can only be overcome through the accession of the EU as a legal entity to the ECHR, as prescribed by Art.6 TEU. In fact, although not in a linear fashion, ECtHR jurisprudence has often ruled on extraterritorial violations of Convention Rights by applying a broad interpretation of Art.1 ECHR. Through an analysis of ECtHR jurisprudence cross-referenced with the Charter of Fundamental Rights of the European Union, document included post-Lisbon in the Union primary law, we found that Art.47 of the Charter lays out the right to an effective remedy; this is difficult to square with CJEU lack of jurisdiction on foreign policy matters. The resumption of negotiations on EU accession to the ECHR, started in November 2019, gives hope that this gap will be soon closed.

This work has attempted to apply the EHRP framework to the European External Action in order to assess its consistency with its many spheres and in particular within the ENP. Although our final conclusion demonstrated EHRP inefficiency and lack of harmonization with the Union's External Action, we presented, as an antithesis to our thesis, the framework for the implementation of targeted sanctions. The improvements made in this area has been a useful point to argue that the potential for the implementation of an efficient EHRP framework covering the entirety of European External Action does exist in the European legal order. For what concern sanctions, we were able to infer that European human rights considerations are extremely precise when implementing

sanctions, to the point that human rights considerations are able to reverse a UNSC resolution. Moreover, thanks to the fruitful sanctioning policy, we were able to confirm that the EU is normatively driven in its External Action, by posing human rights considerations at the center of its motives: the EHRP has become a necessary requirement for the Union to act normatively in foreign policy. Additionally, the capacity of the CJEU to rule on the legality of restrictive measures or sanctions, granted by Art.275 TFEU, ensures judicial review for these foreign policy acts. In sum, where the CJEU has jurisdiction, the EHRP framework is respected. Judicial review by the CJEU is a fundamental factor in our analysis; in order to reinforce its grasp on human rights considerations in the External Action and in order to provide an efficient EHRP framework, the EU shall provide judicial review for all foreign policy acts. This would actively strengthen the legitimacy of European foreign policy on a structural level.

Confirming our initial argument, insofar the current treaty provisions, substantial issues in coherence and consistency within the EHRP are to be found in every field of the external action. Outlining the legal basis the ENP was founded upon and its current functioning, it is possible to further determine the inefficiency framework at the heart of EHRP. The ENP has been depicted as one of the main areas of action of the EU where the features of the European EHRP presented in our work are most visible. We demonstrated that the ENP is indeed one of the most useful tools to investigate the Union in its quality of Normative Power, as this policy is specifically designed to externalize the European *acquis*. In this context, human rights objectives have been pursued with zeal in relationships with ENP countries, premised on conditionality. Firstly, we considered human rights conditionality as a positive, effective soft power measure that is consistent with the European EHRP and helps achieving a bargaining position on human rights issues with Neighbourhood countries. However, the notion of values being "shared" with certain autocratic Neighbours appeared to discredit the EU and undermine the authority and legitimacy of ENP human rights conditionality approach. Subsequently, we demonstrated that there are gaps within both consistency and capacities of the ENP and that newly arisen challenges within and beyond Europe may result in further unsteadiness of the founding values of EHRP, causing additional inefficiency and underperformance. Evaluating the challenges for European normative

action in the Neighbourhood, we considered inconsistencies at horizontal and vertical level. Horizontally, these deficiencies are mainly explained by the fact that the EU lacks a sufficiently strong legal basis for the implementation of an effective EHRP: European actions are constrained by the lack of clearly defined interinstitutional dynamics that result in inefficiencies and shortcomings when it comes to implementing EHRP objectives. Vertically, consistency is theoretically required by Art.24 TEU, but in practice disaggregation in Member States foreign policy decisions, diverging interests and disruptive solo initiatives keep undermining European EHRP potential in the Neighbourhood and consequently compromise the legitimacy itself to act as a global actor of the Union.

What this work has demonstrated is the inefficiency framework of the EHRP applied to the Neighbourhood and the reasons behind the impossibility for a consistent and fair application of the EHRP objectives in this region. We affirmed that if the EU cannot find effective ways to implement its self-proclaimed human rights objectives coherently and consistently in its own Neighbourhood, its credibility and legitimacy will suffer to the point where its normative action would be void and meaningless.

The current work leaves us with relevant questions and avenues for future research. Firstly, the rise of nationalist and populist movements within Member States and consequently within the democratic representation of Europe could further increase the EHRP inefficiency framework in the Neighbourhood. The interests at stake in the Neighbourhood for single European countries are too crucial to let them vanish behind the vague ideal of an External Human Rights Policy. This has been demonstrated during the migration crisis, which put at risk both Member States' and Europe's credibility as human rights defenders and security providers in the Neighbourhood. It can be said that this work represents the starting point for a comparative study aimed at investigating individual Member States' considerations towards the (un)necessary need for a common EHRP.

Moreover, the issue of diverging national and common interests has indeed the potential to be further developed and investigated as it has repercussions on the European internal battle of values vs. interests. Lawsuits have already been filed with the European Court of Human Rights and the International Criminal Court against Italy and the EU for aiding and abetting human rights violations in Libya and could result in the Union being

indirectly responsible for human rights violations. This possibility deserves further attention from the literature, as it has the potential to overturn the foundations of the EHRP and of the Union as an international actor itself.

Lastly, the approach used in this work, according to which the normative image of the EU as an actor in international relations finds its authority in the successful practice of the EHRP, could be an interesting starting point to shed light on the recently upgraded Common Security and Defence Policy (CSDP). Current trends in EU foreign and security policy pose a challenge to the protection of fundamental rights and CSDP missions are largely exempt from judicial review by the Court of Justice of the European Union. As a matter of fact, what could be evaluated is whether coherence of objectives between the EHRP and the European CSDP, a hard power approach towards conflict drawing from military assets, is at all possible.

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