The European Journal of International Law Vol. 25 no. 4

The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels

Enzo Cannizzaro*

Abstract

The scope of human rights is undergoing a paradigm shift, from a territory-based conception to a functional conception, which tends to protect human rights against the extraterritorial exercise of public authority. In the EU domestic system, this is upheld by Articles 3(5) and 21 TUE, which establish the promotion and protection of human rights as a foreign policy directive. However, the normative effect of these provisions is limited. Due to restraints deriving from the EU Treaties, these two provisions do not seem capable of providing a sufficient legal basis for EU action aimed at promoting and protecting human rights. To endow the Union with the means of action necessary to discharge the engaging function of global protector of human rights, a further development of the European constitutional framework seems to be indispensable.

1 Introductory Remarks

Like many rules of international law, the prohibition of extraterritorial application of domestic law is traditionally conceived of as a corollary to the overarching principle of sovereign equality among states. It is intimately related to the idea that territory constitutes the natural environment for the application of acts of government and it tends to prevent undue interferences by a state in the exclusive power of government of another state. In a sense, this prohibition reflects the territorial obsession that has historically permeated claims and limits to political power.

Even in the contemporary era, thus, territory remains the basic domain for states' public authority. Alternative criteria have proved hitherto to be not entirely free from

* Professor of International Law, University of Rome 'La Sapienza'. Email: enzo.cannizzaro@uniroma1.it.

inconvenience.[1] Thus, territoriality withstands the test of time and the changing structure of the international community. Originally devised as the most natural corollary of the co-existence of a plurality of sovereign entities, that principle has exhibited an unusual capacity to adapt itself to the evolving international landscape and to an ever more interdependent world.

2 Restrictive Extraterritoriality vs. Expansive Extraterritoriality

The prohibition of extraterritorial jurisdiction thus constitutes a limit to the expansive use of states' public authority. Absent a special title of jurisdiction, a state cannot enact laws designed to govern individual conduct abroad or adopt measures of enforcement beyond its boundaries.

There is, however, a different way of looking at extraterritoriality. This way emerges when the law applied to extraterritorially does not aim to govern the conduct of individuals on the territory of other states, but rather to limit this expansive use of jurisdiction. In such a case, extraterritorial application of the law has a defensive character as it purports to externalize the same limits which states' action encounters domestically.

Restrictive extraterritoriality thus appears to be profoundly different from the traditional paradigm. Far from imposing values and interests overseas, it rather tends to limit this claim. It highlights the bright side of extraterritoriality, as an antidote to its most pernicious aspect. It does not outlaw extraterritoriality but simply cures some of its unwarranted effect.

This paradigm appears particularly useful when human rights are at stake.[2] The assumption that human rights constitute a limit to other, and most aggressive, forms of extraterritoriality can be based on the consideration that the function of human rights is precisely to curtail and to corrall the scope of public authority. The logic of fundamental human rights is not to accord to individuals selective protection, *ratione loci*, but rather to reduce the unfettered discretion of public authority. Limiting their effect to a definite geographical space, or to pre-determined conditions of application, would subvert the logic and the very *raison d'être* of the sphere of fundamental rights pertaining to individuals.[3]

3 Paradigms and Implications

Restrictive extraterritoriality seems the perfect paradigm for the vexed question of the extraterritorial application of human rights. The debate on this issue has hinged around the notion of jurisdiction, employed by a significant number of human rights

1 J. Crawford, *Brownlie's Principles of Public International Law* (8th ed., 2012), at 456.

2 In recent literature see M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011); K. Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (2012).

3 For a different view see Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention', 20 *EJIL* (2010) 1223.

treaties to determine the scope of the obligations imposed on the states parties.[4] Initially conceived of in strict territorial terms, referring to the sphere where states' functions are exercised with a certain degree of stability, it is gradually losing that territorial connotation and it is more and more characterized in functional terms, as a notion which links the scope of human rights to the exercise of a state's public authority, be it lawful or unlawful, permanent or occasional.[5] The detachment of the notion of jurisdiction from its original territory-based meaning appears particularly appropriate in the field of human rights. If the scope of states' authority were determined by a non-territorial test, the same test should correspondingly determine the scope of their obligations to respect human rights.

In the EU domestic system, the enlargement of the scope of human rights is further imposed by Articles 3(5) and 21 TUE, which establish the promotion, or even the protection, of human rights as a foreign policy directive. In the next section, the role of these two provisions will be explored, with regard to the three classes of situations identified by Lorand Bartels, namely: extraterritorial conduct, extraterritorial effects of domestic conduct; extraterritorial conduct by other actors.[6] The analysis will show that these two provisions do not add much to the normative value and effect of EU and of international human rights law. Due to restraints flowing from the founding treaties, Articles 3(5) and 21 do not provide a sufficient legal basis for EU action designed to protect human rights overseas.

4 Human Rights as a Shield for EU Extraterritorial Conduct

With regard to extraterritorial conduct this conclusion appears to be self-explanatory. It flows from the approach suggested above, which pleads for a coincidence between the scope of human rights and the scope of states' public authority. Regardless of the place where conduct is performed, executive actions by EU Institutions – a rare occurrence, indeed – or by Member States' organs implementing EU law, would be limited by the full panoply of human rights which apply to domestic conduct, be it of domestic or international origin. The defensive function assigned to human rights, which would consequently apply to every possible action of the Institutions and of the Member

[4] See, e.g., Art. 1 ECHR, Art. 2 ICCPR.

[5] It is common knowledge that, after having initially adopted a strict territorial test in *Banković* (*Banković and Others v. Belgium and Others*, App. no. 52207/88, Judgment of 12 December 2001), the ECtHR has departed from it and has accepted that the Convention is violated by actions performed abroad by organs of a state party if that state exercises, through the presence of these organs, a certain form of territorial control: see *Issa and Others v. Turkey*, App. no. 31821/96, Judgment of 16 November 2004. The sequential reading of the most recent case law gives the impression of a further development which has already led, or which is inexorably leading, to the abandonment of the previous approach, and to the adoption of a more pragmatic test whereby the European Convention applies to every form of exercise of public authority over individuals by the organs of the states parties to the Convention: see *Öcalan v. Turkey*, App. no. 46221/99, Judgment of 12 May 2005; *Al Skeini v. the United Kingdom*, App. no. 55721/07, Judgment of 7 July 2011, at paras 142 and 149; and *Hassan v. the United Kingdom*, App. no. 29750/09, Judgment of 16 September 2014, at para. 75. All ECtHR decisions are available online at http://hudoc.echr.coe.int/.

[6] Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', 25 *EJIL* (2014) 1071.

States within the scope of application of EU law, should make it superfluous to have recourse to the extraterritorial shield offered by Articles 3(5), and 21 TUE.

Analogous conclusions should be drawn with regard to the second class of situations, whereby actions performed domestically by the EU, or by the Member States in implementing EU law, can ultimately exacerbate the situation of fundamental rights of people outside its boundaries: by increasing poverty, reducing access to food or medicine, and so forth.

To clarify this point, a distinction between direct and indirect causes of the violation of human rights is in order.

It seems safe to assume, first of all, that human rights obligations also cover domestic actions resulting in direct violations of human rights abroad, such as embargos on food or medicines adopted and carried out in the awareness that they will result in the death or grave suffering of a person or of a group of persons. This consequence can be accommodated in the doctrine on the *effet utile* of human rights. As early as in 1988, the European Court of Human Rights found that 'the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective'.[7] The obligation to protect human rights in a 'practical and effective' way applies nowadays to a much broader range of situations, from the obligation to abstain from actions taken in the awareness that they will probably result in a violation of human rights by another entity,[8] to the obligation to take actions within the state's territory to prevent violations from occurring outside that territory.[9] In this context, it does not seem that Articles 3(5) and 21 add much to the normative content, which can be extracted from domestic or from international human rights law.

To take an example drawn from the recent legislative practice of the EU, one can genuinely believe that a prohibition on trading in guillotines and other goods which could be used for capital punishment, torture, or other cruel, inhuman, or degrading treatment or punishment, imposed by Council Regulation (EC) No 1236/2005 of 27 June 2005, is in keeping with the obligations incumbent upon the EU to protect human rights abroad.[10]

[7] In the *Soering* case (*Soering v. the United Kingdom*, App. no. 14038/88, Judgment of 7 July 1989) the Court famously found that 'the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (Art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country'.

[8] See, e.g., *Hirsi Jamaa and Others v. Italy*, App. no. 27765/09, Judgment of 23 February 2012, at paras 131, 136, and 150.

[9] For some examples from the most recent case law see *Sharifi and Others v. Italy and Greece*, App. no. 16643/09, Judgment of 21 October 2014, at paras 234–235; *Tarakhel v. Switzerland*, App. no. 29217/12, Judgment of 4 November 2014, paras 89–91 and 122.

[10] Although these measures undoubtedly pursue a human rights purpose, they do not need a specific human rights legal basis and can be reasonably deemed to fall within the general competence of the EU to regulate foreign trade. The reason lies in the fact that human rights constitute a limit to the whole set of the competences possessed by the EU, that cannot be exercised if their exercise results in a violation of human rights. It follows that the EU, acting under its competence in the field of commercial policy, has the duty to determine the goods, trade in which must be prohibited in order to avoid the free trade regime violating its obligations to protect human rights in a 'practical and effective' way.

On the contrary, the EU can hardly be held responsible for violations of human rights occurring beyond its borders as an indirect consequence of conduct performed by its Institutions within its boundaries. Neither under *Soering* and its progeny, nor under the general law of international responsibility, can a violation of human rights be attributed to an entity when such violation, although prompted by the initial conduct of that entity, constitutes the ultimate and unforeseeable product of a chain of events unfolding outside its control.

5 Is the EU under the Obligation to Ensure Respect for Human Rights Worldwide?

Extraterritorial application of human rights, beyond the paradigm referred to above, entails stepping on the insidious ground of extraterritoriality in the strict sense, namely, in Lorand Bartels' words, of 'the obligation to "protect" the human rights of persons from the activities of other actors, and of the obligation to "fulfil" the human rights of those persons'.[11]

International human rights law does not, in principle, impose active obligations to protect human rights against the conduct of other actors. Such an obligation can flow from special rules of international law. Apparently, this is the case with common Article 1 of the 1949 Geneva Conventions and of Additional Protocol I, which requires the parties to respect and to ensure respect for humanitarian law in all circumstances.[12]

Arguably this provision directs the parties to carry out extraterritorial actions with a view to protecting human rights and to preventing their violation. However, it is silent on the means through which this objective ought to be attained and, thus, it is particularly difficult to determine its normative content. Absent an indication to the contrary, the mere existence of an obligation to ensure respect for human rights can hardly condone actions which prove to be illegal under international law. Certainly it does not impose executive actions in order to substitute for the defaulting state in discharging its conventional obligations.

With strict regard to the obligation to prevent genocide, prescribed by Article I of the Genocide Convention, the ICJ famously said that such an obligation 'is both normative and compelling'.[13] In the same paragraph the Court pointed out that a state which fulfils this obligation must respect 'the United Nations Charter and any decisions that may have been taken by its competent organs'. In more general terms, a few

[11] Bartels, *supra* note 6, at 1074.

[12] For different opinions on the scope and content of this obligation see Condorelli and Boisson de Chazournes, 'Quelques remarques à propos de l'obligation des Etats de "respecter et de faire respecter" le droit international humanitaire en toutes circonstances', in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1984) 17; Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?', 21 *EJIL* (2010) 125.

[13] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Rep. (2007) 43, at para. 427. See Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment', 18 *EJIL* (2007) 695.

paragraphs below the Court said, 'it is clear that every State may only act within the limits permitted by international law'.[14]

Arguably, Articles 3(5) and 21 TUE produce analogous effects, albeit from a purely domestic perspective. By virtue of these two provisions, the EU is under an obligation to ensure respect for human rights worldwide, in the sense that its action must tend to promote and protect human rights, without being restricted to a particular geographical or functional sphere. However, the means used to attain this objective must be consistent with international law. After all, respect for international law is included in the set of the objectives laid down by the same provisions. One can hardly assume that the EU is empowered to pursue one of these objectives to the detriment of others.

6 Extraterritorial Application of Human Rights and the Limits of the EU Competence

The capacity to protect human rights worldwide, however, could be further impaired by the limits to EU action under the founding Treaties.

In spite of the broad set of objectives laid down by Articles 3(5) and 21, these two provisions do not confer new competences on the EU. As if to play down the innovative character of Article 3(5), Article 3(6) points out that '[t]he Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties'. In analogous terms, Article 21(3) indicates that the objectives of Article 21(1) and (2) will be pursued through 'the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies'.

This limitation considerably curtails the set of means at the disposal of the Union to protect human rights beyond its boundaries. For example, the EU does not possess the competence to conclude human rights treaties and, therefore, to acquire the *status* of party to these treaties, which would confer on it the ability to require compliance by the other parties.

Nor can it be said that, in spite of the non-existence of a new competence, this objective can nonetheless be pursued by each of the policies that come within the external action of the Union. This conclusion would have required that the means of action which are conferred to the EU under the different areas of external action and under the external aspects of its other policies could be used unconditionally for the pursuit of political objectives.

In this perspective, the EU would be regarded as an entity empowered to use all its competence to attain its political objectives. Such a conclusion can be hardly drawn from the incoherent and fragmentary system of the EU's external relations. The combined reading of Articles 23 and 40 TUE seems to point to a different direction. Article 23 assigns the pursuit of the political objectives laid down by Article 21(1) and (2) to the primary competence of the CFSP.[15] Article 40 TUE prevents the other EU substantive policies from autonomously pursuing the objectives of the CFSP.

[14] *Application of the Genocide Convention, supra* note 13, at para. 430.

[15] Under Art. 23 TUE, the CFSP 'shall be guided by the principles and shall pursue the objectives' of Art. 21(1) and (2). In more restrictive terms, the other policies coming within the external action of the Union 'shall be conducted in the context of the principles and objectives of the Union's external action' (see, e.g., Art. 207 TFUE).

The effect of these two provisions seems thus to confine the aspiration of the EU as a global champion of human rights to the narrows of the principle of conferral. Whereas the instruments of the CFSP can be used unconditionally to promote and to protect human rights, other instruments can be used only to the extent that they fall within the scope of the substantive competences assigned to the EU, to attain the specific objectives assigned to them. Should one assume that the extraterritorial protection of human rights pertains, primarily if not exclusively, to the CFSP, the somewhat disappointing conclusion should be drawn that Articles 3(5) and 21 TUE merely impose directives of foreign policy. To endow the Union with the means of actions necessary to play a different and more engaging role, a further development of the European constitutional framework seems to be indispensable.

Lorand Bartels has been invited to write a Rejoinder to Enzo Cannizzaro, which will be posted on EJIL: Talk! at www.ejiltalk.org.