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Is the EU a Human Rights Organisation?

Allan Rosas

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

IS THE EU A HUMAN RIGHTS ORGANISATION?

ALLAN ROSAS*

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1. INTRODUCTION

To answer the question put in the title of this paper, it is necessary to clarify what I mean by a human rights organisation. I have in mind above all international organisations, be they intergovernmental (IGOs) or non-governmental (NGOs), whose essential mandate is focused on the promotion and protection of human rights. A clear example of an intergovernmental human rights organisation would be the Council of Europe, which provides for an elaborate human rights convention system, with the European Convention on Human Rights, including its advanced system of judicial control (the European Court of Human Rights), as the foremost example.¹ Examples of non-governmental human rights organisations are offered by Amnesty International and Human Rights Watch.

With this use of the notion of human rights organisation, I find it fairly obvious that the question put in the title of this presentation should be answered in the negative, in other words, that the European Union (hereafter, EU) is *not* a human rights organisation. As, on the other hand, the promotion and protection of fundamental rights and human rights figure relatively high on the Union's agenda, the reader may well think that my answer is either too pejorative or too formalistic. If someone insists on calling the EU a human rights organisation, I have no real quarrel with that. But it may be interesting to note that when I have put this question to participants in a number of international human rights courses, the overwhelming majority has always answered 'no'; the EU, according to them, is not a human rights organisation.²

But let us not dwell too much on this question of terminology. The main purpose of this paper is to use my negative answer as an introduction to a discussion of the status and role of fundamental rights and human rights in the activities of the EU more generally. In particular, I would like to focus on those specific features of the EU which distinguish it from a human rights organisation *stricto sensu* as characterised above. It goes without saying that it is not possible here to provide an exhaustive exposé of all fundamental rights- and human rights-related activities of the Union.

It should, in fact, be stressed at the outset that these activities comprise a vast and diverse area, ranging from fundamental rights issues in the legislative and administrative activities of the EU political institutions and in the case law of the European Court of Justice, to human rights concerns in the treaty and other activities of the EU in its relations with third countries.³ Moreover, the obligation to respect fundamental rights as defined by the Union applies not only to the Union's

¹ Suffice it to mention, as a source of reference, the monumental commentary by Pieter van Dijk *et al.*, eds., *Theory and Practice of the European Convention on Human Rights*, 4th ed. (Antwerpen/Oxford, Intersentia 2006).

² This question has been put to the participants notably of the Advanced Courses on the International Protection of Human Rights, organised each August by the Institute for Human Rights of the Åbo Akademi University (www.abo.fi/institut/imr/courses.htm).

³ For an overview, see, e.g., Philip Alston, ed., *The EU and Human Rights* (Oxford, Oxford University Press 1999); Allan Rosas, 'The European Union and Fundamental Rights/Human Rights', in: Catarina Krause and Martin Scheinin, eds., *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights, Turku/Åbo 2009), 443; Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (Oxford/Portland, Hart Publishing 2010), 143-162.

institutions in the strict sense but also to the Member States and their courts and authorities when they are acting within the scope of Union law.⁴ Important developments have taken place, as compared to the situation reigning at the early days of European integration, when the focus was on economic integration and fundamental rights received scarce, if any, attention.⁵

2. HOW IT ALL BEGAN

One of the first steps to develop a fundamental rights regime at Community level was taken by the European Court of Justice (hereafter, ECJ). The context and issue at stake are revealing. In 1963 and 1964, the Court had affirmed that the provisions of the EEC Treaty can have direct effect, in other words be invoked directly by individuals before courts and authorities,⁶ and that Community law enjoys primacy, in other words in case of conflict prevails over the laws of the Member States, including arguably their national constitutions.⁷ There was, then, a risk that the Member States, and some of their constitutional courts in particular, would reject the idea of the primacy of a Community law which did not include the principle of respect for fundamental rights. Would, for instance, the German Constitutional Court accept that an EEC regulation could prevail over the Bill of Rights of the German Constitution, in particular as there was no express obligation for the Community legislator to see to it that the EEC regulation was in conformity with fundamental rights?⁸

The answer of the ECJ, given in a case decided in 1969, was that Community law, too, should respect fundamental rights.⁹ The Court's role as a guardian of this principle was developed and specified in several important judgments of the 1970s.¹⁰ It is not necessary here to describe these jurisprudential developments in any greater detail. What I would like to stress are the *constitutional* aspects involved. The ECJ arguably was asking itself, would a Community law in a state of expansion and development preserve its legitimacy if it remained blind to fundamental and

⁴ See Rosas and Armati, *op.cit.* note 3 *supra*, 147-151. See also article 51 (1) of the Charter of Fundamental Rights of the European Union, OJ 2010, C 83/389, which refers to situations when the Member States 'are implementing Union law'. But see the Explanations relating to article 51 referred to in article 52 (7) of the Charter. According to article 6 (1) of the Treaty on European Union, the provisions of the Charter shall be interpreted 'with due regard to' the Explanations.

⁵ In Case 1/58 *Stork v. High Authority*, Recueil 1959 43, the European Court of Justice not only declined competence to examine whether European Coal and Steel Community decisions were in violation of fundamental rights principles of a national constitution but also refrained from developing a standard of fundamental rights protection at Community level.

⁶ Case 26/62 *Van Gend en Loos* [1963] ECR 1.

⁷ Case 6/64 *Costa v. ENEL* [1964] ECR 585.

⁸ See the seminal article by one of the then judges at the ECJ Pierre Pescatore, 'Les droits de l'homme et l'intégration européenne', 4 *Cahiers de droit européen* (1968), 629. See also Allan Rosas, 'The European Court of Justice and Fundamental Rights: Yet Another Case of Judicial Activism?', in: Carl Baudenbacher and Henrik Bull, eds., *European Integration Through Interaction of Legal Regimes* (Oslo, Universitetsforlaget 2007), 33.

⁹ Case 29/79 *Stauder* [1969] ECR 419.

¹⁰ See, e.g., Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case 4/73 *Nold* [1974] ECR 491; Case 36/75 *Rutili* [1975] ECR 1219. See also Rosas, *op.cit.* note 3 *supra*, at 445-447; Rosas, *op.cit.* note 8 *supra*, at 37-40.

human rights imperatives? And more concretely, would the Member States accept the principle of primacy if Community legal acts, adopted outside a fundamental rights/human rights control system, could always prevail over national law, including national constitutions with their fundamental rights catalogues? In the same vein, what would the reaction of the Member States be if the application of Community law at the national level was found to contravene the European Convention of Human Rights (to which most of the Member States had adhered) and they would thus be held responsible for something that could at least partly be beyond their control?

The Court's new case law, holding that the general principles of Community law included fundamental rights, while it did not yet suffice to convince the German Constitutional Court,¹¹ soon found explicit support in political declarations adopted by the political institutions and Treaty changes ratified by the Member States. For instance, a clause was included in the Treaty on European Union (hereafter, TEU), introduced by the Treaty of Maastricht (1992), providing that '[t]he Union shall respect fundamental rights, as guaranteed by the European Convention [on Human Rights] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'. It is worth noting that the terminology here is the same as the one being used by the Court of Justice, in other words 'fundamental rights', rather than 'human rights', and that the legal source to be applied directly, again in accordance with the Court's case law, is the 'general principles of Community law' (now the 'general principles of the Union's law').

3. FUNDAMENTAL RIGHTS – HUMAN RIGHTS

The preference for the notion of fundamental rights rather than human rights when it comes to the development of EU law internally is confirmed by later developments.¹² Of particular importance in this regard is the EU Charter, first proclaimed as a 'soft law' instrument in 2000¹³ and made part of binding primary law by the Treaty of Lisbon (which entered into force on 1 December 2009).¹⁴ The official title is 'Charter of Fundamental Rights of the European Union'. It is a constitutional instrument, designed for the EU itself and akin to the constitutional rights catalogues of national constitutions, rather than an international human rights instrument. To be sure, the content of the Charter is to a large extent inspired by international human rights instruments and there is even a provision of the Charter (Article 52 (3)) which makes it mandatory to respect those rights guaranteed by the European Convention on Human Rights which correspond to the rights recognised by the

¹¹ In its so-called *Solange I* decision of 29 May 1974 (BVerfGE 37, 271), the German Constitutional Court asserted a right to assess the compatibility of rules of Community law with the fundamental rights enshrined in the German Basic Law 'as long as' ('solange') Community law did not provide a system of fundamental rights protection which corresponded to the German Bill of Rights. In *Solange II* (Order of 22 October 1986, BVerfGE 73), the Constitutional Court more or less reversed the presumption. The Court now held that it would no longer exercise its right of review 'as long as' the Communities generally ensured effective protection of fundamental rights which was substantially similar to the German system. See, e.g., Rosas, *op.cit.* note 3 *supra*, at 447, 462-463.

¹² See also Rosas and Armati, *op.cit.* note 3 *supra*, at 147.

¹³ OJ 2000 C 364/1.

¹⁴ See note 4 *supra*.

Charter. However, that does not prevent the Charter from providing more extensive protection. Moreover, the EU Charter is inspired by not only international human rights instruments but also the 'constitutional traditions common to the Member States'.¹⁵

In 2007, an EU Fundamental Rights Agency was established, with its seat in Vienna, mainly to provide the political institutions with information, assistance and expertise in the field of fundamental rights. The name of the Vienna Agency is the European Union Agency for Fundamental Rights. The use of the notion of fundamental rights (rather than human rights) is explained by the focus on internal EU fundamental rights issues, which is clearly to be seen in its constituent instrument.¹⁶

True, there is one provision in the TEU which, although it is primarily designed for internal consumption, refers to the notion of human rights rather than fundamental rights. I am thinking of Article 7 TEU, which provides that sanctions can be taken against a Member State which seriously and persistently violates the values mentioned in Article 2.¹⁷ Also Article 49 TEU on the conditions for becoming a member of the EU refers to Article 2. The latter provision mentions 'respect for human rights, including the rights of persons belonging to minorities'. But the same Article also lists human dignity, freedom, democracy, equality and the rule of law as values on which the Union is founded. In any case, the provision is arguably designed to set out the constitutional value foundations of the Union both in a symbolic sense and so as to guarantee that Member States are willing and able to ensure fulfilment of their obligations arising out of the EU legal order rather than to further the cause of international human rights as an objective *an sich*.

It is also true that both the case law of the ECJ and, as was already pointed out, the Charter of Fundamental Rights draw heavily upon the European Convention on Human Rights and other international human rights instruments. But the formal source of law which is directly applicable is the general principles of the Union's law, and after the entry into force of the Treaty of Lisbon, also the provisions of the Charter of Fundamental Rights. The international instruments are used more as guidelines and sources of inspiration than as directly binding and applicable texts.¹⁸

This has become even more evident with the entry into force of the Treaty of Lisbon. The Court of Justice, in its most recent case law, normally takes a certain provision of the Charter of Fundamental Rights as a starting point and directly applicable source while references to the European Convention or other international human rights instruments are made only if required by the Charter (which, as was noted above, provides that Charter rights which correspond to Convention rights

¹⁵ See the Preamble of the Charter. The reference to national constitutional traditions is also to be found in Article 6 (3) TEU, as amended by the Treaty of Lisbon, and it originates in the ECJ's case law, starting with *Internationale Handelsgesellschaft* (note 10 *supra*).

¹⁶ Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Agency for Fundamental Rights, *OJ* 2007 L 53/1. See also Philip Alston and Olivier De Schutter, eds., *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Oxford/Portland, Hart Publishing 2005); Rosas, *op.cit.* note 3 *supra*, at 452-453.

¹⁷ This clause has never been used in practice, Rosas and Armatì, *op.cit.* note 3 *supra*, at 151.

¹⁸ Allan Rosas, 'The European Union and International Human Rights Instruments', in: Vincent Kronenberger, ed., *The European Union and the International Legal Order: Discord or Harmony?* (T.M.C. Asser Press, The Hague 2001), 53; Allan Rosas, 'International Human Rights Instruments in the Case-Law of the European Court of Justice', in: *Law in a Changing Europe: Liber Amicorum Pranas Kūris* (Mykolo Romerio Universitetas, Vilnius 2008), 363.

should, as a minimum, be given the same meaning as in the Convention) or if there are some other special reasons.¹⁹

The conclusion of this discussion on the relationship between fundamental rights and human rights is this: The emphasis on the notion of fundamental rights when EU law and EU internal developments are at stake suggests a constitutional rather than international approach. The EU legal order is a constitutional order which now, with the Charter of Fundamental Rights, is endowed with its own Bill of Rights, much in the same way as States have constitutions and constitutional rights catalogues.²⁰ While the EU Charter is certainly inspired by international human rights instruments, it also has a life of its own. Its precise contours and contents can only be fully understood later, in the light of subsequent Union legislation, practice and case law applying and interpreting the Charter.

4. ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The situation may to some extent change if and when the EU accedes to the European Convention on Human Rights as a Contracting Party. This possibility has been the subject of long and difficult discussions.²¹ In an Opinion of 1996, the ECJ held that, as Community law stood at that time, the Communities lacked competence to adhere to the European Convention.²² This question has now been settled by the Treaty of Lisbon. According to Article 6 (2) TEU, the Union 'shall accede' to the Convention.²³ Accession negotiations are currently underway between the European Commission, acting on behalf of the EU, and the Council of Europe Member States (including those that are members of the EU as well) and may well lead to a positive result later this year. If the EU becomes a Contracting Party in its own right, would I not have to reconsider my answer to the question put at the outset? And what about the fact that the EU is already today a Contracting Party to the UN Convention on the Rights of Persons with Disabilities, opened for signature in 2007?²⁴

No, on the contrary, I would argue that accession to the Disability Convention, and future accession to the European Convention on Human Rights, prove my

¹⁹ See Allan Rosas and Heidi Kaila, 'L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice: un premier bilan', *Il Diritto dell'Unione Europea* no. 1/2011 (forthcoming).

²⁰ See Rosas and Armati, *op.cit.* note 3 *supra*, at 3, 13-14.

²¹ There is an abundance of Council of Europe and EU documentation referring to the discussions on EU accession to the European Convention on Human Rights. See, e.g., Resolution 1610 (2008) of 17 April 2008, 'The accession of the European Union/European Community to the European Convention on Human Rights', adopted by the Parliamentary Assembly of the Council of Europe, and the Report of the Committee on Legal Affairs and Human Rights of the Assembly, Council of Europe doc. 11533 of 18 March 2008.

²² Opinion 2/94 [1996] ECR I-929.

²³ See also 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 annexed to the TEU and the TFEU and article 59 of the European Convention on Human Rights, as amended by article 17 of Protocol No. 14 amending the control system of the Convention. The latter provision provides that the EU 'may accede' to the Convention.

²⁴ Council Decision 2010/48/EC of 26 November 2009, *OJ* 2010 L 23/35.

point. The Council of Europe (which, as was noted earlier, can be seen as a true human rights organisation) is not a Party to international human rights conventions. Nor is the United Nations, which in many ways promotes international standard-setting in the field of human rights and the monitoring of respect for human rights world-wide. States, on the other hand, are Parties to human rights conventions. While some States do honour and promote human rights, few of us would describe a State as a human rights organisation. States pursue a broad range of policies, including, hopefully, human rights policies, but we all know how difficult it may be, in the carrying out of foreign policy, to find the right balance between interests and values.

The situation for the EU is similar, if not identical, to that of States. In a basic provision relating to external relations contained in the TEU (Article 3(5)), it is said that the Union, in its relations with the wider world, 'shall uphold and promote its values *and interests* and contribute to the *protection of its citizens*' (emphasis added). It is true that this general aim is followed by the more specific aim of protecting human rights, but many other objectives are listed as well, such as peace, security, sustainable development and free and fair trade. Article 21 of the Treaty on the Functioning of the European Union (hereafter, TFEU) provides that the Union's action on the international scene shall be guided by some principles such as democracy, the rule of law and the universality and indivisibility of human rights and fundamental freedoms. The same Article, however, also sets out a number of other objectives, including safeguarding not only the values but also the 'interests, security, independence and integrity' of the Union. This, of course, is related to the fact that the EU is an economic and political community of deep integration rather than an intergovernmental organisation in the classical sense.

When the question of EU accession to the European Convention on Human Rights became a subject of discussion, many EU Member States were hesitant or even opposed. Among those Member States were also to be found States that are generally known for their active human rights policies. How can this be explained? It seems to me that some of the doubts concerning EU accession stemmed from a reluctance to accept a move which might indicate that the EU had become, if not a State, 'almost' a State.²⁵

At the end, it was held that whatever the precise legal and constitutional status of the EU, the Union had obtained 'real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community'²⁶ to such an extent that non-accession to the European Convention raised the question of a gap in the Convention system and this gap tended to become wider and wider as the integration process moved forward. The question was increasingly raised why people could not complain to the European Court of Human Rights over the activities of the EU despite the fact that the Member States had conferred more and more competences and powers to the Union and might thus escape responsibility for the fulfilment of Convention obligations. It is true that complainants can try to attack the Member State or States that apply or implement EU law, but the chances of success, in case the Member State does not act within its own margin

²⁵ On the different notions and characterisations used with respect to the EU see, e.g., Rosas and Armati, *op.cit.* note 3 *supra*, at 6-17, which also contains a list of both 'state-like' and 'non-state-like' features of the EU.

²⁶ The quotation is taken from the judgment in *Costa v. ENEL*, note 7 *supra*.

of appreciation but rather executes a Union legal act, are rather slim, given the presumption of conformity with the European Convention that, as far as the EU is concerned, the European Court of Human Rights has accepted in its *Bosphorus* case law.²⁷

By way of conclusion, it seems obvious that accession to the European Convention on Human Rights and other international human rights treaties will after all not reinforce the idea that the EU is a human rights organisation. Human rights organisations such as the Council of Europe may promote and adopt human rights conventions but they are not invited to become Contracting Parties themselves notably as they lack the competences, powers and institutions which are necessary in order to be able to apply and implement such conventions. The EU, for its part, is deemed to possess the necessary competences, powers and institutions. Exactly for this same reason, the EU is also deemed to be engaged in activities which have the potential of being prejudicial to the rights guaranteed by the Convention.

5. IMPLICATIONS FOR THE EU LEGAL AND JUDICIAL SYSTEM

EU adherence to human rights conventions has both internal and external consequences. Internally, the convention becomes an integral part of the Union legal order and it may well contain provisions which would be recognised by the EU Courts as having direct effect. Externally, the EU makes a legally binding commitment vis-à-vis the other Contracting Parties, including third States not members of the EU. In this respect, adherence becomes a part of the Union's treaty relations and more generally its foreign policy agenda.

As to *internal* application, it can be asked what position in the hierarchy of norms the European Convention, or any other human rights treaty, would enjoy, as compared with EU primary law (notably the basic Treaties, the Charter of Fundamental Rights as well as the general principles of Union law) and secondary law in the form of Union legislative acts (notably regulations and directives). Concerning the European Convention, a precise answer is difficult to give at this juncture, as accession is yet to be accomplished. The question of hierarchy of norms will probably not pose a major problem, as the Charter of Fundamental Rights, as already noted earlier, incorporates the minimum protection provided by the European Convention on Human Rights with respect to those rights in the Charter which correspond to the rights guaranteed by the Convention. With these caveats, it can be noted that the ECJ has held that international treaties concluded by the Union are, in the hierarchy of norms, situated between primary law and legislative acts.²⁸ In case of conflict, primary law prevails in principle over international agreements. But again, as today's Union primary law includes fundamental rights guarantees, notably the Charter of Fundamental Rights, the question seems to be of limited practical relevance.

²⁷ See Case of *Bosphorus Hava Yollari Turizm v. Ireland* (Application No. 45036/98), judgment of 30 June 2005, Reports of Judgments and Decisions 2005-VI; Case of *Kokkelvisserij v. Netherlands* (Application No. 13645/05), Decision of 20 January 2009.

²⁸ Rosas and Armati, *op.cit.* note 3 *supra*, at 42, 48-49.

In this context, the *Kadi* judgment of the Court of Justice of 2008, much discussed in legal and political circles, comes to mind.²⁹ In this judgment, the Court asserted its right and obligation to conduct a full review of the legality of Union measures which implement binding UN Security Council sanctions. In some quarters, concerns were expressed that the Court undermined respect for the UN Charter and the powers of the Security Council. The critics either overlooked, or alternatively did not like, the fact that the Court limited its findings to the place of UN sanctions and EU measures to implement them in the Union constitutional order, not in the sphere of public international law. It was in that *EU internal* context that the Court observed that, even assuming that the UN Charter was binding on the Union, it would have to yield to EU primary law, notably fundamental rights.³⁰ In doing so, the Luxembourg Court only acted in the same way as would have been the case in many constitutional or other national courts.³¹

The *Kadi* judgment underlines the fact that the EU Courts (the ECJ and the General Court) are not international human rights courts but perform functions which are similar to those of national courts. As far as EU restrictive measures (sanctions) against individuals or groups of individuals are concerned, the jurisdiction of the EU Courts stems from the fact that such measures are nowadays taken at the Union rather than at national level.³² If this were not the case, judicial review would fall upon the national courts of the Member States which have taken restrictive measures.

More generally, even a cursory look at the case law of the EU Courts will reveal that they deal with a wide range of issues such as agriculture, environmental protection, taxation, social issues, free movement rights in the internal market and the status of third-country nationals and asylum-seekers, in other words, matters that in the past used to be dealt with by the Member States and their courts alone. Fundamental rights may come up in the context of any of these or other substantive fields. There are no specific fundamental rights or human rights remedies and the internal organisation of the EU Courts does not provide for any distinct fundamental rights chamber or section. On the other hand, the EU Courts are only competent in matters of EU law.³³ Thus, if a question of fundamental or human rights comes up before a national court, and the case does not fall within the scope of Union law, the ECJ is not competent to give a preliminary ruling to the national court. If one of the parties thinks that the judgment of the national court is not in conformity with the European Convention on Human Rights, he or she can complain directly to the European Court of Human Rights in Strasbourg (provided internal remedies have been exhausted), not to the EU Courts.

That said, I hope that the preceding discussion has demonstrated that the EU Courts are far from alien to fundamental and human rights concerns. The Charter of Fundamental Rights will certainly contribute to an even greater emphasis on fundamental rights in the Court's case law. Allow me in this context to come back

²⁹ Joined Cases C-402/05 and C-415/05 *Kadi and Al Barakaat International Foundation v. Council* [2008] ECR I 6351.

³⁰ Joined Cases C-402/05 and C-415/05 *Kadi*, note 29 *supra*, paras 307-309.

³¹ Allan Rosas, 'Counter-Terrorism and the Rule of Law: Issues of Judicial Control', in: A-M Salinas de Frías, KHL Samuel and ND White, eds., *Counter-Terrorism: International Law and Practice* (Oxford, Oxford University Press 2011, forthcoming).

³² See, e.g., Rosas, *op.cit.* note 31 *supra*.

³³ Rosas and Armati, *op.cit.* note 3 *supra*, at 147-151.

to the *Kadi* judgment. While the Court, as I noted above, focused on the internal EU aspect, that is, the review of the legality of EU measures implementing UN sanctions, it should be added that, in my view, the end result should not bring human rights and international law lovers into tears. That UN political bodies (the Security Council and its Sanctions Committees) can take draconian sanctions against individuals who are suspected but not condemned of crimes, without any judicial control of the legality of these decisions, should make us all pause for a moment.³⁴ Was the UN not meant to promote and uphold human rights rather than to discard fundamental rule of law principles? It would seem that the current UN sanctions regime, even with the new Office of Ombudsperson, which can receive requests from individuals and entities seeking to be removed from sanctions lists,³⁵ does not live up even to the most basic rule of law standards recognised in international or European law.³⁶

Be that as it may, the ECJ, in *Kadi*, stuck to its fundamental mandate, that is, to see to it that the values on which the Union is founded, including respect for the rule of law and human rights (Article 2 TEU), be honoured and that in the interpretation and application of Union law, 'the law is observed' (Article 19(1) TEU). The Court was clearly acting in its capacity of constitutional court applying the fundamental rights and rule of law principles which are at the very core of the EU constitutional order.

6. HUMAN RIGHTS IN EU EXTERNAL RELATIONS

Let me now move more specifically to the sphere of EU *external* relations. Do EU human rights policies vis-à-vis third countries and international organisations change the picture, so that the Union, at least as far as this external aspect is concerned, could or should be characterised as a human rights organisation?

It should be observed at the outset that in external relations, too, human rights have become an important ingredient, although somewhat later than the emergence of the internal fundamental rights regime.³⁷ At the level of instruments and legal norms, one can distinguish between so-called autonomous (unilateral) Union legal acts, on the one hand, and international agreements on the other. Relevant Union autonomous acts include regulations of a general nature instigating financing programmes for democracy and human rights, more specific instruments concerning a certain region or sector which may include a human rights-related component,

³⁴ See, e.g., Hans Corell, 'Reflections on the Security Council and Its Mandate to Maintain International Peace and Security', in: Ole Engdahl and Pål Wrange, eds., *Law at War: The Law as it Was and the Law as it Should Be: Liber Amicorum Ove Bring* (Leiden, Martinus Nijhoff 2008), 68; Martin Scheinin, 'Is the ECJ Ruling in *Kadi* Incompatible with International Law?', 28 *Yearbook of European Law* (2010), 637; Rosas, *op.cit.* note 31 *supra*.

³⁵ UN Security Council Resolution 1904 (2009) of 17 December 2009, UN doc. S/RES/1904 (2009).

³⁶ See Case T-85/09 *Kadi v Commission*, judgment of the General Court of 30 September 2010 nyr, para. 128. See also Rosas, *op.cit.* note 31 *supra*.

³⁷ See, e.g., Daniela Napoli, 'The European Union's Foreign Policy and Human Rights', in: Nanette Neuwahl and Allan Rosas, eds., *The European Union and Human Rights* (The Hague, Martinus Nijhoff 1995), 297; Barbara Brandtner and Allan Rosas, 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice', 9 *European Journal of International Law* (1998), 468.

instruments relating to unilateral trade preferences as well as decisions taken in the context of the Common Foreign and Security Policy (hereafter, CFSP).³⁸ In fact, legislative acts imposing economic and financial sanctions ('restrictive measures') normally require a preceding CFSP decision. Sanctions are often, but far from always, based on binding UN Security Council sanctions resolutions.³⁹

As far as international agreements are concerned, the EU, as mentioned above, is now a Contracting Party to one multilateral human rights convention (the new UN Disability Convention) and may in the near future become a Contracting Party to the European Convention on Human Rights. But in its bilateral relations with third countries, the EU has already since the early 1990s insisted on the inclusion of a human rights clause in trade and cooperation agreements of a general nature.⁴⁰ Such a clause is to be found in agreements binding around 150 third countries.⁴¹ The human rights clause does not really create new law but its main purpose is to reaffirm universal values recognised, *inter alia*, in the Universal Declaration of Human Rights of 1948, and to enable the Parties, arguably normally the EU, to take sanctions against States which are considered to violate the clause.⁴² Human rights provisions may be included in more specific agreements as well, such as agreements concluded with Kenya and the Seychelles on the conditions and modalities for the transfer of suspected pirates or armed robbers at sea, in the context of the EU naval operation (*Atalanta*) outside the coasts of Somalia.⁴³

Generally speaking, EU instruments, whether autonomous acts or bilateral agreements, which contain human rights provisions combine the carrot and the stick. The main emphasis is on the carrot (for instance, financing various projects and programmes in third countries or trade preferences accorded to such countries) but the use of the stick is not excluded. Behaviour deemed to be in violation of the human rights clause may lead to the suspension of unilateral financial assistance

³⁸ Brandtner and Rosas, *op.cit.* note 37 *supra*; Barbara Brandtner and Allan Rosas, 'Trade Preferences and Human Rights', in: Alston, *op.cit.* note 3 *supra*, 699; Rosas, *op.cit.* note 3 *supra*, at 464-474.

³⁹ Rosas, *op.cit.* note 31 *supra*.

⁴⁰ See, e.g., Mielle Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality?* (Antwerp/Groningen/Oxford, Intersentia/Hart Publishing 2001); Rosas, *op.cit.* note 3 *supra*, at 466-470.

⁴¹ See the Inventory of Agreements containing the Human Rights Clause established by the European Commission, DG RELEX/B2, Treaties Office, 3 March 2011. See also the corresponding Inventory of Agreements containing the Suspension Clause.

⁴² In addition to the literature mentioned in notes 37-40 *supra*, see also Allan Rosas, 'The European Union: In Search of Legitimacy', in: Vinodh Jaichand and Markku Suksi, eds., *60 Years of the Universal Declaration of Human Rights in Europe* (Antwerp/Oxford/Portland, Intersentia 2009), 415 at 424-429.

⁴³ On the *Atalanta* Operation see Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Antwerp/Oxford/Portland, Intersentia 2010), 179-191, 251-252, 646, notably at 186-189. Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, *OJ* 2009 L 79/49; Exchange of Letters between the European Union and the Republic of Seychelles on the conditions and modalities for the transfer of suspected pirates and armed robbers from EUNAVFOR to the Republic of Seychelles and for their treatment after such transfer, *OJ* 2009 L 315/35.

or of trade preferences, or the operation of an agreement. Sometimes funds are frozen, travel bans imposed on the leading circles of a particular regime, and/or arms exports prohibited, as demonstrated by the recent sanctions against the Qadhafi regime in Libya.⁴⁴ Sometimes a carrot in the form of financial assistance can function as a stick as well: for instance, support for a non-governmental organisation may be viewed as an unfriendly act by the regime in power in the recipient country.

If we look at the use of the stick in actual practice, the nature of the EU as an economic and political integration community rather than as a human rights organisation becomes obvious. The stick is used quite selectively. The main emphasis has been on small or at the most medium-sized States in Africa, Asia and Eastern Europe, or certain groups and individuals, notably alleged terrorists.⁴⁵ By and large, sanctions have not been imposed on dictatorial or authoritarian regimes deemed sufficiently important from the point of view of trade and political cooperation (although there are some exceptions such as an arms embargo imposed on China after the Tiananmen Square massacre⁴⁶). In this respect, the EU of course finds itself in good company. The practice of the UN Security Council is also quite selective.

It is true that the EU does not turn a completely blind eye to human rights problems in countries which have not been the subject of outright sanctions. With some 40 third countries, the EU is engaged in what is termed a 'human rights dialogue'.⁴⁷ Moreover, the EU has at its disposal a panoply of other means of persuasion, such as suspending or postponing negotiations for a new trade and cooperation agreement or the reduction of future financial assistance. However, the existence of such more 'gentle' means of persuasion do not alter the fact that the stick in the forms of sanctions is used quite selectively. It is perhaps symptomatic that the mandate of the EU Fundamental Rights Agency in Vienna, which possibly might contribute to a more systematic and coherent human rights policy, does not extend to EU external relations.

It is not my intention here to discuss whether this selectivity is good or bad from a normative perspective. My main point, of course, is simply to underline the *political* character of EU decision-making in this area. How could it be otherwise? While it is true that the EU, according to Article 1 TEU, is an 'ever closer union among the peoples of Europe', it is also a Union of States pursuing political and economic interests. That said, *if* sanctions are imposed, there should be respect for human rights as well as judicial control, especially if the rights of individuals are

⁴⁴ See Council Decision 2011/137/CFSP of 28 February 2011 concerning restrictive measures in view of the situation in Libya, *OJ* 2011 L 58/53; Council Regulation (EU) No. 204/2011 of 2 March 2011 concerning restrictive measures in view of the situation in Libya, *OJ* 2011 L 58/1; Council Implementing Regulation (EU) No. 272/2011 of 21 March 2011 implementing Article 16(2) of Regulation (EU) No. 204/2011 concerning restrictive measures in view of the situation in Libya, *OJ* 2011 L 76/32.

⁴⁵ For a list of restrictive measures (sanctions) in force on 8 March 2011, see European Commission, Restrictive measures, http://ec.europa.eu/external_relations/cfsp/sanctions/docs/measures_en.pdf. See also Rosas, *op.cit.* note 3 *supra*, at 467-469.

⁴⁶ Declaration of the European Council, Madrid, 27 June 1989, reproduced in the list of restrictive measures established by the European Commission, note 45 *supra*, at 7.

⁴⁷ See Council of the European Union, Human Rights dialogues and consultations, <http://consilium.europa.eu/showPage.aspx?id=1682&lang=EN>.

affected.⁴⁸ The Treaty of Lisbon has in this respect introduced an improvement: According to Article 275 TFEU, the EU Courts have jurisdiction to review the legality not only of legislative acts but also of CFSP decisions 'providing for restrictive measures against natural or legal persons'. This possibility of judicial review of CFSP decisions imposing restrictive measures against individuals or groups of individuals did not exist before the Treaty of Lisbon.

7. HUMANITARIAN LAW

As this first annual CLEER public lecture is delivered at The Hague, the city of the 1899 and 1907 Peace Conferences, the International Criminal Court (hereafter, ICC) and other similar jurisdictions, it seems particularly appropriate to add a word on international humanitarian law applicable in armed conflicts (hereafter, humanitarian law).⁴⁹ What is the relevance of humanitarian law for EU law, and if it is relevant, could it affect our answer to the question, is the EU a human rights organisation?

It should be noted at the outset that in EU external relations, the notion of human rights has been understood in a large sense, to encompass a wide area of human rights including civil, political, economic, social and cultural rights as well as the rights of persons belong to minorities.⁵⁰ Already the first financial human rights regulations of 1999, which concerned the Initiative for Democracy and Human Rights, mentioned humanitarian law as well.⁵¹ A more recent regulation of 2006 refers to assistance with a view, inter alia, to promote and strengthen the ICC, ad hoc international criminal tribunals, as well as to promote observance of international humanitarian law.⁵² And a recent Council Decision on the ICC states that the ICC is 'an essential means of promoting respect for international humanitarian law and human rights'.⁵³

A Council Common Position establishing common rules governing control of exports of military technology and equipment provides for a number of criteria limiting the right of Member States to grant export licences. One of the criteria concerns respect for human rights in the country of final destination as well as

⁴⁸ Rosas, *op.cit.* note 31 *supra*.

⁴⁹ On the concept of international humanitarian law applicable in armed conflicts and the relations between this concept and the law of war, on the one hand, and human rights, on the other, see, e.g., Allan Rosas; *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts* (Helsinki 1976, reprint by the Åbo Akademi University Institute for Human Rights, Turku/Åbo 2005).

⁵⁰ Brandtner and Rosas, *op.cit.* note 37 *supra*, at 483-488; Allan Rosas, 'Economic, Social and Cultural Rights in the External Relations of the European Union', in: Asbjørn Eide, Catarina Krause and Allan Rosas, eds., *Economic, Social and Cultural Rights: A Textbook*, 2nd rev. ed. (Dordrecht/Boston/London, Martinus Nijhoff 2001), 479.

⁵¹ Council Regulation (EC) No. 975/1999 of 29 April 1999, OJ 1999 L 120/1; Council Regulation (EC) No. 976/1999 of 29 April 1999, OJ 1999 L 120/8.

⁵² Article 2 (1) (a) (iii) and (c) (iii) of Regulation (EC) No. 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, OJ 2006 L 386/1.

⁵³ Article 1 (2) of Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, OJ 2011 L 76/56. See also the Agreement between the ICC and the EU on cooperation and assistance of 10 April 2006, OJ 2006 L 115/50.

respect by that country of international humanitarian law.⁵⁴ With respect to humanitarian law in particular, the Common Position provides that the Member States, having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, shall deny an export licence 'if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of humanitarian law'.

As the activities of the EU have been more and more geared towards a common security and defence policy, including military missions in various hot-spots (such as the above-mentioned naval force outside the coast of Somalia to combat piracy),⁵⁵ the need not only to promote international humanitarian law but also to ensure its respect by EU military forces, has become more acute. It seems clear that the EU and its Member States must respect at least the general principles of humanitarian law if they become embroiled in an armed conflict.⁵⁶

On the other hand, the EU missions undertaken under the Common Security and Defence Policy (hereafter, CSDP) have generally not made the Union party to an armed conflict in the strict sense. That is why the EU has stressed the need to respect also human rights in its military and civilian missions. For instance, a Report on the Implementation of the European Security Strategy, approved by the European Council in December 2008, states that the EU needs to continue mainstreaming human rights issues in all activities in this field, including CSDP missions.⁵⁷ International humanitarian law is not mentioned in that document.

While humanitarian law does come up in other documents, including in two mission agreements concerning military missions in Africa (AMIS and EUFOR DR Congo),⁵⁸ the overall impression is a somewhat stronger emphasis on human rights law. The EU Guidelines on promoting compliance with international humanitarian law of December 2005, updated in December 2009,⁵⁹ provide explicitly that while the general commitment to comply with humanitarian law extends to measures taken by the EU and its Member States in their own conduct, including by their armed forces, such operations are not covered by the Guidelines themselves.

As I have pointed out elsewhere,⁶⁰ the distinction between humanitarian law and human rights law is increasingly difficult to uphold. This is true, in particular, with respect to international crisis management (peace-keeping, peace-building and peace-enforcement operations). Such operations are not war-making in the traditional sense but come, in my view, closer to the notion of international armed

⁵⁴ Article 2 (2) of Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, *OJ* 2008 L 335/99.

⁵⁵ Rosas and Armati, *op.cit.* note 3 *supra*, at 214-219.

⁵⁶ See generally Naert, *op.cit.* note 43 *supra*.

⁵⁷ Report on the Implementation of the European Security Strategy: Providing Security in a Changing World, Brussels, 11 December 2008, doc. S407/08.

⁵⁸ Naert, *op.cit.* note 43 *supra*, at 153, 251-252, 527.

⁵⁹ Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL), *OJ* 2009 C 303/12.

⁶⁰ Allan Rosas, in collaboration with Pär Stenbäck, 'The Frontiers of International Humanitarian Law', 24 *Journal of Peace Research* (1987), 219; Allan Rosas, 'Human Rights at Risk in Situations of Internal Violence and Public Emergency: Towards Common Minimum Standards', in: Asbjørn Eide and Jan Helgesen., eds., *The Future of Human Rights Protection in a Changing World: Essays in Honour of Torkel Opsahl* (Oslo, Norwegian University Press 1991), 165.

policing.⁶¹ When the criminals are at loose, the police must act! Thus, the EU should perhaps not try to focus its doctrine on any sharp distinction between international armed conflicts, non-international armed conflicts, public emergencies not constituting armed conflicts, and so on, but should rather develop a modern concept of human rights and humanitarian standards relevant for all its military and civilian missions.⁶²

8. CONCLUSION

Be that as it may, the development of the CSDP underlines the role of the Union as a political and military actor rather than as a human rights organisation. More generally, the Union furthers not only its values but also its economic, political and security interests in its dealings with third States. Internally, the emphasis is on fundamental rights, as a concept of the EU constitutional order. The strengthening of EU human rights and fundamental rights policies and doctrines should take this reality fully into account. This does *not* mean that the human rights and fundamental rights component of EU policies could not or should not be strengthened. I believe, in fact, that they should be so strengthened. But if such efforts are based on the wrong assumption that the only, or at least dominant, goal of the EU is the promotion and protection of human rights and humanitarian law, then disappointment and frustration will be the only possible outcome.

⁶¹ Allan Rosas, 'Towards Some International Law and Order', 31 *Journal of Peace Research* (1994), 129; Allan Rosas, 'Construing International Law and Order', in: Jarna Petman and Jan Klabbers, eds., *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Leiden/Boston, Martinus Nijhoff 2003), 89 at 108.

⁶² Cf. The Turku Declaration of Minimum Humanitarian Standards, adopted by an international expert meeting in Turku, Finland, on 2 December 1990, reprinted, e.g., in UN doc. E/CN.4/Sub.2/1991/55; 85 *American Journal of International Law* (1991), 377; 31 *International Review of the Red Cross* (1991), 328. See also Asbjørn Eide, Theodor Meron and Allan Rosas, 'Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards', 89 *American Journal of International Law* (1995), 215.