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# Convergence through EU Unilateralism

Jed Odermatt

## I. Introduction

Much has been made in recent years of the United States' withdrawal from the leadership in multilateral institutions, and its preference to pursue unilateral action. This is often contrasted with the approach of the European Union, which traditionally has been more supportive of international cooperation and multilateral institutions.<sup>1</sup> The EU Treaties commit the Union to respect international law and to seek solutions to international problems through multilateral means, and the EU has sought to influence the development of international law via multilateral institutions, especially through the United Nations and UN bodies. Yet in recent years, many of the EU's policies have been criticised for being 'unilateral', 'extra-territorial', or even violating international law. This points to a certain paradox of the EU as a convergence actor. As the EU becomes more assertive at the international level, as it seeks to play a greater role in a number of fields of global governance, such policies may have the effect of simultaneously undermining that very system of multilateral governance. In areas such as climate change mitigation, financial market regulation, data protection and human rights protection, the EU's unilateral approach often stems, not from disengagement with multilateralism, but from an inability to make progress through multilateral institutions. Its push for greater convergence towards its own values and norms can at the same time have the effect of weakening the general multilateral system. This contribution analyses and discusses this apparent paradox through the lens of EU multilateralism and unilateralism. It discusses how the EU may at the same time be driving forward fields of international law and promoting convergence towards its values and interests, but also risks undermining the integrity of those multilateral institutions.

The first part of the chapter discusses the European Union and its approach to multilateralism. It shows how the EU has a strong commitment towards multilateralism, and

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<sup>1</sup> See Jed Odermatt and Ramses A Wessel, 'The Challenges of Engaging with International Institutions – The EU and Multilateralism Under Strain' in Ramses A Wessel and Jed Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar, 2019) 658.

that its understanding of what this entails continues to change over time. It argues that multilateralism is about much more than working with a number of actors, but about a commitment to certain values, including the involvement of international institutions, the respect for certain global norms and international law. The second part then discusses fields of law where the EU has been challenged and criticised for pursuing a unilateral approach, focusing on the fields of climate change policy, data protection and the use of autonomous restrictive measures (sanctions). In these areas, it is argued, the EU is pursuing more unilateral measures to promote convergence because it has not been able to find agreement at the international level. The phenomenon of ‘EU unilateralism’ can be understood in terms of divergence and convergence: on the one hand, the EU is seeking to push forward the law and promote greater convergence around its norms, yet pursuing this policy in a unilateral manner may also lead to greater fragmentation of the very legal order it seeks to promote.

The chapter does not make the argument that unilateral measures and action can never be justified, or the EU should never pursue certain policies unilaterally. Rather, it argues that in cases where the EU seeks to be a global leader, such action can cause significant friction for non-EU states and other international organisations. This trade-off should be acknowledged. When the EU seeks to promote convergence with EU norms and values via unilateral policies, such policies can have the effect of driving fragmentation of the multilateral order. The argument, moreover, is not only a legal one—states and organisations can and do adopt unilateral acts that are in conformity with international law. As Sands argues, “‘Unilateral’ acts become especially contentious when they are associated with the *imposition* of one community of its values on another community and where that other community has not consented or acquiesced in the imposition of such values’.<sup>2</sup> The EU is not obligated, under EU law or international law, to pursue such policies solely through multilateral institutions. Yet the EU should acknowledge the drawbacks associated with unilateral approaches. In some instances, EU unilateralism may indeed drive forward and develop international law through convergence with EU norms.

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<sup>2</sup> Philippe Sands, “‘Unilateralism’ Values and International Law’ (2000) 11 *European Journal of International Law* 293.

## II. The EU and Multilateralism

The EU Treaties commit the Union to multilateralism. Its external action is to be guided by principles including democracy, the rule of law, the universality and indivisibility of human rights and respect for the principles of the UN Charter.<sup>3</sup> Article 21 of the Treaty on European Union (TEU) also sets out that the EU shall ‘promote multilateral solutions to common problems, in particular in the framework of the United Nations’.<sup>4</sup> It shall pursue common strategies and actions to ‘promote an international system based on stronger multilateral cooperation and good global governance’.<sup>5</sup> Although Article 3(5) TEU does not explicitly mention multilateralism, it commits the Union to ‘strict observance and the development of international law, including respect for the principles of the United Nations Charter’.<sup>6</sup> The EU’s commitment to multilateralism is also set out in numerous foreign policy documents and statements (see below).

The EU priorities at the 74th United Nations General Assembly clearly demonstrate the enduring importance of strengthening multilateralism. They set out that ‘[t]he European Union is an indispensable partner of the United Nations to promote and strengthen multilateralism and the rules-based international order’.<sup>7</sup> The document, moreover, emphasises ‘translating multilateralism into action’. This means that the EU is not to pursue multilateralism for its own sake, but in order to address pressing global challenges. EU documents prioritise certain areas of partnership and cooperation in this regard. For instance, in recent years, reform of the UN system, improving partnerships with the UN and regional organisations, conflict prevention and action on climate change, have been some of the EU’s key goals in the UN General Assembly. The promotion of human rights and pursuing the UN’s sustainable development goals have also been prioritised, as has working on cybersecurity. This appears to recognise that the UN and the EU share some of the most pressing challenges. The issue of migration and forced displacement, which is also set out as a priority area of engagement with the UN, is clearly linked with the issues facing the EU and its own migrant/refugee challenge.

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<sup>3</sup> Article 21(1), Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (‘TEU’).

<sup>4</sup> Article 21(1) second para, TEU.

<sup>5</sup> Article 21(2)(h) TEU.

<sup>6</sup> Article 3(5) TEU.

<sup>7</sup> General Secretariat of the Council, ‘EU priorities at the United Nations and the 74th United Nations General Assembly, September 2019–September 2020’, Brussels, 15 July 2019. Available at <http://data.consilium.europa.eu/doc/document/ST-10895-2019-INIT/en/pdf>.

The EU Treaties and other documents highlight the importance of multilateralism. But what does this precisely mean, and what does it require in terms of EU law and policy? There is a debate among International Relations scholars about the precise meaning of multilateralism.<sup>8</sup> According to one view, multilateralism is a form of cooperation between more than two states—it is to be contrasted with unilateralism and bilateralism.<sup>9</sup> This narrow, quantitative definition is concerned with the number of actors involved. This understanding of multilateralism has been broadened to also involve a certain way of doing foreign policy.<sup>10</sup> According to this understanding, multilateralism also involves a commitment to certain values: the involvement of international institutions, the respect for certain global norms and a commitment to international law.<sup>11</sup> Multilateralism, then, has both a quantitative and qualitative dimension—it seeks to address international problems through international cooperation of a number of states, but also requires commitment to the principles of this ‘rules-based order’ to make this system work.

It is understandable then, that the EU’s commitment to multilateralism is often equated with its commitment to international institutions. The key institutions in this rules-based order include the World Bank, the International Monetary Fund, the World Trade Organization and the United Nations and the wider UN system. Yet a commitment to multilateralism, it is argued, involves more than working within institutions, but also a commitment to a set of internationally recognised norms in order for these institutions to function: the sovereign equality of states, the principle of non-intervention and prohibition of the use of force in international relations, as well as a commitment to respect international human rights law. This broader understanding of multilateralism therefore involves a commitment to certain values.

What does a commitment to multilateralism mean for the EU? Multilateralism is usually presented in a positive light. Yet multilateralism should not be viewed as inherently preferable or more desirable than these other foreign policy approaches. The provision of aid is usually a unilateral policy, and EU trade agreements continue to be concluded in a bilateral manner. Moreover, multilateral institutions may be dominated by one or more states, giving the

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<sup>8</sup> Robert O Keohane, ‘Multilateralism: An Agenda for Research’ (1990) 45 *International Journal* 4, 731–64.

<sup>9</sup> *Ibid.*

<sup>10</sup> De Búrca presents the EU’s preference for a ‘governance mode’ of foreign policy. Gráinne de Búrca, ‘The EU as a Legal Power in Global Governance?’ in Bart Van Vooren, Steven Blockmans, Jan Wouters (eds), *The EU’s Role in Global Governance: The Legal Dimension* (Oxford University Press, 2013) 40.

<sup>11</sup> Ruggie discusses three features of multilateralism: indivisibility, generalised organising principles and diffuse reciprocity. John G Ruggie, (ed), *Multilateralism Matters: The Theory and Praxis on an International Form* (Columbia University Press, 1993).

impression of multilateralism, whereas beneath the surface it pursues the goals and policies of a small group of powerful states.<sup>12</sup> There may be instances where the pursuance of objectives has failed at the global level, and unilateral measures seek to fill that gap. This was the argument used to justify the EU's controversial emissions trading scheme applied to aircraft from outside the EU—the policy was justified because talks within the International Civil Aviation Organization (ICAO) had failed (see below).

There are a number of advantages to pursuing a multilateral approach. Multilateralism can provide greater certainty and predictability in international relations when other actors agree to certain rules of the game. This rules-based system then has the inherent value of providing stability, since it provides avenues for states to seek to change international rules and develop international law. Multilateralism and multilateral institutions are also closely connected with the provision of global public goods. Multilateralism may also be a more effective means of pursuing EU objectives, given its nature as a 'normative' power. It has been suggested that the EU has multilateralism and respect for international institutions in its 'DNA'.<sup>13</sup> According to this argument, one should expect the EU to be more open towards multilateralism since it is itself a form of cooperation between states. Established as a form of economic cooperation to respond to the horrors of the Second World War, this argument goes, we should expect the EU to also show a friendly attitude towards other multilateral institutions. However, this is not always the case. The EU has its own strategic and economic interests, and these can be pursued through various methods, of which multilateralism is one form.

Moreover, although the EU Treaties explicitly mention multilateralism as a value and a preferred method of foreign policy, it is by no means a legal obligation. Article 3(5) TEU, which sets out the values and interests the EU is to pursue in its external relations,<sup>14</sup> does not commit the EU to multilateralism, beyond mentioning, 'respect for the principles of the United Nations Charter'. Article 21(1) TEU further provides that the Union's 'action on the international scene' is to be guided by numerous principles, including the 'respect for the principles of the United Nations and international law'.<sup>15</sup> One of the goals of the EU's external action is to 'consolidate

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<sup>12</sup> This has been described as 'unilateralism with a multilateral cover'. Ruth Wedgwood, 'Unilateral Action in a Multilateral World' in Stewart Patrick and Shepard Forman (eds), *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement* (Lynne Rienner, 2002).

<sup>13</sup> Stephan Keukeleire and Tom Delreux, *The Foreign Policy of the European Union*, 2nd edn (Palgrave Macmillan, 2014) 301: 'the EU's commitment to a multilateral approach can be seen as part of its DNA'.

<sup>14</sup> Article 3(5) TEU.

<sup>15</sup> Article 21(1) TEU; See Opinion in *C-366/10 Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, EU:C:2011:637, para 43.

and support democracy, the rule of law, human rights and the principles of international law'.<sup>16</sup> This applies not only to 'the Union's external action' but also to 'the external aspects of its other policies'.<sup>17</sup> So while respect for international law and the 'principles' of the United Nations are legal obligations on the EU institutions, there is no similar legal commitment to pursuing multilateralism.

The EU's commitment to multilateralism is also shown in the EU's foreign policy documents. The 2016 EU Global Strategy,<sup>18</sup> for instance, seeks to give effect to the EU's commitment to multilateralism:

The EU will promote a rules-based global order. We have an interest in promoting agreed rules to provide global public goods and contribute to a peaceful and sustainable world. The EU will promote a rules-based global order with multilateralism as its key principle and the United Nations at its core.<sup>19</sup>

[...]

The EU will strive for a strong UN as the bedrock of the multilateral rules-based order, and develop globally coordinated responses with international and regional organisations, states and non-state actors.<sup>20</sup>

Here the EU presents the reasons why it is in the Union's interests to pursue a multilateral approach. As a group of medium-sized states, the Union is more likely to achieve its goals and interests through a rules-based international order, rather than one based on pure power politics.

There are differences in the way the EU presents its commitment to multilateralism in the 2016 EU Global Strategy compared with the 2003 EU Security Strategy. Developed in the wake of the Iraq war, which divided EU Member States, the document puts the EU's commitment to multilateralism front and centre. However, this document views multilateralism as a commitment to multilateral *institutions*, especially the United Nations. The 2016 Global Strategy, on the other hand, does not prioritise the UN and institutions to the same extent. It sees multilateralism as involving other states, other regions, other international organisations, civil society and non-state actors. Moreover, whereas the 2003 Strategy highlighted the role of

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<sup>16</sup> Article 21(2)(b) TEU.

<sup>17</sup> Article 21(3) TEU.

<sup>18</sup> *Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy*, European External Action Service, Brussels, June 2016 ('EU Global Strategy 2016').

<sup>19</sup> *Ibid* 8.

<sup>20</sup> *Ibid* 39.

the United States, the 2016 Strategy sees a diminished importance for the US, demonstrating the importance of other regions, especially Asia. This has recently been expressed in the 2019 Council Conclusions on ‘EU action to strengthen rules-based multilateralism’<sup>21</sup> prepared as part of the EU priorities at the United Nations and the 74th United Nations General Assembly.<sup>22</sup> In addition to supporting the UN and existing multilateral agreements, it also prioritises ‘extending’ multilateralism to new realities. This includes using forums such as the Organisation for Security and Cooperation in Europe (OSCE), the Internet Governance Forum, the Council of Europe and the Organisation for Economic Co-operation and Development (OECD).

Another shift is the importance of ensuring that multilateralism provides results. The emphasis is not on multilateralism for its own sake, but to more effectively address global problems. The 2019 Council Conclusions also stress, therefore, the idea of ‘effective multilateralism’, or ‘translating multilateralism into action’: ‘An *effective*, relevant and resilient multilateral system must be capable of facing new global realities; remain true to the rules and principles of the UN Charter; and promote the peaceful resolution of disputes among states.’<sup>23</sup> The conclusions set out the EU priorities in order to build ‘an *effective* multilateral system that delivers results in tackling today’s and tomorrow’s global challenges’.<sup>24</sup> There is an emphasis throughout on effectiveness and providing results. It is not only about making institutions work better, but also broadens multilateralism to include a ‘multi-stakeholder approach’ that includes human rights defenders, non-governmental organisations, the media, the private sector and social partners, culture and business communities including the tech sector, academia and local governments.<sup>25</sup>

This is why the EU has presented its role in the Iran nuclear deal as an example of its commitment to multilateralism. The 2016 Global Strategy also highlights the need for intersecting multilateralism, that is, cooperation between the Union and other regions. While the Strategy refers to institutions, it also highlights the need for reform of these bodies, including the UN and international financial institutions. There are also a number of policy areas where the Union sees multilateralism as playing a particularly important role.

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<sup>21</sup> General Secretariat of the Council, ‘EU action to strengthen rules-based multilateralism’ Brussels, 17 June 2019.

<sup>22</sup> See Press Release, Council of the EU, ‘EU Priorities at the United Nations and the 74th United Nations General Assembly adopted’ 15 July 2019 (‘Council Conclusions’), [www.consilium.europa.eu/en/press/press-releases/2019/07/15/eu-priorities-at-the-united-nations-and-the-74th-united-nations-general-assembly-adopted/](http://www.consilium.europa.eu/en/press/press-releases/2019/07/15/eu-priorities-at-the-united-nations-and-the-74th-united-nations-general-assembly-adopted/).

<sup>23</sup> *Ibid* para 1.

<sup>24</sup> *Ibid* para 8.

<sup>25</sup> *Ibid* para 9, point 12.

Disarmament, non-proliferation and peace and security are important. The protection of the environment, action against climate change and policy on sustainable development are also given greater prominence. And areas that have not been previously discussed as having a strong multilateral dimension, such as digital governance and cyber-security are also mentioned as key areas that necessitate a multilateral approach.

The EU's support for multilateralism appears to be even more important in a global context in which support for multilateral institutions is increasingly challenged. The United States, once viewed as one of the EU's key partners in multilateralism, shows a much more skeptical attitude towards multilateral institutions. The Trump presidency, for example, has shown a clear skepticism (or outright hostility) towards multilateral institutions, seeking to pursue an 'America First' strategy in which the UN and other bodies are given little importance. The Trump foreign policy is driven by 'principled realism', one which prioritises strong sovereign states, and 'deals' between powerful states, rather than through multilateral bodies. The Trump Administration's withdrawal from the Joint Comprehensive Plan of Action and the Paris Climate Change Agreement—both of key importance for the EU—demonstrates this foreign policy in action. How should the EU and its Member States respond to this shifting global context? Should it also, under certain circumstances, pursue unilateral measures to achieve its aims and objectives? Or should it continue to pursue and support multilateralism, not just in its rhetoric and official statements, but also in its substantive policies? Of course, this is not a binary choice—but as the EU promotes convergence through unilateral measures, this can have the consequence of undermining the multilateral order and rules-based system in more subtle ways.

### III. EU 'Unilateralism'

The EU's commitment to multilateralism can be contrasted with the trend towards greater unilateralism in EU policy in recent years. As with multilateralism, there is no single (legal) definition of the term, and is used to describe various policies that are adopted by a state or international organisation that have certain external effects, where those policies have not been consented to or agreed upon with other states and organisations. Unilateralism is often associated with powerful states, such as the United States, adopting a self-centred foreign

policy, which undermines multilateral values.<sup>26</sup> Unilateralism is therefore not just about a state or organisation adopting a policy alone, but pursuing a policy or taking measures ‘that would not fit into existing international norms or rules’.<sup>27</sup>

As with multilateralism, unilateral action is not inherently positive or negative, and much of the EU’s ‘unilateral’ activity ostensibly pursues goals that seek to uphold certain global values, such as human rights or the protection of the environment. Legal scholars have discussed the various ways, for instance, that EU law and policy can have external effects, and in some cases described as a form of EU unilateralism.<sup>28</sup> There has also been a discussion of a trend in EU policy described as the ‘global reach’ of EU law,<sup>29</sup> encompassing a broad range of policies and actions under which the EU policy has certain effects outside EU territory:

It includes the extraterritorial application of EU law, the presence of territorial extension, and the so-called ‘Brussels Effect’, all phenomena concerned with the effects of unilateral legislative instruments and regulatory action beyond the EU’s borders. But ‘global reach’ also refers to the impact of the EU’s bilateral relationships in the form of agreements with third countries or third country agencies, and of the EU’s engagement with multilateral fora and the negotiation of international legal instruments.<sup>30</sup>

In their study on the topic of *EU Law Beyond EU Borders*, Cremona and Scott discuss the various ways in which the EU has had an effect beyond its own borders in areas such as the regulation of the Internet and data privacy; climate change; EU competition law; financial regulation; and migration. Some of these policies have a clear external element, and are pursued with the intention of protecting ‘EU values’, such as in the area of human rights or environmental protection. Others are focused more on internal concerns, such as financial stability in the Union.<sup>31</sup> Such policies have been criticised, mostly due to the fact that they—intentionally or otherwise—apply EU law outside of its borders. This argument is sometimes

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<sup>26</sup> See Wedgwood (n 12) 12; Gabriella Blum, ‘Bilateralism, Multilateralism, and the Architecture of International Law’ (2008) 49 *Harvard International Law Journal* 323–79; David M Malone and Yuen Foong Khong (eds), *Unilateralism and U.S. Foreign Policy: International Perspectives* (Lynne Rienner, 2003).

<sup>27</sup> Atsushi Tago, ‘Multilateralism, Bilateralism, and Unilateralism in Foreign Policy’ in *Oxford Research Encyclopedia, Politics* (Oxford University Press, 2019).

<sup>28</sup> See Joanne Scott and Lavanya Rajamani, ‘EU Climate Change Unilateralism’ (2012) 23 *European Journal of International Law* 469.

<sup>29</sup> Elaine Fahey, *The Global Reach of EU Law* (Routledge, 2016); Marise Cremona and Joanne Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press, 2019).

<sup>30</sup> Marise Cremona and Joanne Scott, ‘Introduction’ in Cremona and Scott (n 29) 1.

<sup>31</sup> Joanne Scott, ‘The Global Reach of EU Law’ in Cremona and Scott (n 29): ‘...it is important to be aware that the vast majority of EU measures that give rise to territorial extension pursue objectives that are internal to the EU and are less prone to causing controversy...’

framed in terms of violating principles of public international law regarding extra-territorial jurisdiction. Such policies can also be criticised for pursuing a more unilateral approach. Some of the policies have aggravated other states. It should be pointed out, however, that in many cases the EU has pursued such policies precisely because a multilateral approach did not prove satisfactory. This has been presented as ‘contingent multilateralism’.<sup>32</sup> This means that the EU will seek to resolve issues at the global level, but if this fails, it has the prerogative to ‘go it alone’ and pursue its own agenda and interests. One could argue that the EU’s commitment to multilateralism does not prevent it from pursuing its objectives and interests through other measures if and when multilateral processes do not achieve satisfactory outcomes. On the other hand, such an approach to multilateralism can have the effect of undermining the importance of global institutions and lead other states to pursue similar unilateral measures. In order to safeguard and promote certain values and principles, the EU will at times disregard multilateralism to pursue these objectives through various types of unilateral measures.

One may argue that the EU should not be expected to wait for a multilateral solution to emerge before taking action in areas such as climate action, data protection and international security. Yet as discussed above, the argument is not that there is a binary decision between pursuing a multilateral or unilateral course of action, or that unilateral actions are illegal or unjustified. Rather, in the policy fields discussed below, the EU is seeking to uphold and promote certain ‘values’ at the international level. It should also be acknowledged that by doing so, the EU may also have the effect of undermining values associated with multilateralism, and risks antagonising other states and organisations. The three examples discussed are climate change, data protection and autonomous measures. While these are very different policies in terms of their effects and rationale, they are all areas where the EU has sought to uphold certain values through unilateral action, which at the same time has the consequence of putting strain on multilateral approaches.

## A. Climate Change

The first main area where the EU has been criticised for following a unilateral approach has been in the field of climate change.<sup>33</sup> In 2003, the EU adopted legislation establishing a scheme

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<sup>32</sup> Scott and Rajamani (n 28).

<sup>33</sup> Scott and Rajamani (n 28).

for greenhouse gas emission allowance trading,<sup>34</sup> and in 2008 amended this Directive to include emissions from international aviation within the emissions trading system (ETS). The ETS applied to flights that arrive or depart from the territory of an EU Member State. It applied to the entire flight, even in cases where the majority of the flight took place outside the airspace of EU Member States. It was argued that the EU's ETS was in violation of international law due to the 'extra-territorial' scope of the legislation.

The question of whether a certain policy is 'extra-territorial' in nature does not have clear legal criteria. The International Law Commission has defined extra-territorial jurisdiction as 'an attempt to regulate by means of national legislation, adjudication or enforcement the conduct of persons, property or acts beyond its borders which affect the interests of then State in the absence of such regulation under international law'.<sup>35</sup> Yet when the Court of Justice of the European Union (CJEU) was asked to determine the legality of the Directive, it focused on the fact that, although the Directive may have some extra-territorial effects, it was ultimately tied to EU territory.<sup>36</sup> The problem was that, while the Directive applied to EU territory, it applied in a way that took into account activity that took place outside EU territory. However, for the CJEU, it was enough that there was at least *some* link to EU territory. While the Court did not explicitly accept the 'effects doctrine' argument, it appears to have been motivated in part by the idea that the EU can legislate with respect to certain activities where it produces effects within the EU.<sup>37</sup>

While this approach to climate change has been criticised for its apparent extra-territorial effect, it has also been presented as a way in which the EU acts as a 'norm entrepreneur', 'using (the threat of) unilateral action to stimulate climate action elsewhere'.<sup>38</sup> Thus, the EU is able to promote convergence towards an EU regulatory regime through the application of its internal law. This policy of using threats may produce certain positive outcomes, but it may not be conducive to fostering the values of mutual respect and cooperation that underpin multilateralism.

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<sup>34</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] 25 OJ L275/32, 25 October 2002.

<sup>35</sup> United Nations Report of the International Law Commission Fifty-eighth session (1 May–9 June and 3 July–11 August 2006) General Assembly Official Records, Supplement No 10 (A/61/10), para 2.

<sup>36</sup> Judgment in C-366/10 *Air Transport Association of America* EU:C:2011:864, 21 December 2011.

<sup>37</sup> For a discussion of the 'effects doctrine' and international law, see the discussion of Advocate General Darmon in Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others v Commission* EU:C:1994:12, 5217–20.

<sup>38</sup> Scott and Rajamani (n 28) 473.

## B. Data Protection

Similar problems arise regarding the effort to deal with numerous issues regarding another global phenomenon: the Internet, and the ‘extraordinarily complex’<sup>39</sup> issue of the application of EU data protection law. This is a field where the growing importance of privacy as a human right comes into conflict with the commercial interest in data and the increasing ‘commodification’ of personal information.<sup>40</sup> In addition, the global reach of the Internet, especially the phenomenon of cloud computing, challenges a territorial-based understanding of sovereignty and jurisdiction. This was one of the issues that arose in *Google Spain*.<sup>41</sup> While the main focus of the case has been on the ‘right to be forgotten’, it also deals with issues of jurisdiction and the extent to which the EU may legislate regarding activity that takes place outside the EU. The impact of such decision may have been limited, however, through recent judgments such as C-507/17 *Google v CNIL* in which the CJEU held that Google and search operators are not required under EU law to remove links on all versions of its search engine.<sup>42</sup>

The EU’s legislative efforts in this area still seek to tie EU jurisdiction to nationality or territory, and in this way do not seek to apply EU legislation to non-EU states. The General Data Protection Regulation, for example, ties its scope to EU territory or its relationship to EU citizens or businesses. However, as the ETS discussed above, it does so in a way that makes it possible to apply with respect to activity outside EU territory, since it applies to data controllers and data processors even if they do not carry out those activities within the territory of the Union.<sup>43</sup> It applies when goods and services are offered to data subjects in the EU, and to the monitoring of the behaviour of data subjects as far as their behaviour takes place in the EU. The EU thus bases its jurisdictional basis for such policies on well-recognised international law principles of jurisdiction—nationality and territory—but does so in a way that significantly expands the scope of its Regulation. Therefore, while the Regulation may be in conformity with international law, it can also be criticised as a form of EU unilateralism, showing a willingness to legislate outside EU territory. As with climate change policy, the Regulation seeks to protect a global value using internal regulation in a field where there has been an inability to develop

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<sup>39</sup> Lokke Moerel, ‘Back to Basics: When Does EU Data Protection Law Apply?’ (2011) 1 *International Data Privacy Law* 2, 93.

<sup>40</sup> Christopher Kuner, Fred H Cate, Christopher Millard and Dan Jerker B Svantesson, ‘The Extraterritoriality of Data Privacy Laws – An Explosive Issue Yet to Detonate’ (2013) 3 *International Data Privacy Law* 3, 147.

<sup>41</sup> Judgment in C-131/12 *Google Spain and Google* EU:C:2014:317.

<sup>42</sup> Judgment in Case C-507/17 *Google v CNIL*, EU:C:2019:772, paras 64–65.

<sup>43</sup> Article 3 of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1-88 (General Data Protection Regulation).

rules in multilateral settings. When dealing with such vital concerns and values, it can be argued that the EU should not wait for rules to be developed on data protection and digital privacy, while the rights of EU citizens are being violated. Yet as with the EU's climate unilateralism, its approach has the effect of antagonising other states that may find themselves caught by this regulatory web.

### C. Autonomous Measures (Sanctions)

The two examples above are areas where the EU has sought to expand the reach of its policies in order to protect certain global norms—the protection of the environment and the promotion of data protection rules. Yet the EU has also pursued a more ‘unilateral’ approach when it comes to its policies regarding restrictive measures. The EU has in the past implemented measures mandated by Chapter VII UN Security Council Resolutions, and in some cases it has even gone further than what was required under these resolutions.<sup>44</sup> Yet the EU has also pursued ‘autonomous’ sanctions, that is, restrictive measures that do not find their legal basis in UN Security Council resolutions.<sup>45</sup> There is no question that the EU has the competence to impose such measures under EU law, but such unilateral measures may give rise to questions regarding their compliance with international law. As with the policies mentioned above, restrictive measures are internal EU law, and apply within the EU's jurisdiction, but have the effect of promoting convergence with certain EU norms outside its territory—they are a tool of foreign policy.

The EU Guidelines on Restrictive Measures sets out that ‘[t]he introduction and implementation of restrictive measures must always be in accordance with international law’.<sup>46</sup> They have also raised concerns from some international lawyers—Dupont notes regarding the measures against Iran, ‘[t]he unprecedented extent of these new EU measures raises various

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<sup>44</sup> See in this regard judgment of 14 October 2009, T-390/08 *Bank Melli Iran v Council*, EU:T:2009:401, para 51, where the Court noted that the Common Foreign and Security Policy (CFSP) legal basis for restrictive measures, now Article 215 of the Treaty on the Functioning of the European Union (TFEU), did not limit the relevant powers of the EU to mere implementation of sanctions imposed by the UN Security Council.

<sup>45</sup> Sanctions against the Central African Republic, the Democratic Republic of Congo, Ivory Coast, Eritrea, Haiti, Iran, Iraq, the Democratic People's Republic of Korea, Lebanon, Liberia, Libya, Somalia and South Sudan have been mandated by UN Security Council resolutions. On the contrary, sanctions against Belarus, Bosnia and Herzegovina, China, Egypt, the Republic of Guinea, Moldova, Myanmar, Syria, Tunisia, the USA, Serbia and Zimbabwe have been autonomously imposed by the EU.

<sup>46</sup> General Secretariat of the Council, Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy, Brussels, 4 May 2018, para 9.

issues regarding their lawfulness under international law'.<sup>47</sup> There has also been debate about whether autonomous restrictive measures taken by the EU should be properly regarded as 'sanctions' in international law.<sup>48</sup> It has been argued that for measures to be regarded as sanctions, they should meet two criteria: that a competent organ objectively establishes the violation of a rule, and that target measures are imposed to restore legality. Regarding autonomous measures taken by the EU, it has been argued that:

in the case of the 'autonomous sanctions' both conditions are lacking: a regional international organization lacks any mandate from the international society to ascertain the violation of the international legality and to restore it vis-à-vis a State which is not a member of it.<sup>49</sup>

EU restrictive measures will often set out the legal basis under international law for steps taken. For example, they may be imposed as a response to an illegal act committed by the target state. Sanctions against Russia, Syria and Iran all contain language that sets out that the measures are a response to that state's continued breaches of international law, although this is often couched in very broad terms. Regarding Russia, this includes 'actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine'.<sup>50</sup> EU restrictive measures may therefore be seen as countermeasures under international law, as they are a response to a breach of international law by a third state. Countermeasures are dealt with in Article 49 of the International Law Commission's Articles of State Responsibility (ASR),<sup>51</sup> which set out that such measures must be a response to a wrongful act under international law (although the ASR is intended to apply to states, its provisions can be applied by analogy to the practice of an organisation such as the EU).

In order for measures to be considered lawful sanctions, they must meet a number of criteria under international law. One element of countermeasures is that they are to be implemented by the injured party. This gives rise to the question of whether sanctions by the

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<sup>47</sup> Pierre E Dupont, 'Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran' (2012) 17 *Journal Conflict & Security Law* 301, 3.

<sup>48</sup> 'Either complementary to or substitutive of the UNSC action, the nature of these restrictive measures is open to debate. The question arises whether they fall into the strict legal definition of "sanctions".' Alan Pellet and Alina Miron, 'Sanctions' in *Max Planck Encyclopaedia of Public International Law*, <http://opil.ouplaw.com/>.

<sup>49</sup> *Ibid.*

<sup>50</sup> Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 78/6-15.

<sup>51</sup> ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) GAOR 56th Session Supp 10, 43.

EU should be considered ‘injured party’ countermeasures or ‘third-party’ countermeasures.<sup>52</sup> Furthermore, countermeasures must be proportionate to the aim being pursued. They are intended to cease the legal activity of the target state; they therefore must not amount to punishment. They must be non-permanent,<sup>53</sup> allowing the target state to comply with the reach of international law. While sanctions are intended to put pressure on the target state to comply with international obligations, they are not intended to ‘penalise’ the state for its actions. EU measures often use a mix of political language disapproving of certain action with legal language setting out the illegality of action by the target state. EU measures could more clearly articulate the internationally wrongful act for which the target state is responsible.

As with the policies discussed above, the EU’s practice of imposing unilateral sanctions is subject to criticism for violating international law, especially as they are adopted outside the context of a multilateral institution. Yet as with policy on climate change and data protection, it also shows a greater willingness on the part of the EU to act alone, or outside of multilateral institutions, when it is difficult or impossible to achieve that policy through a multilateral framework. Whereas these other policies deal with the extraterritorial effects of EU regulatory regimes, the sanctions regime comes closer to a breach of international law. Yet the same tension is present—unable to meet its goals through multilateral institutions (in the case of autonomous measures, there is no agreement in the UN Security Council), the EU has sought to uphold its values, and promote convergence, outside of those bodies. Even if this is in conformity with international law, it may have the effect of eroding the effectiveness of multilateral bodies. Such a tension can also be viewed in terms of convergence and divergence. As it seeks to uphold certain values—commitment to climate change action, data privacy, human rights, etc—it produces greater convergence towards those norms, yet by pursuing these policies in a unilateral manner, it may diverge from its aims of strengthening and supporting multilateral institutions.

## IV. Conclusion

The EU has begun to develop a new form of unilateralism. In IR debates, unilateralism is usually associated with a hegemon such as the United States pursuing its self-interest. Rather

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<sup>52</sup> See Martin Dawiddowicz, ‘Third Party Countermeasures: Observations on a Controversial Topic’ in Christine Chinkin and Freya Baetens (eds), *Sovereignty, Statehood and State Responsibility Essays in Honour of James Crawford* (Cambridge University Press, 2015) 340.

<sup>53</sup> *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* Judgment, ICJ Reports 1997, para 87.

than being founded on narrow self-interest, EU unilateralism is tied with what the EU views as the protection of global norms and values. This has been justified in terms of promoting greater convergence with EU norms and policies—EU unilateralism is presented as more benign because it is used to promote policies that push forward the protection of human rights, data protection and action on climate change. Yet, even if such policies promote convergence and achieve these objectives in the short term, such activity may have the consequence of aggravating the EU’s partners, undermining multilateral institutions, and encouraging other states and organisations to follow a similar unilateral path. This may appear somewhat naïve—should we really expect the EU and the Member States to sit on their hands and do nothing, simply because they cannot be achieved through multilateralism? The argument is not that the EU must choose multilateralism in all cases, but that the EU must also take into account the negative effects that this may have for the multilateral order. As discussed above, there is no *legal* obligation in the EU Treaties to pursue multilateralism, but it is clearly set out as a value that it is to be upheld and respected. This should be acknowledged when the EU adopts such unilateral action in the name of promoting convergence with EU law and values. ‘Contingent’ unilateralism is still unilateralism. At a time when multilateral institutions are under strain, the EU must consider the broader effect that such policies will have, and whether they may promote other actors to pursue similar unilateral approaches. This does not mean that the EU must work through multilateral settings in every policy area, even if there is no hope of progress or consensus, but that the values associated with multilateralism should be kept in mind when adopting such measures.