The EU's Duty to Respect Human Rights Abroad

Kassoti, Eva; Wessel, Ramses A.

Published in:
CLEER Papers

Publication date:
2020

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

CLEER

The EU's Duty to Respect Human Rights Abroad

The Extraterritorial Applicability of the EU Charter and Due Diligence Considerations

Eva Kassoti and Ramses A. Wessel

CLEER PAPERS **2020/2**

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

THE EU'S DUTY TO RESPECT HUMAN RIGHTS ABROAD

The Extraterritorial Applicability of the EU Charter and Due Diligence Considerations

EVA KASSOTI AND RAMSES A. WESSEL

CLEER PAPERS **2020/2**

Editorial policy

The governing board of CLEER, in its capacity as board of editors, welcomes the submission of legal papers and commentaries (max. 40,000 resp. 4.000 words, incl. footnotes, accompanied by keywords and short abstracts) at E.Kassoti@asser.nl. CLEER applies a double blind peer review system. When accepted, papers are published on the website of CLEER.

ISSN 1878-9587 (print)
ISSN 1878-9595 (online)

Printed in The Netherlands
T.M.C. Asser Institute
P.O. Box 30461
2500 GL The Hague
The Netherlands
www.cleer.eu

CONTENTS

ABSTRACT

The paper explores the question of whether the EU is bound by human rights obligations towards individuals located outside the territory of the Member States when it concludes trade agreements with third countries. In this light, the paper focuses on two concrete sub-questions: a) the question of the extra-territorial applicability of the EU Charter of Fundamental Rights; and b) the question of the existence of a due diligence obligation incumbent upon the EU institutions to examine the impact of the agreement to the human rights situation in the third State. In relation to the question of the extraterritoriality of the Charter, the paper argues that territorial considerations are immaterial in the context of determining the Charter's applicability; what matters in this context is whether the situation in question is covered by an EU competence. Next, the paper examines whether a relevant EU duty of due diligence exists –as a matter of either EU or international law. It is shown that the existence of such a duty under international law is far from straightforward and it involves an examination of the relevant primary norms. The paper concludes by highlighting that, as a matter of EU law, a duty of due diligence to take into account the impact of a future agreement on the human rights situation in a third State clearly exists.

ABOUT THE AUTHORS

Eva Kassoti, is Senior Researcher in EU and International Law, T.M.C. Asser Institute, The Hague; **Ramses Wessel** is Professor of European Law at the University of Groningen. Both authors are members of the Governing Board of the Centre for the Law of European External Relations (CLEER) in The Hague.

1. Introduction

Is the EU bound by human rights obligations towards individuals outside the territory of its Member States[1] when it concludes trade agreements with third countries? In the literature, even though the broader issue of the EU's human rights obligations in its external trade policies has received some (limited) attention, [2] this question has remained largely unexplored. Recent developments have rekindled interest in the topic.[3] More particularly, the General Court's (GC) judgment[4] as well as the Opinion of Advocate General (AG) Wathelet[5] in the context of the *Front Polisario* cases before the Court of Justice of the European Union (CJEU) have provided a more solid basis for engagement with the issue

[1] For the territory of the Member states to which the EU treaties apply see art 52 TEU and art 355 TFEU. See also D. Kochenov, *European Union Territory from a Legal Perspective: A Commentary on Art. 52 TEU, 355, 349, and 198-204 TFEU*, University of Groningen Faculty of Law Working Paper 2017-05, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2956011>. See more generally on the notion of territory in EU law, P. Cardwell and R.A. Wessel, *EU External Relations and International Law: Divergence on Questions of 'Territory'?*, in E. Fahey(Ed.), *Framing Convergence with the Global Legal Order: The EU and the World* (Oxford: Hart Publishing, 2020), pp. 143-161.

[2] The seminal work on the topic is V. Moreno-Lax, C. Costello, *The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model*, in S. Peers *et al*. (eds), *The EU Charter of Fundamental Rights: A Commentary*, (Oxford: Hart/Beck, 2014), p. 657. See also more generally L. Bartels, The EU's Human Rights Obligations in relation to Policies with Extraterritorial Effects, 25 *EJIL* 1071 (2014). E. Cannizzaro, The EU's Human Rights Obligations in relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels, 25 *EJIL* 1093 (2014). A. Ganesh, The European Union's Human Rights Obligations Towards Distant Strangers, 37 *Mich. J. Int'l L.* 475 (2015). By way of contrast, the question of the EU's complicity in internationally wrongful acts committed by a third State, namely the violation of a number of human rights of individuals located in that third State, through the conclusion of trade agreements with that third State under the law of international responsibility has gained considerable traction over the last few years. See for example: E. Kassoti, The Legality under International Law of the EU's Trade Agreements covering Occupied Territories: A Comparative Study of Palestine and Western Sahara, CLEER Paper Series 2017/3, available at <https://www.asser.nl/media/3934/cleer17-3_web.pdf>. F. Dubuisson, The International Obligations of the European Union and its Member States with regard to Economic Relations with Israeli Settlements, (2014), available at <http://www.madeinillegality.org/IMG/pdf/etude_def_ang.pdf>. For the procedural and evidentiary difficulties of proving complicity in international law, see O. Corten, P. Klein, *The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the Corfu Channel case*, in K. Bannelier, T. Christakis, and S. Heathcote (eds.), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case*, (London: Routledge, 2012), pp. 315 – 334; V. Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Oxford: Hart Publishing, 2016) pp. 101-103, 218-234.

[3] C. Ryngaert, EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations, 20 *ICLR* 374 (2018). A. Berkes, The Extraterritorial Human Rights Obligations of the EU in its External Trade and Investment Policies, 5 *Europe and the World: A Law Review* 1 (2018). S. Hummelbrunner, Beyond Extraterritoriality: Towards an EU Obligation to Ensure Human Rights Abroad, CLEER Paper Series 19/02, p. 23, available at <https://www.asser.nl/media/679407/cleer_19-02_web.pdf>.

[4] Case T-512/12, *Front Polisario v Council of the European Union* EU:T:2015:953.

[5] Case C-104/16 P *Council of the European Union v Front Polisario* EU:C:2016:677, Opinion of AG Wathelet.

of the EU's duty to protect human rights outside the territory of its Member States.

The *Front Polisario* case concerned an action for annulment brought by Front Polisario, the main Saharawi national liberation movement, against the Council decision[6] adopting the 2010 EU-Morocco Agreement on agricultural, processed agricultural and fisheries products ('Liberalization Agreement')[7] in so far as that Agreement extended to the territory of Western Sahara. According to the applicant the decision breached EU and international law.[8]

The GC ruled that since the Liberalisation Agreement facilitated the export into the EU of products originating from Western Sahara, the Council should have ensured that the production of the goods in question is not conducted to the detriment of the population of the territory and that it does not entail infringements of fundamental rights.[9] At the same time, it needs to be noted that the GC simply assumed the extraterritorial application of the EU Charter of Fundamental Rights (the Charter),[10] namely its application vis-à-vis the peoples of the Western Sahara – without providing more by way of explanation. The GC concluded that the Council failed to fulfil its obligation to examine all the elements of the case before the adoption of the Decision and thus, it annulled the contested Decision insofar as it approved the application of the Liberalisation Agreement to Western Sahara.[11] On appeal, while AG Wathelet agreed that fundamental rights may, in some circumstances, produce extraterritorial effects, he argued that the conditions for the extraterritorial application of the Charter were not fulfilled *in casu.*[12] While the Advocate General disagreed with the GC's reliance on the Charter, he did postulate the existence of a duty of due diligence on the part of the EU institutions to take into account the human rights impact of the agreement in the territory of the third State before actually concluding it.[13] According to the AG, this due diligence obligation is incumbent upon the EU institutions on the basis of both EU and international law.[14] The CJEU did not have an opportunity to pronounce on the matter since it concluded, on the basis

---

[6] Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2012] OJ L241/2.

[7] Agreement in the form of an Exchange of Letters between the European Community and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2012] OJ L241/4.

[8] Case T-512/12, *supra* note 4, para. 117.

[9] Case T-512/12, *supra* note 4, paras. 228, 241.

[10] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

[11] Case T-512/12, *supra* note 4, paras. 242-248.

[12] Opinion of AG Wathelet, *supra* note 5, paras. 270-272.

[13] *Ibid*. paras. 254-269.

[14] *Ibid.*

of relevant international law rules applicable between the parties (namely the EU and Morocco), that neither the EU-Morocco Association Agreement[15] nor the Liberalization Agreement were intended to cover the territory of Western Sahara – and it quashed the GC's judgment.[16] Thus, although the precedential value of the GC's judgment is limited due to the exigencies of the case, the question of whether the EU is bound by human rights obligations towards distant strangers when it concludes trade agreements with third countries still looms large.

On this basis, the purpose of this contribution is to revisit this question in the light of the *Front Polisario* case. In order to do so, the contribution will focus on two concrete sub-questions that this new jurisprudential development gives rise to: a. the question of the extraterritorial applicability of the Charter of Fundamental Rights; and b. that of the existence of a due diligence obligation incumbent upon the EU institutions to examine the impact of the agreement on the human rights situation in the third State.

2. The Extraterritorial Applicability of the EU Charter of Fundamental Rights: The Irrelevance of Notions of Territoriality in Defining the Charter's Scope of Application

In contrast to some human rights instruments, the Charter does not contain a clause defining its territorial scope. Articles 52 TEU and 355 TFEU are of little avail in establishing the territorial scope of the Charter since they merely define the Member States' territory to which the TEU and the TFEU apply.[17] In a similar vein, the Charter's applicability has not been conditioned upon the threshold criterion of jurisdiction.[18]

In lieu of a jurisdictional clause, the Charter only contains a provision stipulating its field of application. Art. 51(1) of the Charter specifies that the provisions

[15] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L70/2.

[16] Case C-104/16 P *Council of the European Union v Front Polisario* EU:C:2016:973, paras. 81-115. For comment see E. Kassoti, The *Council v Front Polisario* Case: The Court of Justice's Selective Reliance on Treaty Interpretation, 2 *European Papers* 23 (2017). J. Odermatt, Council of the European Union v. Front Populaire pour la Libération de la Saguia-El-Hamra et Du Rio de Oro (Front Polisario). Case C-104/16P, 111 *AJIL* 731 (2017).

[17] V. Moreno-Lax, C. Costello, *supra* note 2, p. 1664. For analysis of arts 52 and 355 TFEU, see D. Kochenov, *supra* note 1.

[18] See for example Art 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'): "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." European Convention of Human Rights (adopted 4 November 1950, entered into force 3 September 1953), available at <https://www.echr.coe.int/Documents/Convention_ENG.pdf>. Art 2 of the International Covenant on Civil and Political Rights ('ICCPR'): "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant…" International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. See also generally C. Ryngaert, *Jurisdiction in International Law*, 2nd ed., (Oxford: Oxford University Press, 2015), pp. 22-26.

of the Charter "are addressed to the institutions of the Union … and to the Member States only when they are implementing Union law."[19] The wording of Art. 51(1) of the Charter suggests that the application of the Charter has been defined exclusively *rationae materiae*:[20] since the Charter applies to acts of the institutions of the Union and to national acts implementing EU law,[21] the crux of the matter is whether a situation is covered by an EU competence.[22]

In this sense, Art. 51(1) of the Charter envisages a parallelism between EU action and application of the Charter.[23] The only limitation contained in the relevant provision pertains to the material scope of the Charter – which has been limited in so far as action by Member States is concerned.[24] As the Court explained in its seminal judgment in *Akerberg Fransson*: "[S]ituations cannot exist which are covered … by European Union law without those fundamental rights being applicable. The applicability of European Union law entails the applicability of the fundamental rights guaranteed by the Charter."[25]

This construction suggests that territorial criteria bear no relevance in the context of determining the applicability of the Charter.[26] In this light, the model propounded by Moreno-Lax and Costello in 2014 still holds great explanatory

---

[19] In the Explanations to the Charter it is also stressed that Art. 51 of the Charter "seeks to clearly establish that the Charter applies primarily to the institutions and bodies of the Union", whereas Member States are only bound by the Charter "when they act in the scope of Union law." Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17, p 32. For commentary on Art. 51, see A. Ward, *Article 51*, in S. Peers *et al*. (eds.), *supra* note 2, p. 1413 at pp. 1413-1454.

[20] T. Van Danwitz, K. Paraschas, A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights, 35 *Fordham Int'l L. J.* 1396 (2017), p.1399. According to Tridimas: "The Charter does not apply unless a situation is governed by Union law by virtue of a connecting factor other than the Charter … Nonetheless, within the ambit of EU law, there is no limitation *rationae materiae* in the scope of application of the Charter." T. Tridimas, Fundamental Rights, General Principles of EU law, and the Charter, 16 *Camb. Yearb. Eur. Leg. Stud*. 361 (2014), 381.

[21] On what constitutes 'implementation of Union law' by the Member States, see generally B. Pirker, Mapping the Scope of Application of EU Fundamental Rights: A Typology, 3 *European Papers* 133 (2018).

[22] V. Kube, *EU Human Rights, International Investment Law and Participation: Operationalizing the EU Foreign Policy Objective to Global Human Rights Protection*, (Berlin: Springer, 2019), at p. 34. For the relevance of a competence-based reading of the scope of the Charter, see the Opinion of Advocate General Bot in Opinion 1/17, ECLI:EU:C:2019:72, para. 195: "[I]t is necessary to clarify that it follows from the second sentence of Article 207(1) TFEU, read in conjunction with Article 21 TEU, that the European Union must, when exercising the competences conferred on it by the EU and FEU Treaties, including those relating to the common commercial policy, respect fundamental rights, of which the principle of equal treatment forms part. The European Union is a union based on the rule of law in which all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights."

[23] Case C-638/16 PPU *X and X v Belgium* Case, Opinion of AG Mengozzi, EU:C:2017:173, para 91.

[24] *Ibid*., para. 97. Joined cases C-8/15 P, C-9/15P and C-10/15P *Ledra Advertising Ltd et al v European Commission and European Central Bank*, EU:C:2016:701, Opinion of AG Wahl, para. 85.

[25] Case C-617/10 *Aklagaren v. Akerberg Fransson*, ECLI:EU:C:2013:105, para 21. See also Case C-390/12 *Robert Pfleger and Others*, ECLI:EU:C:2014:281, para 34.

[26] V. Kube, *supra* note 22, at pp. 34-36.

force. According to them: "The scope of application *ratione loci* of the Charter is … to be determined by reference to the general scope of application of EU law, following autonomous requirements. The Charter applies to a particular situation once EU law governs it. There is no additional criterion, of a territorial character or otherwise, that needs to be fulfilled in this context."[27] Advocate General Mengozzi also shared this view in his Opinion in *X and X v. Belgium*. The case concerned a request for a short-term visa (visa with limited territorial validity) on the basis of Art. 25 of the Visa Code[28] submitted at the Belgian Embassy in Lebanon by a Syrian family living in Aleppo.[29] According to Mengozzi, Art. 51(1) implies that the fundamental rights recognised by the Charter "are guaranteed … *irrespective of any territorial criterion*. If it were to be considered that the Charter does not apply where an institution or a Member State implementing EU law acts extraterritorially, that would amount to claiming that situations covered by EU law would fall outside the scope of the fundamental rights of the Union" – thereby undermining the parallelism between EU action and application of the Charter envisaged under Art. 51(1) of the Charter.[30] Although the CJEU found that the Charter was not applicable *in casu*, this was done on the ground that Art. 25 of the Visa Code did not apply to the situation at hand since the X family were intending to stay in Belgium for more than 90 days – and not on the basis of absence of a territorial link with the EU. According to the Court: "Since the situation at issue in the main proceedings is not … governed by EU law, the provisions of the Charter … do not apply to it."[31] Thus, although the Court did not address the question of extraterritorial applicability of the Charter expressly, it did (at least indirectly) link the question of applicability of the Charter solely to the question of whether the situation at the bar falls within the scope of EU law.

The GC's judgment in *Front Polisario* further attests to the rejection of any territorial considerations as a precondition for the applicability of the Charter. According to the GC, the Council, in concluding an agreement with a third State must examine all the relevant facts in order to ensure that the agreement does not impact the enjoyment of fundamental rights abroad.[32] In other words, according to the GC, the Union institutions bear extraterritorial obligations under the Charter since their actions may entail infringements of fundamental rights abroad.[33]

---

[27] V. Moreno-Lax, C. Costello, *supra* note 2, pp. 1679-1680.

[28] Art. 25(1)(a) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ [2009] L243/1.

[29] Case C-638/16 PPU *X and X v Belgium* EU:C:2017:173, para. 19.

[30] Case C-638/16 PPU *X and X v Belgium* Case, Opinion of AG Mengozzi, *supra* note 23, paras. 89, 92. (Emphasis in the original).

[31] Case C-638/16 PPU *X and X v. Belgium*, *supra* note 29, para. 45.

[32] Case T-512/12, *supra* note 4, para. 228.

[33] O. De Schutter, The implementation of the Charter of Fundamental Rights in the EU institutional framework, November 2016, study requested by the European Parliament's Committee on Constitutional Affairs, at p. 57, available at <http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571397/IPOL_STU(2016)571397_EN.pdf>. C. Ryngaert, *supra* note 2, p. 81.

The case-law of the CJEU regarding targeted sanctions against individuals located abroad[34] further supports the proposition that territorial considerations are immaterial in determining the applicability of the Charter and that the only relevant question in this context is whether an entity has been affected by EU action.[35] There is more case-law to bear out this proposition. The *Mugraby* case concerned an action for damages in respect of injuries that occurred because of the failure of the EU to adopt appropriate measures against Lebanon (suspending aid programmes) under a human rights clause in the EU-Lebanon Association Agreement following Lebanon's fundamental rights violations.[36] While the action failed on the merits, the Court did not question the applicants' assumption that the EU may bear responsibility vis-à-vis a non-EU national for violation of his/her fundamental rights in a third country.[37] Finally, in this context, mention should be made of the *Zaoui* case involving an action for damages for the loss of a family member killed by Hamas.[38] According to the applicant, the

[34] The fact that cases involving targeted sanctions enforced in the territory of a State party against individuals located abroad have not, thus far, raised any issues of 'jurisdiction' within the meaning of Art. 1 ECHR in the context of ECtHR case-law (see for example *Nada v. Switzerland*, App. No. 10593/08, 12 September 2012), does not necessarily mean that they do not raise issues of extraterritoriality. For criticism of the ECtHR's sidestepping of the question of extraterritoriality of the ECHR in the *Nada* judgment, see M. Milanovic, European Court Decides Nada, 23 February 2012, available at <https://www.ejiltalk.org/european-court-decides-nada-v-switzerland/>. This is especially the case if one takes into account the definition of extraterritorial obligations contained in Clause 8(a) of the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011), available at <https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23>. Clause 8(a) of the Maastricht Principles defines extraterritorial obligations as "obligations relating to the acts and omissions of a State, *within or beyond its territory,* that have effects on the enjoyment of human rights outside of that State's territory." (Emphasis added). See also M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, (Oxford: Oxford University Press, 2011), p. 7: "*Extraterritorial* application simply means that at the moment of the alleged violation of his or her human rights the individual concerned is not physically located in the territory of the state party in question, a geographical area over which the state has sovereignty or title. Extraterritorial application of a human rights treaty is an issue which will most frequently arise from an *extraterritorial state act*, i.e. conduct attributable to the state, either of commission or of omission, performed outside its sovereign borders … However – and this is a crucial point – extraterritorial application does not *require* an extraterritorial state act, but solely that the individual concerned is located outside the state's territory." (Emphasis in the original). See contra A. Sicilianos, The European Court of Human Rights Facing the Security Council: Towards Systemic Harmonization, 66 *ICLQ* 783 (2017), p. 793.

[35] A. Ward, *supra* note 19, p. 423: "[E]merging case-law shows that once the legal interests of an entity have been affected by EU law, and it is pertinent to the resolution of a dispute, then the Charter will apply, even if that entity is located outside of the EU." V. Kube, *supra* note 22, p. 4. In case C-200/13 P *Council of the European Union v. Bank Saderat Iran*, ECLI:EU:C:2016:284, para. 47, the Court stated that: "Bank Saderat Iran puts forward pleas alleging an infringement of its rights of defence and of its right to effective judicial protection. Such rights may be invoked by any natural person or any entity bringing an action before the Courts of the European Union." See also case T-494/10 *Bank Saderat Iran v. Council of the European Union*, ECLI:EU:T:2013:59, paras. 34-44; case C-176/13 P *Council of the European Union v. Bank Mellat*, ECLI:EU:C:2016:96, para. 49; case C-130/10 *European Parliament v. Council of the European Union*, ECLI:EU:C:2012:472, para 83.

[36] Case C-581/11 P *Mugraby v. Council of the European Union*, ECLI:EU:C:2012:466.

[37] *Ibid*., para 81. L. Bartels, *supra* note 2, p. 1076. V. Kube, *supra* note 22, p. 35.

[38] Case C-288/03 P *Zaoui and Others v. Commission*, ECLI:EU:C:2004:633.

EU was responsible because of its funding of education in Palestinian territory which allegedly incited hatred and thus led to the attack. Although the action failed because the applicants did not manage to prove causality, the Court (again) did not question the assumption that the EU could be held responsible for extraterritorial violations of fundamental rights.[39]

Furthermore, different EU instruments show that Union institutions remain bound by the Charter even when they act outside the territory of EU Member States. A prime example here is Regulation 2016/1624 on the European Border and Coast Guard.[40] According to the Regulation, in performing its tasks, which, *inter alia*, expressly include training[41] and co-ordination of border management activities in the territory of third States,[42] the European Border and Coast Guard Agency "shall guarantee the protection of fundamental rights … in accordance with relevant Union law" and "in particular the Charter."[43] More interestingly for present purposes, the Commission's Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy measures[44] lend further support to the argument advanced here. The Guidelines highlight that the purpose of identifying human rights impacts is to assess "how trade measures which might be included in a proposed trade-related policy initiative are likely to impact: *either on the human rights of individuals in the countries or territories concerned*; or on the ability of the EU and the partner country/ies to fulfil or progressively realise their human rights obligations."[45] De Schutter stressed, in a 2016 study commissioned by the European Parliament, that this "confirms the understanding (illustrated by the *Front Polisario* case …) that fundamental rights that are binding in the EU legal order should be complied with also for the benefit of individuals situated outside the territories of the Member States: such fundamental rights have in other terms, an 'extraterritorial' scope…".[46] In this context, it is also worthwhile noting that the Guidelines explicitly provide that: "Respect for the Charter of fundamental rights in Commission acts and initiatives is a *binding legal requirement* in relation to both internal policies and external action."[47]

Overall, the existing case-law on the extraterritorial application of the Charter as well as several EU instruments support the conclusion reached above on the basis of a textual analysis of Art. 51(1). Whether or not the EU institutions

---

[39] *Ibid.*, paras 3, 13-15. L. Bartels, *supra* note 2, p. 1076. V. Kube, *supra* note 22, p. 35.

[40] Regulation 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard amending Regulation 2016/399 of the European Parliament and of the Council and repealing Regulation No 863/2007 of the European Parliament and of the Council, Council Regulation No 2007/2004 and Council Decision 2005/267/EC, OJ[2016] L251/1.

[41] *Ibid.*, Art. 36(7).

[42] *Ibid.*, Art. 54(1) – (3).

[43] *Ibid.*, Art. 34(1).

[44] European Commission, Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy measures, 2 July 2015, available at <https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf>.

[45] *Ibid.*, p. 2 (Emphasis added).

[46] O. De Schutter, *supra* note 33, p. 2.

[47] *Ibid.*, p. 5. (Emphasis in the original).

exercise their powers within the territory of the Member States is immaterial; what matters in the context of triggering the applicability of the Charter is whether the situation at hand is covered by an EU competence.

3. The Extraterritorial Applicability of the EU Charter of Fundamental Rights: Importing the ECtHR's Model of Effective Control?

As seen above, there is sustained practice to support the view propounded by Moreno-Lax and Costello to the effect that the Charter reflects "an assumption that EU fundamental rights simply track all EU activities, as well as Member State action when implementing EU law."[48] However, this view has not gone unchallenged. Others have argued that the equivalence of meaning and scope between the rights of the Charter and the corresponding rights of the ECHR, provided for under Art. 52(3) of the Charter,[49] allows the transposition of the jurisdictional clause of Art. 1 ECHR to the fundamental rights regime of the Charter. This is the approach followed by Advocate General Wathelet in his Opinion in the *Front Polisario* case before the CJEU.[50] The Advocate General applied by analogy the ECtHR's effective control standard and concluded that the Charter would apply "where an activity is governed by EU law *and* carried out under the effective control of the EU and/or its Member States but outside their territory."[51]

There are many reasons militating against the 'importation' of the effective control standard developed by the ECtHR. As Ryngaert observes, the development of this particular extraterritoriality standard by the ECtHR has been to a large degree influenced by the type of cases that have come before the court in question, namely extraterritorial military operations conducted by ECHR contracting parties.[52] Such cases typically involve State conduct outside its territory and thus, the development of the effective control standard in order to determine the reach of the Convention is, arguably, logical in this particular context. However, as Ryngaert stresses "normally the EU will not engage in

---

[48] V. Moreno-Lax, C. Costello, *supra* note 2, p. 1658.

[49] Art 52(3) of the Charter stipulates that: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

[50] Opinion of Advocate General Wathelet in case C-104/16 P, *supra* note 5. See also E. Guild, S. Carrera, L. Den Hertog, J. Parkin, Implementation of the EU Charter of Fundamental Rights and Its Impact on EU Home Affairs Agencies: Frontex, Europol and the European asylum Support Office, report requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, (2011) European Parliament Directorate General for Internal Policies Policy Study pp. 48-50, <http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-LIBE_ET(2011)453196>.

[51] Opinion of Advocate General Wathelet in case C-104/16 P, *supra* note 5, para. 270 and fn. 24 citing relevant ECtHR case-law regarding the extraterritorial application of the ECHR. (Emphasis added).

[52] C. Ryngaert, *supra* note 2, p 382. M. Milanovic, *supra* note 34, pp. 118-127. For an overview of the relevant case-law see the fact-sheet of the ECtHR on Extraterritorial Jurisdiction of States Parties to the European Convention on Human Rights (ECtHR, July 2018) <https://www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf>.

such extraterritorial *conduct*, but rather take decisions that may have extraterritorial *effects*."[53] The factual scenario of the *Front Polisario* case, involving the conclusion of a trade agreement with a third State that might have affected the enjoyment of fundamental rights by individuals in that third State, attests to the inappropriateness of extrapolating from this strand of ECtHR case-law.

In this context, it would seem more apt to derive guidance from the ECtHR's case-law involving measures with extraterritorial effect – rather than focusing on the Court's jurisprudence involving extraterritorial conduct. However, as Bartels notes, while there is a plethora of judgments regarding the application of the ECHR to extraterritorial conduct, cases regarding its application to measures with extraterritorial effects are not only few and far between but also contradictory.[54] The examples furnished by Bartels highlight this point. In *Kovačić,* the ECtHR acknowledged the principle that when "acts of the [State's] authorities continue to produce effects, albeit outside [that State's] territory, … such that [State's] responsibility under the Convention could be engaged."[55] Conversely, in *Ben El Mahi*, the Court found inadmissible an application against Denmark for permitting the publication of allegedly offensive caricatures of the Prophet Muhammad since there was no jurisdictional link between the applicants [a Moroccan national resident in Morocco and two Moroccan associations based and operating in Morocco] and Denmark. [56] Thus, according to the Court in *Ben El Mahi*, persons affected by a measure adopted by a contracting party are not considered as falling within its jurisdiction – a proposition that is hard to reconcile with the principle established in *Kovačić*.[57] Overall, the ECtHR has generated some inconsistent case-law on extraterritoriality – and thus, it may, in practice, be of little guidance in ascertaining the outer boundaries of extraterritorial jurisdiction.[58]

There are further reasons to reject the transposition of the extraterritoriality standard developed by the ECtHR. It needs to be noted that there is no textual support for this argument. Art. 51 of the Charter, which expressly purports to prescribe its field of application, makes no reference to territory or jurisdiction as a threshold criterion for the applicability of the Charter.[59] More particularly,

[53] C. Ryngaert, *ibid.*

[54] L. Bartels, *supra* note 2, p. 1077.

[55] *Kovačić and Others v Slovenia* App Nos 44574/98, 45133/98, 48316/99, (ECtHR, Decision on Admissibility, 09 October 2003 and 1 April 2004), p. 55.

[56] *Ben El Mahi and Others v Denmark* App No 5853/06 (ECtHR, 11 December 2006).

[57] L. Bartels, *supra* note 2, p. 1077.

[58] See in general M. Milanovic, Al-Skeini and Al-Jedda in Strasbourg, 23 *EJIL* 121 (2012).

[59] Art 51 of the Charter reads: "1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the treaties. 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify the powers and tasks as defined in the Treaties." See also the Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17, p. 32.

nothing in the Charter itself (or in the Explanations thereto), justifies the imposition of a superadded jurisdictional condition to its applicability.

One could argue that the equivalence of meaning and scope between the rights of the Charter and the corresponding rights under the ECHR, provided for under Art. 52(3) of the Charter, entails that the limitations to ECHR rights (*in concreto* the jurisdictional limit of art 1 ECHR) should also apply to the Charter as a whole. This position was adopted by the Belgian government in the *X and X v. Belgium* case.[60] As the Opinion of Advocate General Mengozzi in the same case stresses, this view is erroneous on a number of grounds. More particularly, this position conflates the question of *applicability* of the Charter[61] (namely, its field of application as provided for under Art. 51 of the Charter) with that of the *scope and content of the obligations* enshrined therein[62] (namely, the scope and interpretation of the Charter rights as provided for under Art. 52 of the Charter).[63] Simply put, Art. 52(3) of the Charter merely enshrines the rule that "the law of the ECHR prevails where it guarantees protection of the fundamental rights at a higher level."[64] As the text of Art. 52 and the Explanations thereto make clear, the rights of the ECHR and the relevant case-law of the ECtHR are relevant in the context of interpretation of the Charter rights to the extent that the Charter provisions *correspond* to those of the ECHR.[65] *A contrario*, in so far as the Charter does not correspond to the ECHR (and Art. 51 which pertains to the Charter's field of application certainly does not), no equivalence between the two instruments is envisaged.

Furthermore, Art. 52(3) of the Charter specifies that the equivalence of meaning and scope between the rights of the Charter and the corresponding rights of the ECHR "shall not prevent Union law from providing more extensive protection." As the Explanations to Art. 52 of the Charter make clear, this caveat against a 'lock, stock and barrel' transposition of the meaning and scope of ECHR rights is an expression of the autonomy of the EU legal order which allows for divergences from the ECHR (provided that the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR).[66] If one accepts that the 'scope and meaning' of the rights enshrined in the Charter (Art. 52(3) of the Charter) also encompass the jurisdictional limit of Art. 1 ECHR, this would mean that the EU is required to apply to Charter rights *the exact same limitations* as those accepted in the scheme of the ECHR.[67] This reading of Art. 52(3) of the Charter would not only render the explicit reference to the Union's ability to guarantee more extensive protection redundant,[68] but it would also

[60] Case C-638/16 PPU *X and X v Belgium* EU:C:2017:173, see also the Opinion of AG Mengozzi, *supra* note 23, para. 95.

[61] See the text of art 51 Charter and the Explanations thereto.

[62] See the text of art 52 Charter and the Explanations thereto.

[63] Opinion of AG Mengozzi, *supra* note 23, para 101.

[64] *Ibid*., para. 98.

[65] See art 52(3) of the Charter of Fundamental Rights [2012] OJ C 326/391, see also Explanations to the Charter, *supra* note 19, p. 33.

[66] *Ibid.*

[67] Opinion of AG Mengozzi , *supra* note 23, para. 99.

[68] *Ibid.*

undermine the Charter's aspiration to contribute to an autonomous EU fundamental rights regime.[69]

4. Territorialising the Obligation to Respect Human Rights Abroad: The *Soering* Model

The previous sections showed that there is abundant evidence to support the proposition that territorial considerations are immaterial in ascertaining the extraterritorial applicability of the Charter and what matters in this context is whether a situation is covered by an EU competence. Furthermore, it was shown that attempts to 'import' the ECtHR's extraterritoriality standard fall short of convincing on numerous grounds.

However, in the literature, there have been calls to move away from the (still nebulous) concept of extraterritoriality of the human rights obligations owed by the EU to distant strangers and to approach the question through the lens of a territorial due diligence obligation of the EU to examine the human rights situation in the territory of the third State.[70] According to Ryngaert, reframing the debate in terms of territorial due diligence obligations would have the benefit of avoiding "the need for complicated doctrinal constructions of extraterritorial obligations, …".[71] According to this line of argumentation, the decision on the conclusion of an international agreement by the EU remains essentially a territorial one and as such it triggers a (territorial) obligation to take into account, before the decision's adoption, the agreement's compatibility with human rights law or its effects on the enjoyment of human rights abroad.[72]

Ryngaert's model of territorialisation of the EU's human rights obligations towards distant strangers draws inspiration from and builds upon[73] the ECtHR's line of reasoning in the *Soering* case.[74] The case raised the question of whether extradition of an individual to a third State where he could face the death penalty constituted a violation of Art. 3 ECHR which prohibits torture and inhuman or degrading treatment. While the ECtHR stressed that the notion of jurisdiction laid down in Art. 1 ECHR is essentially territorial, it did establish the existence of a territorial due diligence obligation incumbent upon States Parties to take into account the foreseeable consequences of extradition that may occur outside their jurisdiction.[75] The Court held that:

> [T]he decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 …, and hence engage the responsibility of that State, under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country … In so

[69] V. Kube, *supra* note 22, p. 31. V. Moreno-Lax, C. Costello, *supra* note 2, pp. 1660, 1682.
[70] C. Ryngaert, *supra* note 3, pp. 383-389.
[71] *Ibid.,* p. 383.
[72] *Ibid*., p. 385.
[73] *Ibid*.
[74] *Soering v. United Kingdom*, Appl. No. 14038/88, Judgment of 7 July 1989.
[75] *Ibid*., para. 86.

> far as liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.[76]

On this basis, Ryngaert proposes to extend the territorial principle propounded in *Soering* to cover situations such as those at hand.

However, the adoption of this territorial due diligence model is not without problems. First, it needs to be noted that, from a jurisdictional perspective, the *Soering* judgment is based on territoriality; in *Soering* (and in other extradition and expulsion cases more generally) the individual is actually located within the territory of a State party (i.e. within the territorial jurisdiction of a State party). As Miller observes, in this line of case-law:

> [A]n individual [is] entitled to allege violation of Convention rights because the wrongful act occurs either immediately before (extradition) or immediately after (expulsion) the individual is within a signatory state's territory. Jurisdiction extends in these cases, in other words, because the wrongful act … is directly connected to the individual's territorial presence in a signatory state, and the signatory state is accordingly responsible for the conditions under which it brings someone into its country and forces him to leave … It is because the individual is ultimately *present* in the state – whether as a result of extradition or pending expulsion – that related acts fall 'within the jurisdiction' of signatory states under Article 1.[77]

By way of contrast, situations such as those that gave rise to the *Front Polisario* case are essentially different: in this type of cases, the trade agreement concluded between the EU and the third State potentially impacts on the enjoyment of human rights by individuals located outside the territory – and (thus) outside the jurisdiction – of Member States. In this light, any extrapolation from the *Soering* line of case-law seems misplaced.

It is worth noting that Ryngaert himself acknowledges that the lack of presence of an individual in the territory of a Member State is problematic in the context of extending the *Soering* model to human rights violations resulting from the EU's conclusion of a trade agreement with a third State.[78] According to him, "this lack of *actual presence* need however not be fatal to a finding of jurisdiction."[79] Borrowing from the line of arguments put forward by Jackson in the context of expanding the *Soering* doctrine to cases of state complicity in torture abroad,[80] Ryngaert claims that "it would be absurd for one specific form of complicity to be prohibited under the principle in *Soering*, but to ignore 'equally consequential forms', especially in light of the universal recognition of human rights."[81] Accord-

---

[76] *Ibid*., para. 91.

[77] S. Miller, Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention, 20 *EJIL* 1223 (2009), at pp. 1242, 1243. (Emphasis in the original).

[78] C. Ryngaert, *supra* note 3, p. 386.

[79] *Ibid*. (Emphasis in the original).

[80] *Ibid.* See also M. Jackson, Freeing *Soering*: The ECHR, state Complicity in Torture, and Jurisdiction, 27 *EJIL* 816 (2016), p. 828.

[81] *Ibid.*

ing to him, the EU's facilitation of serious human rights violations abroad through the conclusion of trade agreements could be considered as an 'equally consequential form'[82] – thereby, allowing at a theoretical level at least, the extension of the *Soering* model to this type of cases. It needs to be stressed that in the light of the absence of relevant judicial practice, this argument remains *de lege ferenda*. In this context, it needs to be borne in mind that, in *Soering*, the ECtHR acknowledged and emphasised the special circumstances of extradition.[83] Thus, it is questionable whether the application of the *Soering* doctrine in a non-extradition scenario would be legally sound. Ultimately, one wonders whether this approach serves its express purpose of obviating "the need for complicated doctrinal constructions of extraterritorial obligations".[84] Indeed, although by following the *Soering* model the focus shifts to territorial (instead of extraterritorial) considerations, some intellectual juggling is also needed in this context. Shoehorning scenarios with a clear extraterritorial dimension (such as those that gave rise to the *Front Polisario* case) in a model that was specifically designed to cover situations with a territorial nexus somewhat detracts from the persuasive force of this line of thinking.

More fundamentally, this approach fails to identify the exact legal basis of this (territorial) obligation under EU law. In fact, the *Soering* – inspired model does not address at all the fact that, unlike the ECHR, the Charter's applicability has not been conditioned upon the threshold criterion of jurisdiction. In this light, merely extrapolating from the case-law of the ECtHR without more seems to neglect the fact that, as seen above, the Charter aspires to contribute to an autonomous EU fundamental rights regime – which radically departs from international human rights law notions of 'territoriality' and 'jurisdiction'.

5. Territorialising the Obligation to Respect Human Rights Abroad: A Due Diligence Obligation to Examine the Human Rights Situation in the Third Country?

Although the previous section showed that the *Soering*-inspired territorial due diligence model seems to be unconvincing in our context, there have also been other attempts to 'territorialise' the EU's duty to protect human rights abroad that are worth discussing here. More particularly, in the context of the *Front Polisario* case, AG Wathelet, while disagreeing with the GC's reliance on the Charter, confirmed the existence of an EU obligation of due diligence pertaining to the need to examine the potential impact of a treaty on the human rights situation in a third state; an obligation which, according to the AG, stems both from EU and international law.[85] This section will address this argument.

As far as the existence of a duty of due diligence under EU law is concerned, the AG' s argument is two-pronged. First, the AG asserted that this obligation

[82] *Ibid.*
[83] *Soering v. United Kingdom*, *supra* note 74, paras. 86, 89.
[84] C. Ryngaert, *supra* note 3, p. 383.
[85] Opinion of AG Wathelet, *supra* note 5, paras. 254-269.

results from a combined reading of Articles 3(5), 21(1)(2)(c), and 23 TEU.[86] In his view, these articles dictate that all actions of the EU must comply with the principles of the rule of law, human rights and human dignity.[87] While it is questionable whether Art. 23 TEU can be considered the correct legal basis to anchor an EU law duty of due diligence – since it merely refers back to the objectives of Article 21 TEU[88] – the situation seems to be different when it comes to Arts. 3(5) and 21 TEU.

More particularly, the advent of the Lisbon Treaty has strengthened the nexus between trade and human rights. The text of Art. 207 TFEU attests thereto. According to Art. 207 TFEU "[t]he common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action". These objectives are stated in Arts. 3(5) and 21 TEU – and they expressly include the promotion of human rights. Thus, as Van Elsuwege stresses: "[e]ven though the precise meaning of the partly overlapping provisions [Art. 3(5) and Art. 21 TEU] may be subject to discussion, it is obvious that the integration of human rights in EU external trade relations is a constitutional obligation and not a mere policy choice."[89] The existence of an EU law duty to take into account human rights when the Union acts in the area of its external policies is further supported by the Court's case-law on the normative weight to be attached to Art. 21 TEU. In *Parliament v Commission*, the Court stated that:

> As regards, in particular, provisions of the EU-Tanzania Agreement concerning compliance with the principles of the rule of law and human rights, as well as respect for human dignity, it must be stated that *such compliance is required of all actions of the European Union*, including those in the area of the CFSP, as is clear from the provisions, read together, set out in the first subparagraph of Article 21(1), Article 21(2)(b) and (3) TEU, and Article 23 TEU.[90]

On this basis, it is at least arguable that, under EU law, there is a duty incumbent upon the EU institutions to examine the human rights situation in the third State before concluding an agreement therewith in order to ensure that it would not have a negative impact on the enjoyment of human rights abroad.[91] As the European Ombudsman highlighted in her Decision on the EU-Vietnam Free Trade Agreement:

> EU institutions and bodies must always consider the compliance of their actions with fundamental rights and the *possible impact of their actions on fundamental rights*.

---

[86] *Ibid*., paras. 254-255.

[87] *Ibid*., para. 255.

[88] S. Hummelbrunner, *supra* note 3, p. 34. According to Hummelbrunner, Art. 3(5) TEU is not an appropriate legal basis in this context since it merely establishes "EU objectives on the international scene in a more general way." *Ibid*.

[89] P. van Elsuwege, *The Nexus between Common Commercial policy and Human Rights: Implications of the Lisbon Treaty*, in G. Van Der Loo, M. Hahn (eds.), *The Law and Practice of the Common Commercial Policy: The First 10 Years after the Treaty of Lisbon*, (Leiden: Brill, forthcoming), p. 2, on file with the authors.

[90] Case C-263/14, *European Parliament v Council of the European Union*, EU:C:2016:435, para. 47. (Emphasis added).

[91] S. Hummelbrunner, *supra* note 3, p. 40. V. Kube, *supra* note 22, pp. 69-71.

> This applies also with respect to administrative activities in the context of international treaty negotiations. The EU Administration should not only ensure that the envisaged agreements comply with existing human rights obligations, and do not lower the existing standards of human rights protection, but should also aim at furthering the cause of human rights in the partner countries.[92]

Importantly, whether or not the agreement does actually bear a negative effect on the human rights in the third State is immaterial. What matters in this context, according to the AG, is the existence of an obligation "under EU law to examine the general human rights situation in the other party to the international agreement, and more specifically to study the impact which that agreement could have on human rights."[93] The General Court's judgment in *Front Polisario* further corroborates the view that, in order to fulfil its due diligence obligations, the Union institutions must examine the human rights situation in the third party and on the basis of that examination decide whether the agreement could have a negative impact thereon.[94]

Secondly, the AG based the existence of the EU's duty of due diligence on an argument of effectiveness. According to Wathelet, the relevant due diligence obligation results from the need to give practical effect to the EU's duty to respect international human rights law.

> [I]t is settled case-law that the Union must respect international law in the exercise of its powers. It follows that, if it is not to be devoid of any practical purpose, the question of the conformity of the agreement at issue with international law must be taken into account in the prior examination of all relevant facts to be conducted by the institutions before concluding an international agreement.[95]

This argument seems to stand on thin evidentiary grounds. More particularly, this line of reasoning presupposes that, under international human rights law, there is an obligation to take into account the possible negative impact of an agreement on the enjoyment of human rights abroad before concluding it. However, there is no general, free-standing obligation of due diligence under international law.[96] The requirement to act with due diligence only exists as a

---

[92] European Ombudsman, Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement, 26 February 2016, para. 10. (Emphasis added). For the sake of completeness, it should be mentioned that in her Decision in the EU-Vietnam Free Trade Agreement, the European Ombudsman found that, although Art. 21(1) and (2) TEU do not establish a legally binding obligation to carry out a human rights impact assessment, "it would be in conformity with the spirit of the[se] legal provisions … to carry out a human rights impact assessment." *Ibid.*, para. 11. Thus, although the Ombudsman did not read these provisions as entailing a legally binding due diligence obligation, she did rely on them in order to support the existence of a non-binding standard of 'good administration'. *Ibid.*, para. 10.

[93] Opinion of AG Wathelet, *supra* note 5, para. 257.

[94] Case T-512/12, *supra* note 4, paras. 225-228.

[95] Opinion of AG Wathelet, *supra* note 5, para. 256.

[96] J. Crawford, *State Responsibility: The General Part*, (New York: Cambridge University Press, 2014), pp. 219-232. See also generally T. Koivurova, Due Diligence, Max Planck Encyclopedia of Public International Law, February 2010. On the principle of due diligence in international law, see J. Kulesza, *Due Diligence in International Law*, (Leiden: Brill, 2016).

corollary of a primary rule, and thus, it is to be established on a case-by-case basis – with reference to the relevant primary norms.[97] Since the AG failed to show either the existence of a broad due diligence obligation incumbent upon the EU under international human rights law, or that, *in concreto*, the relevant international human rights norms encompass such a duty, the 'effectiveness argument' put forward in his Opinion is unconvincing.

Secondly, the AG inferred the existence of a due diligence obligation incumbent upon the EU to take into account the impact of an agreement on the human rights situation in the third country from international law. According to Wathelet:

> In addition to the obligation under EU law to examine the general human rights situation in the other party to the international agreement, and more specifically to study the impact which that agreement could have on human rights, international law requires actors in international law, in particular States and international organisations, to respect peremptory norms of international law (*jus cogens*) and *erga omnes* obligations.[98]

However, this proposition is problematic to the extent that the AG does not clarify the exact source of this putative international law obligation. More particularly, this argument suffers from the same weaknesses identified above. The AG's thesis could only hold if either: a) one assumes the existence of a general due diligence obligation under international law; or b) one assumes that the norms of international law invoked in the case at hand require the EU to conduct due diligence activity.

It thus seems fairly safe to assume that indeed no broad due diligence obligation exists under general international law.[99] As Besson explains: "The standard of due diligence, even if it may be grounded … as a standard independent from the obligation it is qualifying …, cannot ground that obligation itself, and hence cannot give rise to a human rights duty in the first place. The conditions for that duty to arise have to be met independently."[100] The case-law of the ICJ also confirms that there is no free-standing due diligence obligation in international law.[101] As the Court stated in the *Genocide* case:

---

[97] N. McDonald, The Role of Due Diligence in International Law, 68 *ICLQ* 1041 (2019), p. 1044. S. Besson, Due Diligence and extraterritorial Human Rights Obligations – Mind the Gap!, 9 *ESIL Reflections* 1 (2020), on p. 6, available at <https://esil-sedi.eu/wp-content/uploads/2020/04/ESIL-Reflection-Besson-S.-3.pdf>.

[98] Opinion of AG Wathelet, *supra* note 5, para. 257. See also *ibid*., para 269: " Even if the existence and enforceability of such a principle in EU law were disputed, it is clear that international law imposes a clear obligation on the European Union and its Member States not to recognise an illegal situation resulting from the infringement of principles and rules concerning fundamental rights and not to render aid or assistance in maintaining the situation created by that infringement. To that end, *the EU's institutions and its Member States must examine the impact which the international agreement at issue could have on human rights*." (Emphasis added).

[99] N. McDonald, *supra* note 97, p. 1044. S. Besson, *supra* note 97, p. 6.

[100] S. Besson, *ibid.*

[101] See McDonald's analysis of the relevant ICJ jurisprudence in N. McDonald, *supra* note 97, pp. 1045-1048. McDonald's analysis focuses in particular on the *Corfu Channel* case, *ICJ Reports* 1949, p. 4; the *Pulp Mills* case, *ICJ Reports* 2010, p. 14; the *Armed Activities on the Ter-*

> The Genocide Convention is not the only instrument providing for an obligation on the states parties to it to take certain steps to prevent the acts it seeks to prohibit. Many other instruments include a similar obligation, in various forms … The content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented. The decision of the Court does not, in this case, purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts.[102]

In the absence of a broad due diligence obligation under general international law, one must examine whether the applicable norms in each case prescribe such a duty. In the particular context of the *Front Polisario* case, there seems to be no evidence that the relevant international law norms[103] involve a due diligence requirement. Thus, while it is arguable that under EU law there is a due diligence obligation to take into account the possible negative impact of the agreement on the human rights situation in the third country, the existence of a similar duty under international law is to be determined on a case-by-case basis – depending on the primary norms invoked in each case.

6. **Conclusions**

The paper explored the question of whether the EU is bound by human rights obligations towards individuals located outside the territory of the Member States when it concludes trade agreements with third countries. Recent case-law of the CJEU, and more particularly the *Front Polisario* saga, has rekindled interest in the topic. Thus, the paper focused on two concrete sub-questions that this line of case-law has given rise to: a) the question of the extraterritorial applicability of the EU Charter of Fundamental Rights; and b) the question of the existence of a due diligence obligation incumbent upon the EU institutions to examine the impact of the agreement to the human rights situation in the third State.

In relation to the question of the extraterritorial applicability of the Charter, it was shown that territorial criteria bear no relevance in determining the Charter's applicability. More particularly, the paper argues that what matters in this context is whether the situation at hand is covered by an EU competence. The paper then went on to discuss efforts that have been made in the literature to import into the fundamental rights regime of the Charter the extraterritoriality standard developed by the ECtHR. It was shown that this approach is erroneous to the extent that it fails to take into account that, contrary to other human rights instruments, the Charter does not contain a superadded jurisdictional condition for its applicability and that this approach undermines the Charter's aspiration to create an autonomous fundamental rights regime.

---

ritory of the Congo case, *ICJ Reports* 2005, p. 168; and the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, *ICJ Reports* 2007, p. 43.

[102] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, *ibid*., para. 429.

[103] For the relevant norms, see Opinion of AG Wathelet, *supra* note 5, paras. 258-259.

Against this background, the paper turned next to different attempts to 'territorialise' the EU's duty to protect human rights abroad by advocating in favour of the existence of a relevant EU duty of due diligence – allegedly stemming both from EU and international law. It was shown that it is complex to establish the EU's obligation to act with due diligence in the context of concluding an international agreement on the basis of international law. In order to do that, one must examine the relevant primary norms involved and the extent to which these norms contain a due diligence requirement. On the other hand, this contribution argues that a duty of due diligence clearly exists as a matter of EU law to take into account the impact of a future agreement on the human rights situation in the third State.

ASSER INSTITUTE
Centre for International & European Law

Founded in 2008, the Centre for the Law of EU External Relations (CLEER) is the first authoritative research interface between academia and practice in the field of the Union's external relations. CLEER serves as a leading forum for debate on the role of the EU in the world, but its most distinguishing feature lies in its in-house research capacity, complemented by an extensive network of partner institutes throughout Europe.

Goals

- To carry out state-of-the-art research leading to offer solutions to the challenges facing the EU in the world today.
- To achieve high standards of academic excellence and maintain unqualified independence.
- To provide a forum for discussion among all stakeholders in the EU external policy process.
- To build a collaborative network of researchers and practitioners across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

Assets

- Complete independence to set its own research priorities and freedom from any outside influence.
- A growing pan-European network, comprising research institutes and individual experts and practitioners who extend CLEER's outreach, provide knowledge and practical experience and act as a sounding board for the utility and feasibility of CLEER's findings and proposals.

Research programme

CLEER's research programme centres on the EU's contribution in enhancing global stability and prosperity and is carried out along the following transversal topics:

- the reception of international norms in the EU legal order;
- the projection of EU norms and impact on the development of international law;
- coherence in EU foreign and security policies;
- consistency and effectiveness of EU external policies.

CLEER's research focuses primarily on four cross-cutting issues:

- the fight against illegal immigration and crime;
- the protection and promotion of economic and financial interests;
- the protection of the environment, climate and energy;
- the ability to provide military security.

Network

CLEER carries out its research via the T.M.C. Asser Institute's own in-house research programme and through a collaborative research network centred around the active participation of all Dutch universities and involving an expanding group of other highly reputable institutes and specialists in Europe.

Activities

CLEER organises a variety of activities and special events, involving its members, partners and other stakeholders in the debate at national, EU- and international level.

CLEER's funding is obtained from a variety of sources, including the T.M.C. Asser Instituut, project research, foundation grants, conferences fees, publication sales and grants from the European Commission.

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS
T.M.C. Asser Instituut inter-university research centre

CLEER is hosted by the T.M.C. Asser Instituut,
Schimmelpennincklaan 20-22
2517 JN, The Hague, The Netherlands

CLEER

E-mail: info@cleer.eu
Website: http://www.cleer.eu