THE EXTRATERRITORIAL APPLICABILITY OF THE EU CHARTER OF FUNDAMENTAL RIGHTS: SOME REFLECTIONS IN THE AFTERMATH OF THE *FRONT POLISARIO* SAGA

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The Front Polisario cases before the Court of Justice of the European Union (CJEU) brought to the forefront the question of whether the EU is bound by the Charter of Fundamental Rights when it concludes trade agreements with third states that may affect the enjoyment of fundamental rights abroad. This is closely linked to the broader issue of the extraterritorial application of the Charter. In light of these developments, the article purports to revisit this question with a view to ascertaining the current state of the law. It examines and rejects the argument in favour of transposing the extraterritoriality standard developed by the European Court of Human Rights. Against this backdrop, the article continues by focusing on Article 51 of the Charter, which prescribes the Charter's field of application. The main argument advanced is that territorial considerations are immaterial in the context of determining the Charter's applicability; what seems to matter in this context is whether the situation in question is covered by an European Union (EU) competence.

Keywords: EU Charter of Fundamental Rights, extraterritorial application, European Court of Human Rights, effective control standard, material scope of the Charter, personal scope of the Charter

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EJLS 12(2), November 2020, 117-141 doi:10.2924/EJLS.2019.022

[EJLS Online First, 22 June 2020]

I. 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, the question has been viewed as part of the broader issue of the 'extraterritorial scope'[2] of the EU Charter of Fundamental Rights[3], which, until recently, had received scant scholarly attention.[4] However, recent developments have rekindled interest in the

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1 For the territory of the Member states to which the EU treaties apply see art 52 TEU and art 355 TFEU. See also Dimitry Kochenov, 'European Union Territory from a Legal Perspective: A Commentary on Art. 52 TEU, 355, 349, and 198-204 TFEU' (2017) University of Groningen Faculty of Law Working Paper 2017-05 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2956011> accessed 20 January 2020.

2 Cedric Ryngaert, 'EU Trade Agreements and Human rights: From Extraterritorial to Territorial Obligations' (2018) 20 International Community Law Review 374 at 375. Extraterritorial obligations have been defined 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'. Clause 8(a) of the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011) <https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23_> accessed 20 January 2020.

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

4 The seminal work on the topic is Violeta Moreno-Lax and Cathryn Costello, ' 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steven Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary*, (Hart/Beck 2014) 657. See also more generally Lorand Bartels, 'The EU's Human Rights Obligations in relation to Policies with Extraterritorial Effects' (2014) 25 European Journal of International Law 1071; Enzo Cannizzaro, 'The EU's Human Rights Obligations in relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels' (2014) 25 European Journal of International Law 1093; Aravind Ganesh, 'The European Union's Human Rights Obligations Towards Distant Strangers' (2015) 37 Michigan Journal of International Law 475. 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: Eva Kassoti, 'The Legality under International Law of the EU's

topic.[5] More particularly, the judgement of the General Court (GC)[6], as well as the Opinion of Advocate General Wathelet,[7] in the context of the *Front Polisario* cases before the CJEU have provided a more solid basis for engagement with the issue of the EU's duty to protect human rights extraterritorially.

The *Front Polisario* cases concerned an action for annulment brought by Front Polisario, the main Saharawi national liberation movement, against the Council decision[8] adopting the 2010 EU-Morocco Agreement on agricultural, processed agricultural and fisheries products ('Liberalization Agreement')[9] in so far as that Agreement extended to the territory of

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Trade Agreements covering Occupied Territories: A Comparative Study of Palestine and Western Sahara' (2017) CLEER Paper Series 2017/3, <https://www.asser.nl/media/3934/cleer17-3_web.pdf> accessed 20 January 2020; Francois Dubuisson, 'The International Obligations of the European Union and its Member States with regard to Economic Relations with Israeli Settlements' (2014) <http://www.madeinillegality.org/IMG/pdf/etude_def_ang.pdf> accessed 20 January 2020. For the procedural and evidentiary difficulties of proving complicity in international law, see Olivier Corten and Pierre Klein, 'The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the Corfu Channel case' in Karine Bannelier, Theodore Christakis, and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case*, (Routledge 2012) 315 – 334; Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart Publishing 2016) 101-103, 218-234.

5 Cedric Ryngaert (n 2); Antal Berkes, 'The Extraterritorial Human Rights Obligations of the EU in its External Trade and Investment Policies' (2018) 5 Europe and the World: A Law Review 1.

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

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

8 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.

9 Agreement in the form of an Exchange of Letters between the European Community and the Kingdom of Morocco concerning reciprocal liberalization

Western Sahara. According to the applicant the decision breached EU and international law.[10] The General Court (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.[11]

It needs to be noted that the GC simply assumed the extraterritorial application of the Charter – 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.[12] On appeal, while Advocate General 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*.[13]

The European Court of Justice (ECJ) did not have an opportunity to pronounce on the matter since it concluded, on the basis of relevant international law applicable between the parties (namely the EU and Morocco), that neither the EU-Morocco Association Agreement[14] nor the Liberalization Agreement were intended to cover the territory of Western

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measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 of 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. (Hereinafter referred to as the 'Liberalization Agreement').

10 *Front Polisario* (n 6) para 117.

11 Ibid paras 228, 241.

12 Ibid paras 242-248.

13 Opinion of AG Wathelet (n 7) paras 270-272.

14 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. (Hereinafter referred to as the 'Association Agreement').

Sahara, thus quashing the GC's judgment.[15] As such, although the precedential value of the GC's judgment is limited due to the peculiarities of the case, the question of whether the EU is bound by the Charter when it concludes agreements that may affect the enjoyment of fundamental rights of distant strangers still looms large.

The purpose of this article is to revisit the question of the extraterritorial scope of the Charter in light of this new jurisprudential development and to evaluate the current state of the law. There are good reasons to do so. As it will be shown below, the position adopted by Advocate General Wathelet amounts, in essence, to the transposition of the 'jurisdictional clause' of the European Convention of Human Rights into the scheme of the Charter. This contradicts the mainstream view in the literature as propounded in 2014 by Moreno-Lax and Costello, namely that 'EU fundamental rights simply track all EU activities, as well as Member State action when implementing EU law'.[16]

Although not binding, the Opinion of the Advocate General carries some authoritative weight. For example, Cremona wrote in 2019 that the 'precise degree to which the EU Charter of Fundamental Rights applies in extraterritorial contexts may still be debated'.[17] Here she highlighted the extraterritoriality model put forward by Advocate General Wathelet in *Front Polisario* – while mentioning in a footnote that Moreno-Lax and Costello take a different view.[18] Furthermore, in the context of the *X and X v. Belgium* case, the Belgian government also shared the approach taken by Advocate General Wathelet in *Polisario* with regards to the question of the extraterritorial

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15 Case C-104/16 P *Council of the European Union v Front Polisario* EU:C:2016:973, paras 81-115. For comment see Eva Kassoti, 'The *Council v Front Polisario* Case: The Court of Justice's Selective Reliance on Treaty Interpretation' (2017) 2 European Papers 23; Jed 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' (2017) 111 American Journal of International Law 731.

16 Moreno-Lax and Costello (n 4) 1658.

17 Marise Cremona, 'Introduction' in Marise Cremona and Joanne Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press 2019) 16.

18 Ibid 17 and fn 33.

applicability of the Charter.[19] In this light, the question arises: does the model put forward by Moreno-Lax and Costello still hold persuasive force, or should it be replaced by the model proposed by Advocate General Wathelet?

The need to clearly articulate the position with regards to the issue of the Charter's extraterritoriality is further reinforced by the fact that recent literature on the topic has not engaged with the approach adopted by Advocate General Wathelet *in extenso*. More particularly, commentators have largely ignored the arguments against importing extraneous models to delimit the extraterritorial application of the Charter made by Advocate General Mengozzi in his Opinion in *X and X v. Belgium*.[20]

This article fills this gap in the literature and identifies the weaknesses of Advocate General Wathelet's approach – thereby proving the continuing relevance of the extraterritoriality model first developed by Moreno-Lax and Costello. By doing so, it also brings together scattered pieces of literature on the Charter's extraterritoriality, thereby providing a reference point which will hopefully assist in moving the debate on the topic forward. Finally, the article links the question of the EU's duty to protect human rights abroad to broader debates regarding the Charter, clarifying that (seemingly) different approaches to the Charter's scope of application (personal versus material) are not inherently incompatible.

II. Importing Extraneous Models to Delimit the Extraterritorial Application of the Charter of Fundamental Rights?

In contrast with 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.[21] In a similar vein, the Charter's applicability has not been conditioned

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19 Case C-638/16 PPU *X and X v Belgium* Case, Opinion of AG Mengozzi, EU:C:2017:173, para 95.

20 Ibid.

21 Moreno-Lax and Costello (n 4) 1664. For analysis of arts 52 and 355 TFEU, see Kochenov (n 1).

upon the threshold criterion of jurisdiction.[22] In the context of human rights law, it is widely accepted that human rights instruments may impose certain obligations upon state parties to protect individuals outside their territory and that the concept of "jurisdiction" is central to this matter.[23] Jurisdiction in the context of human rights law should be distinguished from the homonymous concept under general international law.[24] As Besson explains, public international law jurisdiction is about '*the competence* of each State to prescribe, enforce and adjudicate, primarily on its territory, but also in exceptional cases outside the latter',[25] whereas international human rights law jurisdiction is '*a threshold criterion* for the application of human rights, i.e. state jurisdiction qua relationship between a certain state party and certain

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[22] 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) <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 20 January 2020. 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) <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 20 January 2020. See also generally Cedric Ryngaert, *Jurisdiction in International Law* (2nd ed, Oxford University Press 2015) 22-26.

[23] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 2004, para 112. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 2005, para 217. See also Lea Raible, 'Title to Territory and Jurisdiction in International Human Rights Law: Three Models for a Fraught Relationship' (2018) 31 Leiden Journal of International Law 315 at 316.

[24] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011) 21-41.

[25] Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 Leiden Journal of International Law 857 at 869. (Emphasis added). Also sharing the view that jurisdiction under public international law and jurisdiction in human rights law are different concepts, Milanovic (n 24) 21-41. Ryngaert (n 22) 22-26.

individuals'.[26] In other words, jurisdiction in the context of human rights treaties is a tool defining the scope of such treaties[27], namely a threshold criterion that needs to be met by a state in relation to an individual in order for human rights obligations to arise.[28] For example, the term 'jurisdiction' in Article 1 ECHR – which makes the application of the rights under the Convention dependent upon the jurisdiction of the state parties – has been interpreted by the European Court of Human Rights (ECtHR) as meaning the exercise of some factual power, authority or control over territory or people.[29] The different meaning of "jurisdiction" under public international

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[26] Besson (n 25) 59. (Emphasis added). See also *Lopez Burgos v Uruguay*, Communication No 52/1979 (views of 29 July 1981) UN Doc CCPR/C/13/D/52/1979, para 12.2: 'The reference in article 1 of the Optional Protocol to "individuals subject to its jurisdiction" [...] is not to the place where the violation occurred, but rather to the relationship between the individuals and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred'.

[27] Maarten Den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction" in Malcolm Langford, Wouter Vandenhole, Martin Scheinin, and Willem Van Genugten (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 158-162.

[28] *Lopez Burgos v Uruguay* (n 26) paras 12.2, 12.3; Milanovic (n 24) 19. See also Besson (n 25) 863 - describing jurisdiction in human rights law as a 'normative trigger of human rights'.

[29] See for example *Loizidou v Turkey* (1995) 20 EHRR 99, para 62; *Bankovic v Belgium* (2001) 44 EHRR SE5, para 71; *Al-Skeini and Others v United Kingdom* (2011) 53 EHRR 18, paras 138-150; *Ocalan v Turkey* (2005) App no 46221/99 (ECtHR, 12 May 2005), para 91; *Al-Jedda v United Kingdom* (2011) 53 EHRR 23, paras 77-86; *Hirsi Jamaa and Others v Italy* (2012) App No 27765 (ECtHR, 23 February 2012), paras 70-75. See also Vassilis P Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility' (2014) 36 Michigan Journal of International Law 129 at 141-142. See also Milanovic (n 24) 41; Besson (n 25) 872-874; Den Heijer and Lawson (n 27) 165 *et seq*. See also the concurring opinion of Judge Loucaides in *Assanidze v Georgia* (2004) 39 EHRR 32/653: 'To my mind "jurisdiction" means *actual authority*, that is to say the possibility of imposing the will of the State on any person, whether exercised within the territory of the High Contracting Parties or outside that territory [...] The test should always be whether the person who claims to be within the "jurisdiction" of a High Contracting Party, in respect of a particular act, can show that the act in question was the result of the exercise of authority by the State concerned'. (Emphasis added).

law on the one hand and under human rights law on the other reflects the idea that there is (and that there should be) a distinction between the *entitlement* to exercise power, authority or control over people or territory and the *facticity* of exercising actual power, authority or control over people or territory, as a trigger of duty towards individuals.[30] As Den Heijer and Lawson highlight:

> In situations where States act beyond their [public international law] 'jurisdiction', the personal scope of human rights protection is therefore not a question of *legitimacy* but of *fact*. It is not relevant whether a State has a legal title to act, but it is relevant whether the link between the individual affected and the State is sufficiently close as to oblige the State to secure that individual's right.[31]

As mentioned earlier, the lack of a jurisdictional clause in the Charter has led Moreno-Lax and Costello to argue that it reflects 'an assumption that EU fundamental rights simply track all EU activities, as well as Member State action when implementing EU law'.[32] 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 Article 52(3) of the Charter[33], allows the transposition of the jurisdictional clause of Article 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 ECJ.[34] The Advocate

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30 Raible (n 23) 324; Den Heijer and Lawson (n 27) 64-165.

31 Den Heijer and Lawson, ibid. See also Martin Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights' in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 76.

32 Moreno-Lax and Costello (n 4) 1658.

33 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'.

34 Opinion of Advocate General Wathelet in case C-104/16 P (n 7). See also Elspeth Guild, Sergio Carrera, Leonhard Den Hertog, Joanna 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

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'.[35]

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.[36] Such cases typically involve state conduct outside its territory and, as such, 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 such extraterritorial *conduct*, but rather take decisions that may have extraterritorial *effects*'.[37] 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

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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> accessed 20 January 2020.

35 Opinion of Advocate General Wathelet in case C-104/16 P (n 7) para 270 and fn 24 citing relevant ECtHR case-law regarding the extraterritorial application of the ECHR. (Emphasis added).

36 Ryngaert (n 2) 382. Milanovic (n 24) 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> accessed 20 January 2020.

37 Ryngaert (n 2).

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.[38] 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'.[39]

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.[40] 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. This, however, is a proposition that is hard to reconcile with the principle established in *Kovačić*.[41] Overall, the ECtHR has generated some inconsistent case-law on extraterritoriality and it may, in practice, be of little guidance in ascertaining the outer boundaries of extraterritorial jurisdiction.[42] As Lord Rodger succinctly put it in *Al-Skeini v. Secretary of State for Defence*:

> What is meant by "within their jurisdiction" in article 1 is a question of law and the body whose function it is to answer that question definitively is the European Court of Human Rights [...] The problem which the House has to face, quite squarely, is that the judgments and decisions of the European Court do not speak with one voice. If the differences were merely in emphasis, they could be shrugged off as being of no great significance. In reality, however, some of them appear much more serious and so present

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38 Bartels (n 4) 1077.

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

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

41 Bartels (n 4) 1077.

42 See in general Marco Milanovic,'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 European Journal of International Law 121.

> considerable difficulties for national courts which have to try to follow the jurisprudence of the European Court.[43]

There are further reasons to reject the transposition of the extraterritoriality standard developed by the ECtHR, especially as there is no textual support for this argument. Article 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.[44] More particularly, 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 Article 52(3) of the Charter, entails that the limitations to ECHR rights (*in concreto* the jurisdictional limit of Article 1 ECHR) should also apply to the Charter as a whole. This was the position adopted by the Belgian government in the *X and X v. Belgium* case.[45] However, as the Opinion of Advocate General Mengozzi in the same case stresses, this view is erroneous on a number of grounds. In particular, this position conflates the question of *applicability* of the Charter[46] (namely, its field of application as provided for under Article 51 of the Charter) with that of the *scope and content*

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43 Lord Rodger's judgment in *Al-Skeini and Others v. Secretary of State for Defence* [2007] UKHL26, paras 65 and 67.

44 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, 32.

45 Case C-638/16 PPU *X and X v Belgium* EU:C:2017:173, see also the Opinion of AG Mengozzi (n 19) para 95.

46 See the text of art 51 Charter and the Explanations thereto.

of the obligations enshrined therein[47] (namely, the scope and interpretation of the Charter rights as provided for under Article 52 of the Charter).[48]

Simply put, Article 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'.[49] As the text of Article 52 and the Explanations thereto make clear, the rights of the ECHR and the pertinent 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.[50] *A contrario*, in so far as the Charter does not correspond to the ECHR – and Article 51 which pertains to the Charter's field of application certainly does not – no equivalence between the two instruments is envisaged.

Furthermore, Article 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 Article 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.[51] If one accepts that the "scope and meaning" of the rights enshrined in the Charter (Article 52(3) of the Charter) also encompasses the jurisdictional limit of Article 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.[52] This reading of Article 52(3) of the Charter would not only render the explicit reference to the Union's ability to guarantee more extensive protection redundant,[53] but it would also

47 See the text of art 52 Charter and the Explanations thereto.

48 Opinion of AG Mengozzi (n 19) para 101.

49 Ibid para 98.

50 See art 52(3) of the Charter of Fundamental Rights [2012] OJ C 326/391, see also Explanations to the Charter (n 44) 33.

51 Ibid.

52 Opinion of AG Mengozzi (n 19) para 99.

53 Ibid.

undermine the Charter's aspiration to contribute to an autonomous EU fundamental rights regime.[54]

III. The Extraterritorial Scope of the Charter: Personal or Material Scope?

As seen earlier, in lieu of a jurisdictional clause, the Charter only contains a provision stipulating its field of application. Article 51(1) of the Charter specifies that the provisions of the Charter 'are addressed to the institutions of the Union [...] and to the Member States only when they are implementing Union law'.[55] The wording of Article 51(1) of the Charter suggests that the application of the Charter has been defined exclusively *rationae materiae*.[56] Since the Charter applies to acts of the institutions of the Union and to national acts implementing EU law,[57] the crux of the matter is whether a situation is covered by an EU competence.[58]

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54 Vivian Kube, *EU Human Rights, International Investment Law and Participation: Operationalizing the EU Foreign Policy Objective to Global Human Rights Protection* (Springer 2019) 31; Moreno-Lax and Costello (n 4) 1660, 1682.

55 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 to the Charter (n 44) 32. For commentary on art 51, see Angela Ward,'Article 51—Scope', in Steven Peers et al. (eds) (n 4) 1413-1454.

56 Thomas Van Danwitz and Katherina Paraschas, 'A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights' (2017) 35 Fordham International Law Journal 1396 at 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'. Takis Tridimas,'Fundamental Rights, General Principles of EU law, and the Charter' (2014) 16 Cambridge Yearbook of European Legal Studies 361 at 381.

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

58 Kube (n 54) 34.

It has been suggested that Article 51(1) of the Charter 'implies that the institutions, bodies, offices and agencies of the EU are bound by the Charter as such, namely when they act *in the capacity as an EU institution, body, office or agency*'.[59] This argument appears to assume that the scope of application of the Charter is personal rather than material; the determinant factor being whether an act has been issued by an EU institution. Proponents of this view have derived support for this argument from the Court's case law concerning EU law obligations applicable to "borrowed" EU institutions under the European Stability Mechanism (ESM) Framework.[60] It is beyond the ambit of the article to examine this argument *in extenso*, especially since it is based on a particular line of case law, namely cases regarding the application of the Charter to EU action undertaken under parallel international agreements concluded by Member States in the field of economic and monetary affairs. However, a few general remarks regarding this view are called for at this juncture. This is especially the case since recent works on the scope of application of Article 51(1) of the Charter simply ignore or paper over the existence of these two (seemingly) different approaches.[61]

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[59] Sandra Hummelbrunner, 'Beyond Extraterritoriality: Towards an EU Obligation to Ensure Human Rights Abroad' (2019) CLEER Paper Series 19/02, 23 <https://www.asser.nl/media/679407/cleer_19-02_web.pdf> accessed 20 January 2020. (Emphasis in the original). See also Steve Peers,'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework' (2013) 9 EU Constitutional Law Review 37 at 52-53.

[60] Peers (n 59) 52. Hummelbrunner (n 59) 22-24. See the Treaty Establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, The Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland ('ESM Treaty') (adopted 02 February 2012, entered into force 27 September 2012) <https://www.esm.europa.eu/sites/default/files/20150203_-_esm_treaty_-_en.pdf> accessed 20 January 2020.

[61] For instance, Kube seems to oscillate between these approaches. On the one hand, she accepts that 'Article 51(1) of the Charter links the application solely to the *addresses of the obligations* [...] For EU organs [...] this provision essentially means that *they are always bound to the Charter* since they are themselves a creation of EU law'. Kube (n 54) 30 (emphasis added). This extract strongly suggests that the

Indeed, in *Ledra Advertising*, both the Advocate General and the Court argued that the Charter is binding on EU institutions irrespective of whether they act inside or outside the EU legal framework.[62] Upon closer inspection however, this view is not at odds with the one put forward here. The argument to the effect that the scope of the Charter appears to be a personal one (when it comes to acts of the EU institutions) is premised on the exercise of a competence by an EU institution. In the great majority of cases, competences are conferred on EU institutions on the basis of EU law and, in some cases, on the basis of international law instruments concluded by the Member States. These are, however, closely intertwined with EU law - *in casu* the ESM treaty. As Tridimas notes:

> The ESM treaty is intended to supplement the EU framework and promote the objectives of economic union and safeguard the financial stability of the euro area. Both in terms of its substantive objectives and its institutional support, it is not self-standing but operates as a satellite treaty which falls within the broader project of European integration.[63]

Thus, while the ESM treaty is an international agreement, its functioning is closely linked to EU law. The treaty's link with EU law has been further strengthened following the adoption of Regulation 472/2013 which provides a significant role for the Commission in the monitoring of the Member States to which financial assistance has been granted in the context of the ESM treaty.[64] By ensuring compliance with the conditionalities contained in the

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author assumes that the scope of the Charter is personal rather than material. On the other hand, at other points in the same chapter, Kube argues that the criterion regarding the application of the Charter 'is not whether a situation is located inside EU territory but only whether it is covered by *the competence of the EU*' – something that implies a competence-based reading of the scope of the Charter (namely, the application of a material criterion). Ibid 34 (emphasis added).

62 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, para 67; 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. See also Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and the Attorney General* EU:C:2012:675, Opinion of AG Kokott, para 176.

63 Tridimas (n 56) 388-389.

64 See art 7 of Regulation 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of

macroeconomic adjustment programme as provided by Article 7 of Regulation 472/2013, the Commission acts, in essence, both under an EU law instrument and under the ESM treaty.[65]

Thus, it seems that, in all cases, the determinant factor in establishing the applicability of the Charter remains in essence a material one; once there is EU action – in the exercise of competences conferred on EU institutions either on the basis of EU law or on the basis of a mandate lawfully granted to them by the Member States – the Charter applies. This proposition is further supported by the text of the *Ledra* judgment itself. In *Ledra*, the obligation of the Commission to comply with the Charter in the design and implementation of Memoranda of Understanding concluded with Member States seeking support from the ESM was justified by the Court with reference to the fact that

> the Commission [...] retains, within the framework of the ESM treaty, its role of guardian of the Treaties as resulting from Article 17(1) TEU, so that it should refrain from signing a memorandum of understanding whose consistency with EU law it doubts.[66]

The relevance of a competence-based reading of the Charter's scope of application was also highlighted by Advocate General Bot in Opinion 1/17. According to the Advocate General,

> it 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

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Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1.

65 For criticism of the Court's failure to take into account Reg. 472/2013 which added an important EU component to the ESM framework of granting financial assistance in the context of the *Ledra* judgment, see Anastasia Poulou, 'The Liability of the EU in the ESM Framework' (2017) 24 Maastricht *Journal of* European and Comparative Law 127 at 134.

66 Joined Cases C-8/15 P, C-9/15P and C-10/15P (n 62) para 59.

> compatibility with, in particular, the Treaties, general principles of law and fundamental rights.[67]

Finally, taking into account that the scope of application of the Charter is strictly circumscribed by the competences which the Treaties have conferred on the EU, the proposition to the effect that the scope of application of the Charter is *purely personal* would go against the language and spirit of Article 51(2). The Explanations to the Charter make it abundantly clear that:

> The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties. Consequently, an obligation, pursuant to the second sentence of paragraph 1, for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers.[68]

IV. The Irrelevance of Territorial Criteria for Determining the Charter's Extraterritorial Applicability

The analysis above vindicates the view that Article 51(1) of the Charter envisages a parallelism between EU action and application of the Charter.[69] 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.[70] 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.[71]

This construction suggests that territorial criteria bear no relevance in the context of determining the applicability of the Charter.[72] In this light, the

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67 *Opinion 1/17* EU:C:2019:341, Opinion of AG Bot, para 195.

68 Explanations to the Charter (n 44) 32.

69 Opinion of AG Mengozzi (n 19) para 91.

70 Ibid para 97; Opinion of AG Wahl (n 62) para 85.

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

72 Kube (n 54) 34-36.

model propounded by Moreno-Lax and Costello in 2014 still holds great explanatory 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.[73]

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 Article 25 of the Visa Code[74] submitted at the Belgian Embassy in Lebanon by a Syrian family living in Aleppo.[75] According to Mengozzi, Article 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[76]

– thereby undermining the parallelism between EU action and application of the Charter envisaged under Article 51(1) of the Charter. Although the ECJ found that the Charter was not applicable *in casu*, this was done on the ground that Article 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, '[s]ince the situation at issue in the main proceedings is not [...] governed by EU law, the provisions of the Charter [...] do not apply to it'.[77] Thus, although the Court did not address the question of extraterritorial applicability of the Charter expressly, it did (at least indirectly) link the

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73 Moreno-Lax and Costello (n 4) 1679-1680.

74 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) [2009] OJ L243/1.

75 Case C-638/16 PPU *X and X v Belgium* (n 45) para 19.

76 Opinion of AG Mengozzi (n 19) paras 89, 92. (Emphasis in the original).

77 Case C-638/16 PPU *X and X v Belgium* (n 45) para 45.

question of applicability of the Charter solely to the question of whether the situation at hand 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.[78] In other words, according to the GC, the Union institutions bear extraterritorial obligations under the Charter once their actions may entail infringements of fundamental rights abroad.[79]

The case law of the CJEU regarding targeted sanctions against individuals located abroad[80] further supports the proposition that territorial

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78 Case T-512/12 *Front Polisario* (n 6) para 228.

79 Olivier De Schutter, 'The implementation of the Charter of Fundamental Rights in the EU institutional framework' (study requested by the European Parliament's Committee on Constitutional Affairs, November 2016) 57, <http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571397/IPOL_STU(2016)571397_EN.pdf> accessed 20 January 2020. Ryngaert (n 2) 381.

80 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 (ECtHR, 12 September 2012) does not necessarily mean that they do not raise issues of extraterritoriality. For criticism on the ECtHR's s sidestepping of the question of extraterritoriality of the ECHR in the *Nada* judgment, see Marko Milanovic, 'European Court Decides Nada v. Switzerland' (EJIL: Talk!, 23 February 2012) <https://www.ejiltalk.org/european-court-decides-nada-v-switzerland/> accessed 20 January 2020. 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 (n 1). As previously mentioned 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 Milanovic (n 24) 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

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.[81] As Kube convincingly demonstrates there is more case law to support this proposition.[82] 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 programs) under a human rights clause in the EU-Lebanon Association Agreement following Lebanon's fundamental rights violations.[83] 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 fundamental rights in a third country.[84] Finally, in this context, mention should be made to the *Zaoui* case involving an action for damages for the loss of a family member killed by Hamas.[85] According to the applicant the EU was responsible because of its funding of education in Palestinian territory which allegedly incited hatred and thus led to the attack.

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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 Linos-Alexandre Sicilianos, 'The European Court of Human Rights Facing the Security Council: Towards Systemic Harmonization' (2017) 66 International and Comparative Law Quarterly 783 at 793.

81 Ward (n 54) 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'. Kube (n 54) 34. In Case C-200/13 P *Council of the European Union v Bank Saderat Iran* 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* EU:T:2013:59, paras 34-44; Case C-176/13 P *Council of the European Union v Bank Mellat* EU:C:2016:96, para 49; Case C-130/10 *European Parliament v Council of the European Union* EU:C:2012:472, para 83.

82 Kube (n 54) 34-35.

83 Case C-581/11 P *Mugraby v Council of the European Union* EU:C:2012:466.

84 Ibid para 81; Bartels (n 4) 1076; Kube (n 54) 35.

85 Case C-288/03 P *Zaoui and Others v Commission* EU:C:2004:633.

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.[86]

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.[87] According to the Regulation, in performing its tasks, which, *inter alia*, expressly include training[88] and co-ordination of border management activities on the territory of third states,[89] 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'.[90] More interestingly for present purposes, the Commission's Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy measures[91] lend further support to the

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86 Ibid paras 3, 13-15; Bartels (n 4) 1076; Kube (n 54) 35.

87 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 [2016] OJ L251/1.

88 Ibid art 36(7).

89 Ibid art 54(1) – (3).

90 Ibid art 34(1). One could argue that the text of the Regulation itself forms the basis for the extraterritorial applicability of the Charter. However, this argument is misguided to the extent that it does not take into account the *Fransson* judgment (see above n 71). To the extent that the Regulation envisages that the European Border and Coastal Guard may operate outside the territory of the EU in accordance with EU law, this triggers the applicability of the Charter since as per the *Frannson* judgment, the applicability of EU law entails the applicability of the Fundamental Rights guaranteed by the Charter. See also Violeta Moreno-Lax, *Accessing Asylum In Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017) 298.

91 European Commission, 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy measures' (DG Trade, 2 July 2015) <https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf> accessed 20 January 2020.

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.[92]

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...[93]

In this context, it is also worthwhile noting that the Guidelines explicitly provide that '[r]espect 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'.[94]

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 Article 51(1), thereby highlighting the continuing relevance of the extraterritoriality model established by Moreno-Lax and Costello in 2014. Whether or not the EU institutions 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.

V. Conclusion

The *Front Polisario* saga before the CJEU has brought to the forefront the question of whether the EU is bound by the Charter of Fundamental Rights when it concludes trade agreements with third states that may affect the enjoyment of fundamental rights abroad. In turn, this question is closely

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92 Ibid 2 (Emphasis added).

93 De Schutter (n 79) 2.

94 European Commission Guidelines (n 90) 5 (Emphasis in the original).

linked to the broader (and still nebulous) question of the extraterritorial application of the Charter. In this light, the article revisited the question of the extraterritoriality of the Charter by taking stock of recent developments, with a view to ascertaining the current state of the law.

The article argued that the attempt to import into the fundamental rights regime of the Charter the extraterritoriality standard developed by the ECtHR is misguided on a number of grounds. It was shown that the ECtHR developed the effective control standard primarily in the context of cases involving extraterritorial conduct. By way of contrast, the factual scenario of the *Front Polisario* cases (involving the conclusion of trade agreements with third states that may have an adverse effect on the enjoyment of fundamental rights by distant strangers) does not concern extraterritorial conduct *per se*; rather, it pertains to taking decisions that may have extraterritorial effects. The article further argued that the argument in favour of "importing" the ECtHR's extraterritoriality standard finds no textual support in Article 51 of the Charter – which expressly purports to define the Charter's field of application.

Next, the article addressed the claim to the effect that the equivalence of meaning and scope between the rights of the Charter and the corresponding rights under the ECHR, provided for under Article 52(3) of the Charter, entails that the jurisdictional limit enshrined in Article 1 ECHR is applicable in the scheme of the Charter. It was shown that such a reading of Article 52(3) of the Charter is erroneous to the extent that it conflates the issue of applicability of the Charter with that of the interpretation of the scope and content of the obligations enshrined therein and that it, ultimately, undermines the Charter's aspiration to contribute to an autonomous EU fundamental rights regime.

Against this background, the article continued by clarifying that the Charter's scope of application is essentially material; once a situation is covered by an EU competence, the applicability of the Charter is triggered. Next, the article focused on the question of the extraterritorial applicability of the Charter. The main argument advanced was that a textual analysis of Article 51 of the Charter, in conjunction with the existing case law on the extraterritorial application of the Charter as well as different EU instruments, support the conclusion that territorial considerations are

immaterial in the context of determining the Charter's applicability. In this context, what seems to matter is whether the situation in question is covered by an EU competence.