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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

I. INTRODUCTION

Is the EU bound by human rights obligations towards individuals outside the territory of its Member States when it concludes trade agreements with third

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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

\(^2\) 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.


More particularly, the judgement of the General Court (GC)\(^5\), as well as the Opinion of Advocate General Wathelet\(^6\), 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 Western Sahara. According to the applicant the decision breached EU and international law.\(^{10}\) The General Court (GC) ruled that since the


\(^{7}\) 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 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.
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.\textsuperscript{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.\textsuperscript{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 \textit{in casu}.\textsuperscript{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\textsuperscript{14} nor the Liberalization Agreement were intended to cover the territory of Western Sahara, thus quashing the GC's judgment.\textsuperscript{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

\textsuperscript{11} Ibid paras 228, 241.
\textsuperscript{12} Ibid paras 242-248.
\textsuperscript{13} Opinion of AG Wathelet (n 7) paras 270-272.
\textsuperscript{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').
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'.

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’. 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. 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 applicability of the Charter. 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

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16 Moreno-Lax and Costello (n 4) 1658.
18 Ibid 17 and fn 33.
19 Case C-638/16 PPU X and X v Belgium Case, Opinion of AG Mengozzi, EU:C:2017:173, para 95.
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.*

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.

2. **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. In a similar vein, the Charter's applicability has not been conditioned upon the threshold criterion of jurisdiction.

20 Ibid.
21 Moreno-Lax and Costello (n 4) 1664. For analysis of arts 52 and 355 TFEU, see Kochenov (n 1).
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
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.\textsuperscript{33} Jurisdiction in the context of human rights law should be distinguished from the homonymous concept under general international law.\textsuperscript{34} 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'\textsuperscript{35}, 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 individuals'.\textsuperscript{36} In other words, jurisdiction in the context of human rights treaties is a tool defining the scope of such treaties\textsuperscript{37}, namely a threshold

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\item Besson (n 25) 59. (Emphasis added). See also \textit{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'.
\item 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), \textit{Global Justice, State Duties: The
criterion that needs to be met by a state in relation to an individual in order for human rights obligations to arise. 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. The different meaning of "jurisdiction" under public international 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. 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

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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 32/63: "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).

30 Raible (n 23) 324; Den Heijer and Lawson (n 27) 64-165.
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 Charter33, 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 General applied by analogy the ECtHR's effective control standard and concluded that the Charter would apply 'where an activity is governed by EU

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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'.

law and carried out under the effective control of the EU and/or its Member States but outside their territory'.

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. 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'. 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. 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]

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).


37 Ryngaert (n 2).

38 Bartels (n 4) 1077.
territory, [...] such that [state's] responsibility under the Convention could be engaged'.

Conversely, in *Ben El Mabi*, the Court found inadmissible an application against Denmark for permitting the publication of allegedly offensive caricatures of the Prophet Muhammad since there was no juridisdictional link between the applicants – a Moroccan national resident in Morocco and two Moroccan associations based and operating in Morocco – and Denmark. Thus, according to the Court in *Ben El Mabi*, 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*. 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. 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 considerable difficulties for national courts which have to try to follow the jurisprudence of the European Court.

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

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

41 Bartels (n 4) 1077.


43 Lord Rodger’s judgment in *Al-Skeini and Others v. Secretary of State for Defence* [2007] UKHL26, paras 65 and 67.
jurisdiction as a threshold criterion for the applicability of the Charter. 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 jurisdicational 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. 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 (namely, its field of application as provided for under Article 51 of the Charter) with that of the scope and content of the obligations enshrined therein (namely, the scope and interpretation of the Charter rights as provided for under Article 52 of the Charter).

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'. As the text of Article 52 and the Explanations thereto make clear, the rights of the ECHR and the pertinent case law of the

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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.

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.
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.\(^5\) 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.\(^6\) 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.\(^7\) 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,\(^8\) but it would also undermine the Charter's aspiration to contribute to an autonomous EU fundamental rights regime.\(^9\)

3. 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(i) of the Charter

\(^{50}\) 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.

\(^{54}\) 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.
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'. The wording of Article 51(1) of the Charter suggests that the application of the Charter has been defined exclusively rationae materiae. Since the Charter applies to acts of the institutions of the Union and to national acts implementing EU law, the crux of the matter is whether a situation is covered by an EU competence.

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'. 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

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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.


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.

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. 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.

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. Upon closer inspection

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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 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).

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.  

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. By ensuring compliance with the conditionalities contained in the 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.

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Tridimas (n 56) 388-389.


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.
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 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.

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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.\(^{68}\)

**4. 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*:

\[\text{[S]ituations cannot exist which are covered [...] by European Union law without those fundamental rights being applicable. The applicability of European Union law entails the applicability of the fundamental rights guaranteed by the Charter.}^{71}\]

This construction suggests that territorial criteria bear no relevance in the context of determining the applicability of the Charter.\(^ {72}\) In this light, the model propounded by Moreno-Lax and Costello in 2014 still holds great explanatory force. According to them:

\[\text{The scope of application ratione loci of the Charter is [...] to be determined by reference to the general scope of application of EU law, following autonomous requirements. The Charter applies to a particular situation once EU law governs it. There is no additional criterion, of a territorial character or otherwise, that needs to be fulfilled in this context.}^{73}\]

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\textsuperscript{74} submitted at the Belgian Embassy in Lebanon by a Syrian family living in Aleppo.\textsuperscript{75} According to Mengozzi, Article 51(1) implies that the fundamental rights recognised by the Charter

are guaranteed [...] \textit{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\textsuperscript{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 \textit{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, \textquote{[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}.\textsuperscript{77} 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 hand falls within the scope of EU law.

The GC’s judgment in \textit{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.\textsuperscript{78} In other words, according to the GC, the Union institutions bear

\textsuperscript{75} Case C-638/16 PPU \textit{X and X v Belgium} (n 45) para 19.
\textsuperscript{76} Opinion of AG Mengozzi (n 19) paras 89, 92. (Emphasis in the original).
\textsuperscript{77} Case C-638/16 PPU \textit{X and X v Belgium} (n 45) para 45.
\textsuperscript{78} Case T-512/12 \textit{Front Polisario} (n 6) para 228.
extraterritorial obligations under the Charter once their actions may entail infringements of fundamental rights abroad.\textsuperscript{79}

The case law of the CJEU regarding targeted sanctions against individuals located abroad\textsuperscript{80} 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


\textsuperscript{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 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 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.
been affected by EU action.\(^8\) As Kube convincingly demonstrates there is more case law to support this proposition.\(^8\) 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.\(^8\) 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.\(^8\) 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.\(^8\) 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. 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.\(^8\)

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 training88 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 measures91 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.92

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88 Ibid art 36(7).
89 Ibid art 34(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 *Fransson* 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.
92 Ibid 2 (Emphasis added).
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(i), 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.

5. 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 linked to the broader (and still nebulous) question of the extraterritoriality 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

93 De Schutter (n 79) 2.
94 European Commission Guidelines (n 90) 5 (Emphasis in the original).
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.