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Beyond extraterritoriality: towards an EU obligation to ensure human rights abroad?

Reflections in light of the *Front Polisario* saga

Sandra Hummelbrunner

CLEER PAPERS **2019/2**

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

BEYOND EXTRATERRITORIALITY: TOWARDS AN EU OBLIGATION TO ENSURE HUMAN RIGHTS ABROAD?
REFLECTIONS IN LIGHT OF THE *FRONT POLISARIO* SAGA

SANDRA HUMMELBRUNNER

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

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

CONTENTS

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I. INTRODUCTION

Can the European Union (hereafter, EU or Union), under EU law, be held responsible for violations of human rights occurring outside 'its'[1] territory? And what happens if one were to extend the equation to include human rights violations perpetrated by third States, which the EU indirectly 'encourages' by, say, importing products the fabrication of which entailed human rights violations? To claim that the EU should be held responsible for such behaviour might appear farfetched at first glance, and is disputed. *Cannizzaro,* for instance, has argued that the 'the EU can hardly be held responsible for violations of human rights occurring beyond its borders as an indirect consequence of conduct performed by its Institutions within its boundaries'.[2] The EU General Court, by contrast, appeared to have no qualms to establish an obligation of the EU institutions to examine, before concluding an export facilitation agreement, all the relevant facts in order to ensure that the production of goods for export does not entail infringements of human rights enshrined in the Charter of Fundamental Rights of the European Union[3] (hereafter, EUChFR or Charter).[4] Yet, it failed to substantiate this obligation in a conclusive manner.

That said, it is nevertheless possible to identify several provisions of EU law which could be invoked to that end: The first is Article 51(1) EUChFR, which does not specify whether the EU's duty *to promote the application* of the rights and principles that are enshrined in the EUChFR ends at its borders. It might thus well be the case that the EUChFR curtails the EU's room of manoeuvre in the conduct of its international relations. Apart from that, according to Article 3(5) Treaty on European Union[5] (hereafter, TEU), the Union, in its relations with the wider world, shall contribute to the protection of human rights. Similarly, Article 21(1) TEU establishes that the EU's action on the international scene shall be guided by and seeks to advance the principles which have inspired its own creation, including the universality and indivisibility of human rights. Pursuant to Article 21(2)(b) TEU, the EU shall define and pursue common policies and actions in order consolidate and support human rights. Moreover, the Union shall respect these principles and objectives in the development and implementation of the different areas of the Union's external action and of the external aspects of its other policies (Article 21(3) TEU). Another avenue could be the "right" to good administrative behaviour, on the basis of which the

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[1] Of course, strictly speaking, the EU does not have sovereign territory. When reference is made to the "EU's territory" or the like, it is referred to the territory of the Member States to which the EU Treaties apply in accordance with Article 52 TEU and Article 355 Treaty on the Functioning of the European Union (hereafter, TFEU) *OJ* [2016] C 202/47, 7.6.2016 [consolidated version].

[2] E. Cannizzaro, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels', 25 *European Journal of International Law* 2014, at 1097.

[3] *OJ* [2016] C 202/389, 7.6.2016.

[4] GC, Case T-512/12, *Front Polisario* v. *Council* [2015] ECLI:EU:T:2015:953, para. 228.

[5] *OJ* [2016] C 202/13, 7.6.2016 [consolidated version].

European Ombudsman has established a "duty" of the EU institutions to conduct a human rights impact assessment before concluding an international agreement with a third State.[6]

The aforementioned provisions and rights[7] are either part of the EUChFR or the TEU, and therefore form part of the Union's constitutional framework.[8] Thus, if an obligation of the Union to ensure that its actions do not facilitate human rights violations abroad could be established on one or several of these provisions or rights, the Union would have to make sure that the international agreements it concludes comply with that obligation. This is the case because, according to settled case law of the Court of Justice, the provisions of an international agreement entered into by the Union under Article 218 TFEU are, by virtue of Article 216(2) TFEU, binding upon the Union institutions and its Member States, and therefore form an integral part of the EU legal system as from the coming into force of that agreement.[9] This also implies that the Court of Justice can review the EU act approving the conclusion of an international agreement in light of such a Union obligation,[10] either *ex ante* under Article 218(11) TFEU, or *ex post* in the context of an action for annulment (Article 263 TFEU) or a preliminary reference procedure (Article 267 TFEU). Insofar, the question whether the Union is under an obligation to ensure that its actions do not facilitate human rights violations abroad has constitutional significance that exceeds the mere question of existence of such an obligation. The constitutional implications that are raised in this context not only affect the Union, but also the Member States, particularly when an obligation to ensure that Union action does not facilitate human rights violations abroad can be based on the EUChFR, seeing that they are obliged to observe the rights and principles established in the Charter when implementing EU law (Article 51(1) EUChFR).[11]

The aim of the paper is to evaluate whether aforementioned provisions and rights of the Unions' constitutional framework are more than a mere statement about the EU's self-conception and self-projection as a promoter of human rights around the globe, in that they oblige the EU to ensure that its actions do not facilitate human rights violations abroad. If so, the substance, extent and scope of such an EU "obligation to ensure human rights abroad" shall be assessed. For these purposes, the paper includes insights from public international law, in particular international human rights law and the general law of

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[6] European Ombudsman, Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement (hereafter, Decision EU-Vietnam Agreement), 26 February 2016, available at <https://www.ombudsman.europa.eu/de/decision/en/64308#_ftnref3>.

[7] Note that the right of good administration goes beyond Article 41 EUChFR, and thus only partly belongs to the EU's constitutional framework. See below at IV.B.3.

[8] To this effect see ECJ, Opinion 1/17, *CETA* [2019] ECLI:EU:C:2019:341, paras. 165-167.

[9] See ECJ, Opinion 1/15, *EU-Canada PNR Agreement* [2016] ECLI:EU:C:2016:656 para. 67 (with further references); ECJ, Opinion 2/13, *Accession of the European Union to the ECHR* [ECLI:EU:C:2017:592] para. 180 (with further references).

[10] To this effect see ECJ, Case C-266/16, *Western Sahara Campaign UK* [2018] ECLI:EU:C:2018:118, paras. 42-51.

[11] Nevertheless, the focus of the paper is on the Union's obligation to ensure that human rights are not violated abroad.

international responsibility, that shall complement the analysis of the relevant provisions under EU law. The assessment starts with outlining the research subject, and delimiting it from the issue of complicity (Section II.). This is followed by an evaluation of whether an obligation of the Union to ensure that its action does not facilitate human rights violations abroad can be established via an extraterritorial application of the EUChFR (Section III.). Section IV. is dedicated to the question of whether it is possible to establish such an obligation as a 'territorial' due diligence obligation, based on either the EUChFR, Article 21 TEU, or the right to good administration. In this context, the paper also addresses the legitimacy of such a 'due diligence obligation to ensure human rights abroad' (Subsection IV.D.). Section V. contains final conclusions.

II. EXTRATERRITORIALITY AND BEYOND: THE OBJECT OF RESEARCH

A. **Indirect encouragement of human rights violations abroad**

The extraterritoriality or extraterritorial applicability of EU human rights standards refers to the applicability of such standards to individuals or groups of individuals situated outside the territorial confines of the EU, i.e., outside the Member States' territory.[12] With that said, it should be noted that the object of research of this paper is not restricted to the extraterritorial applicability of the EUChFR or other EU law obligations concerning compliance with human rights, but goes beyond that in that it asks whether there are obligations under EU law to ensure that EU action does not have a negative impact on the enjoyment of human rights abroad. While these issues are interrelated, the focus of the paper is on scenarios in which conduct of the EU has negative effects on the human rights situation in the territory of a third country, for instance in that it indirectly "encourages" human rights violations by that third country. That may sound a bit farfetched at first, but became a salient issue in *Front Polisario* v. *Council*[13] and related cases[14], which concerned trade facilitation agreements that the EU has concluded with the Kingdom of Morocco, and which have been applied[15] to the parts of Western Sahara that are occupied by Morocco. Besides raising issues of self-determination and non-recognition,[16] the application of these agreements

[12] For a similar, yet broader definition applying to international and European human rights treaties more generally, see S. Besson, 'The Extraterritoriality of the European Convention of Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to', 25 *Leiden Journal of International Law* 2012, at 858.

[13] *Front Polisario* v. *Council, supra* note 4.

[14] ECJ, Case C-104/16 P, *Council* v. *Front Polisario* [2016] ECLI:EU:C:2016:973; *Western Sahara Campaign UK, supra* note 10; *Front Polisario* v. *Council*, *supra* note 4.

[15] *Front Polisario* v. *Council, supra* note 4, *Council* v. *Front Polisario, supra* note 14, and *Western Sahara Campaign UK, supra* note 10, raised the question of applicability of several EU-Morocco trade facilitation agreements to Western Sahara. Their *de facto* application to Western Sahara was not contested.

[16] On these issues see S. Hummelbrunner and A.-C. Prickartz, 'It's not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European

to Western Sahara is also problematic because it facilitates the import of products from Western Sahara that will often be obtained under violations of the fundamental rights of the Sahrawi people. In doing so, one could say that their application to Western Sahara indirectly encourages such human rights violations.[17] This was also one of the claims that the Front Polisario, the national liberation movement fighting for the liberation of the Sahrawi people, made in *Front Polisario* v. *Council,* in which it sought the annulment of the Council decision approving the conclusion of the agreement on the liberalisation of trade in agricultural and fishery products between the EU and Morocco.[18] Interestingly, the EU General Court basically followed this reasoning:

> In particular, as regards an agreement to facilitate, inter alia, the export to the European Union of various products originating in the territory concerned, the Council must examine, carefully and impartially, all the relevant facts in order to ensure that the production of goods for export [does not entail] infringements of fundamental rights, including, in particular, the rights to human dignity, to life and to the integrity of the person (Articles 1 to 3 of the Charter of Fundamental Rights), the prohibition of slavery and forced labour (Article 5 of the Charter of Fundamental Rights), the freedom to choose an occupation and right to engage in work (Article 15 of the Charter of Fundamental Rights), the freedom to conduct a business (Article 16 of the Charter of Fundamental Rights), the right to property (Article 17 of the Charter of Fundamental Rights), the right to fair and just working conditions and the prohibition of child labour and protection of young people at work (Articles 31 and 32 of the Charter of Fundamental Rights).[19]

The interesting thing about this finding is that the General Court appeared *to assume* the EUChFR's applicability to the Saharawi people in Western Sahara, however without further substantiating this in a conclusive manner. Given that the Court of Justice set aside the General Court's ruling on appeal, the precedential value of the General Court's ruling is somewhat limited.[20] Yet, since the Court of Justice never dealt with the merits of the case, dismissing

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Union', 32 *Utrecht Journal of International and European Law* 2016, 19–40; A.-C. Prickartz, 'The European Union's Common Fisheries Policy, the Right to Self-determination and Permanent Sovereignty over Natural Resources', 35 *The International Journal of Marine and Coastal Law* 2020 (forthcoming); E. Kassoti, 'The Legality under International Law of the EU's Trade Agreements covering Occupied Territories: A Comparative Study of Palestine and Western Sahara', *CLEER Papers* 2017/3; C. Ryngaert and R. Fransen, 'EU extraterritorial obligations with respect to trade with occupied territories: Reflections after the case of *Front Polisario* before EU courts', 2 Europe and the World: A law review 2018, 20.

[17] See also *Front Polisario* v. *Council, supra* note 4, para. 231; AG Wathelet, Opinion to Case C-104/16 P, *Council* v. *Front Polisario* [2016] ECLI:EU:C:2016:677, para. 268.

[18] Action brought on 19 November 2012, Case T-512/12, *Front Polisario* v. *Council, OJ* [2013] C 55/14, 23.2.2013.

[19] *Front Polisario* v. *Council, supra* note 4, para. 228.

[20] *Council* v. *Front Polisario, supra* note 14. For a discussion of that case, see: A.-C. Prickartz and S. Hummelbrunner, 'EU-Morocco Trade Relations Do Not Legally Affect Western Sahara - Case C-104/16 P Council v Front Polisario' (European Law Blog, 5 January 2017) available at <http://europeanlawblog.eu/2017/01/05/eu-morocco-trade-relations-do-not-legally-affect-western-sahara-case-c-10416-p-council-v-front-polisario/>; 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)' 111 *American Journal of International Law* (2017) 731-738.

Front Polisario's action as inadmissible, the question whether the EUChFR or other EU law provisions prohibit EU action that negatively affects the human rights situation in third countries is still open.

B. **Delimitation from the issue of complicity**

Another legal issue that arises in view of the object of research, yet shall not be evaluated in the remainder of this paper, is complicity in human rights violations perpetrated by third States by aiding or assisting a third State in the commission of human rights violations.[21] Under the general law of international responsibility, a State or international organisation incurs international responsibility for an internationally wrongful act of another State (or international organisation) for providing aid or assistance in committing the act.[22] According to the International Law Commission (hereafter, ILC), this is the case if: it is aware of the circumstances making the conduct of the other State internationally wrongful; the aid or assistance is carried out with a view to facilitating the commission of the wrongful act, and actually facilitates it; and the wrongful act must be such that it would have been wrongful had it been committed by the complicit State itself.[23] Arguably under the same circumstances,[24] a State or international organisation incurs international responsibility for rendering aid or assistance *in maintaining* situations created by a serious breach of a *ius*

[21] Article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts (hereafter, ARSIWA), UNGA Resolution 56/83 (12 December 2001); Article 14 of the Draft articles on the responsibility of international organizations (hereafter, DARIO), Yearbook of the International Law Commission, vol. II, Part Two (2011), 26. Art 58 DARIO concerns the situation where a State renders aid or assistance in the commission of an internationally wrongful act by an international organisation.

[22] Note that the general law of international responsibility is part of customary international law. The ARSIWA and the DARIO intend to codify and progressively develop the law of international responsibility. Since the ILC, in respect of several articles of the DARIO, could only rely on limited practice, the DARIO are more about progressively developing these rules than codifying them. See: ILC, 'Commentaries on the Draft articles on Responsibility of States for Internationally Wrongful Acts', Yearbook of the International Law Commission, vol. II, Part Two (2001), at 31; ILC, 'Commentaries on the draft articles on the responsibility of international organizations, with commentaries', Yearbook of the International Law Commission, vol. II, Part Two (2011), at 46f.

[23] See Article 16 ARSIWA, *supra* note 21, and Article 14 DARIO, *supra* note 21. See also ILC, 'Commentaries ARSIWA', *supra* note 22, at 65-67; ILC, 'Commentaries DARIO', *supra* note 22, at 66. For an in-depth discussion of this issue see V. Lanovoy, 'Complicity in an internationally wrongful act' in A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: Cambridge University Press 2016) 134.

[24] See ILC, 'Commentaries ARSIWA', *supra* note 22, at 115: "As to the elements of 'aid or assistance', article 41 is to be read in connection with article 16"; ILC, 'Commentaries DARIO', *supra* note 22, at 83. See, however, V. Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Oxford: Hart Publishing 2016), at 115, who argues that under Article 41(2) ARSIWA and Article 42(2) DARIO there is a presumption that 'the putative aiding or assisting actor is imputed with knowledge and/or intention that its aid or assistance will contribute to maintaining the situation resulting from a serious breach of *jus cogens*. Reading into the *Wall* Advisory Opinion, the same rationale could extend to the prohibition of complicity in respect of violations of *erga omnes* obligations'.

cogens provision or an *erga omnes* obligation that was committed by another State or international organisation.[25]

The issue of indirect facilitation of human rights violations abroad begs the question of whether and under which circumstances such facilitation constitutes aid or assistance in the commission of an internationally wrongful act of another State. However, it might often be the case that actions of a State or international organisation that *indirectly* encourage or facilitate human rights violations of another State do not meet the threshold of complicity. In particular, even though there are no requirements as to the nature and forms of complicit actions (or omissions), the ILC has pointed out that the aid or assistance must be 'clearly linked' to the wrongful act,[26] thus excluding actions (omissions) which are too remote from the principal wrongful act.[27] Moreover, according to the ILC, the aid or assistance given must significantly contribute to the wrongful act of the other State.[28] Although the exact contours of both requirements are not entirely clear,[29] and each case needs to be considered individually, it seems likely that many instances of indirect facilitation of human rights violations, such as, e.g., the situation underlying *Front Polisario* v. *Council,* would be considered as too remote or insignificant to trigger international responsibility. Apart from that, in its interpretation of the criterion of aiding or assisting with a view to facilitating the commission of the wrongful act, the ILC seems to proceed from a purpose-based intent requirement, when it states that a 'State is not responsible for aid or assistance […] unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct'.[30] It is not certain whether this standard adds much to the requirement of knowledge of the circumstances of the principal wrongful act, other than requiring a deliberate decision to provide aid or assistance in view of this knowledge, or if it actually presupposes an intent to collaborate in the commission of the internationally wrongful act.[31] If the latter applies, international responsibility for aiding or assisting in the commission of an international wrongful act would rarely be engaged, seeing that in practice it will be

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[25] With regard to a serious breach of a *ius cogens* provision see: Articles 40-41 (*supra* note 21); Articles 41-42 DARIO (*supra* note 21). Note, however, that the ILC does not regard Article 42 DARIO to be customary international law yet. ILC, 'Commentaries DARIO' *supra* note 22, at 83. With regard to a serious breach of an *erga omnes* obligation see ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, I.C.J. Reports 2004, at paras. 155-159.

[26] ILC, 'Commentaries ARSIWA', *supra* note 22, at 66.

[27] V. Lanovoy, *supra* note 24, at 94f; C. Chinkin, *Third Parties in International Law* (Oxford: Clarendon Press 1993) 297; V. Lowe, 'Responsibility for the Conduct of Other States', 101 *Japanese Journal of International Law and Diplomacy* 2002, at 10.

[28] ILC, 'Commentaries ARSIWA', *supra* note 22, at 66.

[29] See V. Lanovoy, *supra* note 24, 94-99.

[30] ILC, 'Commentaries ARSIWA', *supra* note 22, at 66.

[31] For a detailed discussion see V. Lanovoy, *supra* note 24, at 102f and 227-234. It appears, however, that the "intention to facilitate" does not require that the aiding or assisting State or international organisation also shares the specific intent of the principal perpetrator. See N.H.B. Jørgensen, 'Complicity in Genocide and the Duality of Responsibility', in B. Swart, *et al.* (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press 2011), at 266.

hard to prove such intent.[32] Another issue which potentially limits the scope of complicity to a considerable extent is the opposability requirement, i.e., the requirement that the act would be internationally wrongful if committed by the complicit State or international organisation itself. If it follows from this requirement that the complicit State or international organisation has to be bound by the *same* obligations as the "principal" State, and not only to similar ("parallel") obligations, for instance under a different legal instrument or under customary international law, many instances of aid and assistance would not trigger international responsibility.[33] This particularly applies with regard to international organisations seeing that there are many cases in which they are not bound by the same Treaty obligations as States, but may be bound by corresponding customary international law.[34] This would imply that international organisations – including the EU – could often evade international responsibility for aiding or assisting in, e.g., the commission of human rights violations of a State, by relying on the argument that, technically speaking, they are not bound by the legal instrument that is violated by the principal wrongdoer.[35]

In light of these limits on the law of international responsibility with regard to complicity, it appears all the more appropriate to explore whether the European Union could be held responsible for EU acts that indirectly facilitate the commission of human rights violations by a third State under EU law. The general law on international responsibility does not exclude substantive rules, which prohibit States or international organisations from providing aid or assistance in the commission of specific wrongful acts.[36] Neither does it bar substantive rules that establish other standards as to when aid or assistance prompts international responsibility.[37] In particular, they may lay down whether some degree of fault, culpability, negligence or want of due diligence are required to trigger international responsibility.[38] With that said, the subsequent sections of the paper address whether EU law does indeed establish such rules.

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[32] V. Lanovoy, *supra* note 24, at 101; B. Graefrath, 'Complicity in the Law of International Responsibility' 2 *Revue Belge de Droit International* 1996, at 375.

[33] V. Lanovoy, *supra* note 24, at 104; H.P. Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press 2011) 258-265.

[34] V. Lanovoy, 'Complicity', in *Max Planck Encyclopedia of Public International Law* (December 2015), para. 35.

[35] V. Lanovoy, *supra* note 24, at 249f; J. Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press 2013), at 410.

[36] See ILC, 'Commentaries ARSIWA', *supra* note 22, at 66. An example in that regard is the obligation not be complicit in genocide under Article III(e) of the Convention on the Prevention and Punishment of the Crime of Genocide 1948 (hereafter, Genocide Convention), 78 UNTS p. 277.

[37] V. Lanovoy, *supra* note 24, at 6.

[38] See ILC, 'Commentaries ARSIWA', *supra* note 22, at 32. For instance, with regard to Article III(e) of the Genocide Convention, which prohibits complicity in genocide, the International Court of Justice found that 'there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent *(dolus specialis)* of the principal perpetrator'. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, at para. 421.

III. THE EXTRATERRITORIALITY OF THE EU CHARTER OF FUNDAMENTAL RIGHTS

The issue that has been raised in the *Front Polisario* case, or more generally with regard to the external effects of EU action on the enjoyment of human rights in third countries, appears to be whether the human rights obligations resting on the EU are extraterritorial in scope or could be given extraterritorial application.[39] One could, for instance, interpret the General Court's finding in *Front Polisario* v. *Council* as a confirmation of the extraterritorial scope of the EUChFR.

A. **No provision on the Charter's territorial scope of application**

The EUChFR does not contain a provision on the territorial scope of the Charter. Nor does it – unlike many other international and European human rights treaties[40] – make its applicability conditional on the threshold criterion of jurisdiction. Instead, Article 51 EUChFR on the 'field of application' of the Charter simply establishes that

> 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 powers and tasks as defined in the Treaties.

In light of this provision, Moreno-Lax and Costello contended that the 'Charter's silence on matters of jurisdiction, in particular territorial conceptions of jurisdiction, appears to reflect an assumption that EU fundamental rights obligations simply track all EU activities, as well as Member States action when implementing EU law'.[41] It is, however, not self-evident that the non-use of jurisdiction as a determinant for the EUChFR's scope of application is the result of a negative attitude towards or even rejection of the territorial conception underlying human rights treaties, which rely on jurisdiction as a threshold criterion for their ap-

[39] C. Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations', 20 *International Community Law Review* 2018, at 375.

[40] See, for instance, Article 1 European Charter of Human Rights 1950 (hereafter, ECHR), 213 UNTS p. 221: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.

[41] V. Moreno-Lax and C. Costello, 'The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model', in S. Peers et al. (eds.), *Commentary on the EU Charter of Fundamental Rights* (Oxford: Hart Publishing 2014) 1657-1683, at 1658.

plicability. There is no indication in the *travaux préparatoires* or the Explanations to the EUChFR that would point in that direction.[42]

Apart from that, it is possible to think of a variety of reasons why the drafters of the EUChFR might have decided against applying jurisdiction as determinant for the Charter's scope of application. One might be its association with the notion of sovereignty,[43] which has been defined as 'the power that states do have at any given moment of development of the international legal system'.[44] The term jurisdiction is thus charged with being associated to statehood, even though there seems nothing to suggest that the notion of jurisdiction could not be applied to the European Union – or any other international organisation, for that matter.[45] After all, the European Union is entitled to prescribe laws, adjudicate on matters under its purview, and, to a limited extent, even enforce its laws, therefore being entitled to exercise all three forms of jurisdiction, namely prescriptive, adjudicative and enforcement jurisdiction.[46] That said, another reason speaking against inserting a jurisdiction clause into the EUChFR might have been the fact that the concept of jurisdiction is both ambiguous and vague. Even though the concept of jurisdiction under general international law, which has been assumed beforehand and which is about the *right* or *entitlement* of an entity to exercise powers,[47] has been applied to jurisdiction clauses in human rights treaties, it appears that the concept of jurisdiction underlying such clauses is actually a different one.[48] For instance, even though the European Court of Human Rights (hereafter, ECtHR) has associated Article 1 of the European Convention on Human Rights (hereafter, ECHR), which makes the application of the rights and freedoms under the ECHR dependent on the jurisdiction of the contracting States, with the concept of jurisdiction under general international law,[49] the decisive factor for the ECHR's application seems to be some degree of factual power, authority or control over territory or people.[50] Yet, there is a difference between being entitled to exercise power, authority or control over people or territory under international law, and having or exercising actual power, authority or control over them. Whether or not the latter is exercised within the limits of jurisdiction under international law does and should not play a role for the application of human rights. Moreover, even

[42] See 'Explanations relating to the Charter of Fundamental Rights' (hereafter, Explanations to the EUChFR), OJ [2007] C 303/17, 14.12.2007.

[43] See C. Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2nd edition 2015), at 5.

[44] A.J. Colangelo, 'Spatial Legality', 107 *Northwestern University Law Review* 2012, at 106.

[45] S. Besson, *supra* note 12, at 865; F.A. Mann, 'The Doctrine of Jurisdiction in International Law', 111 *Recueil des Cours* 964, at 9.

[46] Following the categorisation of F.A. Mann, *supra* note 45, 13.

[47] F.A. Mann, *supra* note 45, 9-13. Another meaning of the term "jurisdiction", that is not discussed in the remainder of this paper, is the competence of a court to rule on the correct application and interpretation of law.

[48] See M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press, 2011), at pp. 21-41;

[49] See for instance ECtHR, *Banković and Others* v. *Belgium and Others,* Appl. No. 52207/99, 12 December 2001, paras. 59-61.

[50] M. Milanovic, *supra* note 48, at 39-41, 127-207; S. Besson, *supra* note 12, at 872-874.

when accepting that there applies a different concept of jurisdiction to human rights treaties,[51] its exact contours are not clear,[52] and applying it to the EU-ChFR could have caused further difficulties in that regard, as it may well be asked whether and under which circumstances the European Union exercises actual power, authority and control over people or territory *within the EU*. After all, the European Union exercises mostly legislative powers, whereas implementation and enforcement of EU law are left to the Member States in the majority of cases. Certainly, the Member States are under an obligation to implement and enforce EU law, and the Union also has the means to enforce this obligation, but the question is whether this amounts to actual power, authority or control over people or territory on the part of the EU. In particular, it is not clear whether prescriptive power, albeit enforceable, is actually covered. In that regard, the theoretical underpinning of the concept of jurisdiction in international and European human rights law lacks substance,[53] as the literature tends to focus on instances of extraterritorial State acts that may best be described as enforcement measures, such as military occupation, extraterritorial killings, detention or torture.[54] Of course, it is possible to think of situations in which the EU exercises such power, authority or control over people or territory outside the EU. Scenarios that come to mind are, for instance, military operations under the CSDP that involve the establishment of a security zone as a means of peacebuilding,[55] or the detention of persons suspected of committing piracy in the territorial waters of a third State.[56] With respect to such operations, it is, however, noteworthy that it is not necessarily the EU that exercises power, authority or control over people or territory, but one or several Member States. Who actually is in charge, depends on the command and control structures in place, which will not always be easy to determine,[57] also because the application of the effective control standard in respect of military operations conducted by international organisations is not conclusively settled.[58]

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[51] Taking this view: M. Milanovic, *supra* note 48, at 39-41; C. Ryngaert, *Jurisdiction in International Law*, *supra* note 43, at 23-27.

[52] There is, for instance, a vast amount of literature that addresses the seemingly inconsistent ECtHR case law on the extraterritorial application of the ECHR. See, for instance, M. Milanovic, *supra* note 48, at 21-53; C. Ryngaert, 'Extraterritorial Obligations under Human Rights Law', in M. Lattimer and P. Sands (eds.), *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War* (Oxford: Hart Publishing 2018), at 275-277.

[53] Yet, see the theoretical framework established by S. Besson, *supra* note 12, at 865, in which descriptive powers are recognised as a form of jurisdiction: 'Qua de facto authority, jurisdiction consists in effective, overall and normative power or control (whether it is prescriptive, executive, or adjudicative)'.

[54] See for instance M. Milanovic, *supra* note 48, at 118-127.

[55] cf the scenario underlying ECtHR, *Pisari* v. *Moldova and Russia,* Appl. No. 42139/12, 19 October 2015.

[56] As under Article 2(3) of the Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, *OJ* [2008] L 301/33, 12.11.2008, as amended by Council Decision 2012/174/CFSP of 23 March 2012, OJ [2012] L 89/ 69, 27.3.2012.

[57] To this effect, see for instance: ECtHR, *Jaloud* v. *Netherlands,* Appl. No. 47708/08, 20 November 2014, paras. 140-152.

[58] For a detailed analysis of this issue see D. Liakopoulos, 'International responsibility of the European Union in the implementation of the Common Security and Defense Policy (CSDP)', 11 Amsterdam Law Forum 2019, 4-39.

This also raises difficulties with respect to allocating the international responsibility for internationally wrongful acts that occur in that context.[59] Furthermore, in view of the 'split of jurisdiction' between the EU and its Member States, in the sense that the former exercises mostly legislative powers, whereas implementation and enforcement of EU law are mostly left to the latter, it can also be asked whether a 'jurisdiction clause' would have been an appropriate means for determining the EUChFR's scope of application. In particular, such clause might have been difficult to square with the intention to limit the Member States' obligations under the EUChFR to situations falling under the scope of EU law.[60] In view of all of these considerations, it appears reasonable that the drafters of the EUChFR did not choose – deliberately or not – jurisdiction as threshold criterion for establishing the Charter's territorial scope of application. Moreover, they also show that there are no compelling reasons to draw any conclusions from this non-use of jurisdiction in respect of the Charter's (extra)territorial scope of application.

Similar considerations apply with regard to the fact that the EUChFR does not contain a provision that explicitly determines the Charter's territorial scope of application. This can neither be construed as a statement of approval regarding a very broad (extra)territorial scope of application, nor the opposite.[61] This also holds true with regard to the argument that in light of Article 29 of the Vienna Convention on the Law of Treaties[62] (hereafter, VCLT) a treaty without a provision on the territorial scope of application only applies to the territory of the contracting parties concerned.[63] This has been inferred from the wording of Article 29 VCLT, according to which 'a treaty is binding upon each party in respect of its entire territory', unless 'a different intention appears from the treaty or otherwise'. Yet, as the ILC commentaries show, Article 29 VCLT was not meant to create such 'presumption against extraterritoriality',[64] but was created with a view to an entirely different setting, namely treaty-making by federal States and States with overseas territories.[65] Article 29 VCLT clarifies

[59] For details on this issue see R.A. Wessel, 'Division of international responsibility between the EU and its Member States in the area of Foreign, Security and Defence Policy', 3 Amsterdam Law Forum 2011, 34-48, who also assesses the allocation of international responsibility between the Union and its Member States in light of the unclear allocation of competences between them.

[60] As noted in the Explanations to the Charter, *supra* note 42, Article 51 EUChFR 'seeks to clearly establish that the Charter applies primarily to the institutions and bodies of the Union', whereas the Member States are only bound by it 'when they act in the scope of Union law'.

[61] M. Milanovic, *supra* note 48, at 10.

[62] Vienna Convention on the Law of Treaties 1969 (hereafter, VCLT), 1155 *UNTS* p. 331.

[63] M. Milanovic, *supra* note 48, at 10, who references the Russian position on the territorial scope of application of the International Convention on the Elimination of All Forms of Racial Discrimination: ICJ, *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, CR 2008/23, at 40, available at <https://www.icj-cij.org/files/case-related/140/14713.pdf>.

[64] See ILC, 'Draft Articles on the Law of Treaties with Commentaries', Yearbook of the International Law Commission, vol. II (1996), at 214. Note that the ILC commentaries concern Article 25 of the draft Articles on the Law of Treaties, that later became Article 29 VCLT. The slight difference in the wording does not alter the findings concerning Article 29 VCLT.

[65] M. Milanovic, *supra* note 48, at 10.

that absent a provision stating otherwise, international agreements concluded by these States are presumed to apply to the whole territory over which they have a title.[66] In fact, this reading is consistent with the wording of Article 29 VCLT, since it establishes that international treaties apply to the *entire* territory of the contracting States rather than stipulating that they should apply solely to their territory.[67] Insofar, it is not warranted to draw any conclusions from the fact that the EUChFR does not contain a provision on its territorial scope.

In the same vein, Article 52 TEU and Article 355 TFEU do not offer any clues as to the territorial scope of application of the EUChFR, seeing that they are provisions in the sense of Article 29 VCLT, in that they specify the Member States' territories to which the TEU and the TFEU are (not) to apply.[68] Consequently, they should not be read as a statement as to the extraterritorial applicability of the EU Treaties. This is all the more true when considering that there is a bunch of EU law and legislation that applies extraterritorially, most prominently in the field of EU competition law.[69] That being the case, it is not possible to infer anything from Article 52 TEU or Article 355 TFEU in respect of the extraterritorial reach of the EUChFR.[70]

In summary it can be held that both the missing of a provision on the territorial scope of application as well as the non-use of a 'jurisdiction clause' do not *eo ipso* allow any conclusions as to the Charter's territorial scope of application. The same is true with regard to the provisions establishing the territorial scope of the TEU and the TFEU, i.e., Article 52 TEU and Article 355 TFEU.

B. Importing the territorial scope of The Charter from other sources?

Along with the fundamental rights traditions that are common to the national constitutions of the Member States, the ECHR has been the most important source of inspiration in the development of the EU's fundamental rights guarantees, as first initiated by the case law of the Court of Justice,[71] and later confirmed by successive Treaties, most recently by Article 6(3) TEU.[72] It is thus no surprise that also the EUChFR as the most recent cornerstone of that de-

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[66] M. Milanovic, *supra* note 48, at 10.

[67] M. Milanovic, *supra* note 48, at 10.

[68] See L. Jimena Quesada, 'Article 55', in H.-J. Blanke and S. Mangiameli (eds.), *The Treaty on European Union (TEU): A Commentary* (Berlin/Heidelberg: Springer 2013), para. 2.

[69] For a good overview of this topic see G. Monti, 'The Global Reach of EU Competition Law', in M. Cremona and J. Scott (eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: Oxford University Press 2019), at 174-188.

[70] For a similar view see M. Borowsky, 'Artikel 51', in J. Meyer (ed.), Charta der Grundrechte der Europäischen Union (Baden-Baden: Nomos, 4th edition 2014), at para. 16, who argues that Article 52 TEU and Article 355 TFEU do not exclude the extraterritorial application of the EUChFR in respect of situations with an objective link to the (territory of the) EU.

[71] See ECJ, Case 29/69, *Stauder* [1969] ECLI:EU:C:1969:57; ECJ, Case 11/70, *Internationale Handelsgesellschaft mbH* [1970] ECLI:EU:C:1970:114.

[72] See H. Kaila, 'The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States', in P. Cardonnel, *et al.* (eds.), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Oxford: Hart Publishing 2012), at 291.

velopment should be built on this common heritage.[73] In fact, one of the main aims of the EUChFR was the codification of the fundamental rights jurisprudence of the Court of Justice, which drew heavily from said sources, in particular from the ECHR and the case law of the ECtHR.[74] At the same time, the EUChFR was not meant to merely reproduce the human rights standards under existing national and international human rights instruments. With the EUChFR, the drafters also sought to 'provide added value'[75] and to contribute to the development of an autonomous EU fundamental rights doctrine.[76] Insofar, the EUChFR was seen as a promise for a stronger and more effective protection of fundamental rights in Europe, that operates alongside national constitutions and other international human rights instruments, and not just as a formal new layer of protection of fundamental rights.[77] This, however, has also increased the 'potential for discordance' between these different layers of fundamental rights protection involved.[78] This discordance of various layers of fundamental rights has practical implications for the Member States as they remain bound by their national and international human rights obligations, even when acting within the scope of EU law.[79] Article 53 EUChFR, which establishes that nothing in the EUChFR 'shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR], and by the Member States' constitutions', offers no resolution in that regard: the ruling of the Court of Justice in the *Melloni* case made clear that Article 53 EUChFR does not allow Member States to give priority to their constitutional law in case it offers greater protection of fundamental rights than EU law.[80] According to the Court, Article 53 only allows Member States to apply national fundamental rights standards in so far as 'the level of protection pro-

[73] See Recital 5 of the EUChFR's preamble which stipulates that the 'Charter reaffirms […] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights'.

[74] S. Brittain, 'The Relationship Between the EU Charter of Fundamental Rights and the European Convention on Human Rights: an Originalist Analysis', 11 *European Constitutional Law Review* (2015), at 495. See also European Council, 'Conclusions of the Presidency', Cologne 3 - 4 June 1999, 150/99 REV 1, Annex IV: 'European Council Decision on the drawing up of a draft Charter of Fundamental Rights of the European Union'.

[75] 'Record of the first meeting of the Body to draw up a draft Charter of Fundamental Rights of the European Union', 17 December 1999, CHARTE 4105/00, BODY 1, at 12f.

[76] 'Amendments submitted by the members of the Convention regarding social rights and the horizontal clauses', 16 June 2000, CHARTE 4372/00, CONVENT 39, at 431; S. Brittain, *supra* note 74, at 500 and 505.

[77] See B. de Witte, 'Article 53', in S. Peers, *et al.* (eds.), The EU Charter of Fundamental Rights: A Commentary (Oxford: Hart Publishing 2014), para. 53.04.

[78] B. de Witte, *supra* note 77, at para. 53.04.

[79] *cf* L.F.M. Besselink, 'The Member States, the National Constitutions and the Scope of the Charter', 1 *Maastricht Journal* 2001, at 68f, 73-75, 80.

[80] ECJ, Case C-399/11, *Melloni* [2013] ECLI:EU:C:2013:107, paras. 56-60. See also B. de Witte, supra note 77, paras. 53.21-53.24, 53.35.

vided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised'.[81] The same has to apply to international fundamental rights standards, including the ECHR. Thus, while Article 53 EUChFR confirms that national and international fundamental rights standards are not displaced by the EUChFR,[82] and may even be regarded as a recognition of potential conflicts between the EUChFR and other fundamental rights sources as their scope of application is not mutually exclusive,[83] it does not establish a rule of conflict.[84]

The drafters of the EUChFR were well aware of the problem of possible discordances amongst the different layers of fundamental rights protection and thus sought to find a way to create harmony between them.[85] The solutions that found their way into the Charter can be found in Article 52(3) and (4) EUChFR.[86] Paragraph 3 concerns the Charter rights that correspond to rights guaranteed by the ECHR, and stipulates that the meaning and scope of the former shall be the same as those laid down in the ECHR. According to the Explanations to the EUChFR, this shall 'ensure the necessary consistency between the Charter and the ECHR'.[87] With regard to Charter rights that are the result of constitutional traditions common to the Member States, Article 52(4) EUChFR establishes a similar, yet softer, rule of interpretation, by requiring that such Charter rights shall be interpreted in harmony with the Member States' constitutional traditions.

As is clear from the wording of Article 52(3) and (4) EUChFR, this 'synchronisation' of the EUChFR with the ECHR, on the one hand, and with the Member States' constitutional fundamental rights traditions, on the other, pertains to the meaning and scope of the guaranteed *rights*.[88] Yet, in light of the overall aim of Article 52(3) and (4) EUChFR, namely to prevent inconsistencies between the EUChFR and fundamental rights standards prescribed by the Member States' national constitutions and the ECHR respectively, it can be asked if it would not also be legitimate to "import" the territorial scope of the latter into the fundamental rights regime of the EUChFR. This is, in fact, the avenue chosen by Advocate General Wathelet in his opinion to *Council* v. *Front Polisario*, when applying the ECtHR's case law on the extraterritorial reach of the ECHR to the

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[81] *Melloni, supra* note 80, para. 60.

[82] B. de Witte, *supra* note 77, para. 53.27.

[83] L.F.M. Besselink, *supra* note 79, at 75.

[84] AG Bot, Opinion to Case C-399/11, *Melloni* [2012] ECLI:EU:C:2012:600, para. 99.

[85] See European Convention Secretariat, 'Summary of the meeting held on 12 July 2002', 18 July 2002, CONV 203/02, at 4.

[86] Representatives/bodies of the Council of Europe have tagged the EU's accession to the ECHR, as foreseen in Article 6(2) TEU, as the only sure means of avoiding divergences between the EUChFR and the ECHR. See: 'Report from the Committee on Legal Affairs and Human Rights Council in the Parlamentary (sic) Assembly of the Council of Europe', CHARTE 4465/00, CONTRIB 319, 14 September 2000, at 3-5 and 11; 'The Council of Europe's contribution to a European Charter of Fundamental Rights', CHARTE 4105/00 BODY I, 17 December 1999, at 8. See also S. Brittain, *supra* note 74, at 500 and 502.

[87] Explanations to the Charter, *supra* note 42, at 33.

[88] The Explanations to the Charter, *supra* note 42, at 33f, contain a detailed 'list of equivalences' in respect of Charter rights that correspond to rights under the ECHR.

EUChFR *per analogiam*.[89] The benefit of such approach is that it prevents frictions regarding the levels of protection under the EUChFR and the ECHR, which may result from different territorial scopes of application. However, the downside is quite obvious too: While the territorial scope of application of the ECHR is basically the same for every of the Member States, it is quite likely that the territorial scopes of the Member States' fundamental rights regimes are too inhomogeneous to deduce a 'common tradition' in that respect.[90] And even if such common tradition could be established, it is not necessarily the case that it corresponds to the territorial scope of the ECHR. Moreover, the approach of importing the territorial scope of the ECHR or of national constitutional fundamental rights regimes is also difficult to reconcile with the Charter's aspirations to provide added value and to contribute to an autonomous EU fundamental rights doctrine. In that regard it can be referred to the second sentence of Article 52(3) EUChFR, according to which the requirement to interpret Charter rights corresponding to rights guaranteed under the ECHR in accordance with the latter is not absolute in that it does not prevent Union law from providing more extensive protection. This caveat to an absolute transfer of the meaning and scope of ECHR rights is an expression of the autonomy of the EUChFR,[91] which establishes a minimum standard beneath which the Charter may not fall with regard to rights which correspond to the ones of the ECHR.[92] In so doing, Article 52(3) EUChFR balances the necessary consistency between the Charter and the ECHR, on the one hand, and the Charter's autonomy, on the other. A similar approach to the territorial scope of the EUChFR appears reasonable, if appropriate, i.e., if an interpretation of the relevant provisions of the EUChFR, taking into account their wording, objectives, context, and the provisions of Union law as a whole,[93] allows so.[94] Claims that the territorial scope of the EUChFR should be interpreted in light of EU law only,[95] ignore the importance of the ECHR and the Member States' common traditions

[89] AG Wathelet, *Council* v. *Front Polisario, supra* note 17, paras. 270f and in footnote 128 thereof. See, however, AG Mengozzi, Opinion to Case C-638/16 PPU, *X and X* v. *Belgium* [2017] ECLI:EU:C:2017:93, paras 96-101, who rightly argues against such an approach.

[90] Note that it is generally considered difficult to find common constitutional traditions with regard to fundamental rights, which reduces the practical relevance of Article 52(4) EUChFR. See European Convention Secretariat, 'Summary of the meeting held on 12 July 2002', 18 July 2002, CONV 203/02, at 4.

[91] *cf* Explanations to the Charter, *supra* note 42, at 33.

[92] S. Brittain, *supra* note 74, at 505; E.F. Defeis, 'Human Rights, the European Union, and the Treaty Route: From Maastricht to Lisbon', 35 *Fordham Law Journal* 2017, at 1226.

[93] ECJ, Case 283/81, *CILFIT* [1982] ECLI:EU:C:1982:335, para. 20.

[94] *cf* GC, Case T-494/10 *Bank Saderat Iran* v. *Council* [2013] ECLI:EU:T:2013:59, para. 36, in which the General Court considered the aim of Article 34 ECHR, yet concluded that it was not applicable in the context of interpreting the EUChFR (*argumentum e contrario*).

[95] See, for instance, A. Ward, 'Article 51', in S. Peers, *et al.* (eds.), The EU Charter of Fundamental Rights: A Commentary (Oxford: Hart Publishing2014), paras. 51.22f, who argues that 'the only sources governing the interpretation of Article 51 emanate from the EU legal regime, notwithstanding the express reference to the ECHR and other international agreements made in, respectively, Articles 52(3) and 53 of the Charter. This is so because the law on circumstances in which the application of EU fundamental rights is triggered grew up as a function of the development of EU constitutional law, […] within the context of the peculiarities of the EU constitutional system […]'.

regarding fundamental rights as part of the Charter's DNA, and the problems raised when frictions between these layers of fundamental rights protection occur. Insofar, it appears appropriate to give preference to an interpretation of the territorial scope of the EUChFR that accommodates the territorial scope of the ECHR and other fundamental rights instruments, if possible. Furthermore, also more general considerations as to the territorial conception underlying other legal instruments can be of guidance in that regard. In particular, many findings as to the nature, object and purpose of other human rights treaties might apply to the EUChFR as well, and shall thus be taken into account where appropriate. On the other hand, not being burdened with the concept of jurisdiction as applied in other human rights treaties may allow developing a more stringent approach to the territorial scope of application of the Charter than the one(s) established with regard to other human rights treaties.

C. **Establishing the territorial scope of the Charter**

1. *The Charter's personal/functional scope of application*

As already mentioned beforehand, instead of a provision defining the Charter's territorial scope of application or a 'jurisdiction clause', the EUChFR only contains a more general provision on its 'field of application', namely Article 51 EUChFR.[96] In its paragraph 1, it is simply stipulated that the Charter is 'addressed to' the institutions, bodies, offices and agencies of the Union and to the Member States, although to the latter only when implementing EU law,[97] which 'shall therefore respect the rights, observe the principles and promote the application thereof'. Thus, while the provisions of the EUChFR only apply to the Member States when they are implementing EU law, their applicability to the institutions, bodies, offices and agencies of the Union is not restricted in a similar fashion.[98] A previously considered limitation of the Charter's applicability vis-à-vis the Union to instances where its institutions, bodies, offices and agencies are acting 'within the framework of the powers and tasks assigned to

[96] See also AG Mengozzi, *X and X* v. *Belgium, supra* note 89, para. 97.

[97] ECJ, Case C-8/15 P *Ledra Advertising* v. *Commission and ECB* (hereafter, *Ledra*) [2016] ECLI:EU:C:2016:701, para. 67; ECJ, Case C-370/12 *Pringle* [2012] EU:C:2012:756, para. 179. The phrase in Art 51(1) EUChFR 'only when they are implementing Union law' should be read as to solely relate to the Member States. This is not only the most obvious grammatical interpretation. It also corresponds to the explanations to the EUChFR, which have to be considered when interpreting the EUChFR (Article 6(1) TEU, Article 52(7) EUChFR), according to which the 'Charter applies primarily to the institutions and bodies of the Union', whereas it 'is only binding on the Member States when they act in the scope of Union law' (Explanations to the Charter, *supra* note 42, at 32). See S. Peers, 'Towards a New Form of EU Law? The Use of EU Institutions Outside the EU Legal Framework', 9 *European Constitutional Law Review* 2013, at 51f.

[98] See also S. Peers, *supra* note 97, at 51-53; AG Wahl, Opinion to Case C-8/15 P, *Ledra* [2016] ECLI:EU:C:2016:290, para. 85.

them by the Treaties'[99] was dropped in the drafting process. Indeed, as shown in the *Ledra* case, which concerned EU law obligations applicable to "borrowed" EU institutions under the European Stability Mechanism Framework, it is not necessary that these EU actors exercise powers under EU law, given that the EUChFR applies to them regardless of whether they act inside or outside the EU legal framework.[100] Indeed, the formulation of Article 51(1) EUChFR implies that the institutions, bodies, offices and agencies of the EU are bound by the EUChFR as such,[101] i.e., when *acting in the capacity of an EU institution, body, office or agency*. With regard to these EU actors, the scope of the EUChFR appears to be a personal rather than a functional one. However, it should be pointed out that 'acting in the capacity' of a Union institution, body, office or agency implies the (purported or apparent)[102] exercise of a Union competence,[103] or at least that Union institutions purportedly or apparently carry out official functions that correspond to the functions that have been conferred on them by the EU Treaties.[104] In this respect, it can be referred to the *Ledra* case again, in which the Court found that 'the tasks conferred on the Commission and the ECB within the ESM Treaty do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties'.[105] That being the case, the Court concluded that, even though the disputed acts were adopted outside the Union legal order, they were still formally imputable to the Commission.[106] This implies that the Court considers that these acts were adopted by the Commission acting in its capacity as a Union institution. Otherwise, the Court would not have had jurisdiction to review the Commission's action under

[99] 'Draft Charter of Fundamental Rights of the European Union – Draft articles', 15 February 2000, CHARTE 4123/1/00 REV 1, CONVENT 5, at 9; 'Draft Charter of Fundamental Rights of the European Union – New proposal for Articles 1 to 12 (now 1 to 16)', 8 March 2000, CHARTE 4149/00, CONVENT 13, at 2.

[100] *Ledra, supra* note 97, para. 67. See also S. Peers, *supra* note 97, at 52.

[101] AG Kokott, Opinion to Case C-370/12, *Pringle* [2012] ECLI:EU:C:2012:675, para. 176, according to whom the Commission, being an EU institution, is as such 'bound by the full extent of European Union law, including the Charter of Fundamental Rights'. See also P. Dermine, 'The End of Impunity? The Legal Duties of 'Borrowed' EU Institutions under the European Stability Mechanism Framework: ECJ 20 September 2016, Case C-8/15 to C-10/15, Ledra Advertising et al. v European Commission and European Central Bank', 13 European Constitutional Law Review 2017, at 377.

[102] cf S. Besson, *supra* note 12, at 865, who noted the following, albeit with respect to the criterion of jurisdiction: 'This does not mean, of course, that those acts or omissions are necessarily lawful, but only that they stem from a necessarily lawfully organized institutional and constitutional framework, whether those institutions then act *ultra vires* or not. What matters indeed is that state agents exercise some kind of normative power with a claim to legitimacy, even if that claim ends up not being justified'.

[103] For a competence-based reading of the scope of application of the EUChFR, see AG Bot, Opinion to Opinion 1/17*, CETA* [2019] ECLI:EU:C:2019:72, para. 195. Note that the exercise of competences or functions that fall under the EU legal framework not necessarily needs to be lawful, as that would exclude ultra vires acts from the scope of the EUChFR. cf S. Besson, *supra* note 12, at 865.

[104] cf ILC, 'Commentaries DARIO', *supra* note 22, at 60 (with respect to the meaning of 'in that capacity').

[105] *Ledra, supra* note 97, para. 56.

[106] To this effect see *Ledra, supra* note 97, paras. 54-60.

Article 268 TFEU in conjunction with Article 340 TEU.[107] On the other hand, a case can be made that it was the fact that the powers that the Commission exercised under the ESM, in essence, corresponded to its powers within the EU legal framework that led to the applicability of Union law, including the EUChFR, to the Commission.[108] Furthermore, it can also be referred to AG Mengozzi's opinion to case *X and X* v. *Belgium,* in which he postulated 'a parallelism between EU action, whether by its institutions or through its Member States, and application of the Charter'.[109] However, in respect of the Member States, the scope of application of the EUChFR is limited to the implemention of EU law, thus excluding purely national situations, which is consistent with the objective of a complete and comprehensive applicability of the Charter in respect of the Union as the primary addressee of the obligations enshrined in it.[110] Yet this restriction does not have any impact in respect of the (extra)territorial applicability of the EUChFR, when the Member States are implementing EU law.[111]

2. *Effects on the Charter's territorial scope of application*

With that said, what are the consequences of such a 'personal/functional model' when it comes to the territorial scope of application of the EUChFR? The wording of Article 51 EUChFR suggests that whether or not the EU institutions, bodies, offices and agencies or the Member States exercise powers inside or outside the EU's borders seems to be immaterial to the question of the EUChFR's applicability.[112] Lax-Moreno and Castello therefore concluded, as mentioned beforehand, 'that EU fundamental rights obligations simply track all EU activities, as well as Member States action when implementing EU law'.[113] Indeed, in light of the universality of human rights it only seems legitimate that the institutions, bodies, offices and agencies of the Union as well as the Member States when implementing EU law should be bound by the rights and principles of the EUChFR when exercising powers vis-à-vis individuals, regardless of whether they are located within or outside the confines of the EU.[114] Under this conception, the rights and principles of the EUChFR apply when-

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[107] To this effect see *Ledra, supra* note 97, paras. 55, 60. Note that Article 340 TFEU concerns the contractual liability of the Union with respect to damages 'caused by its institutions or by its servants *in the performance of their duties'* (emphasis added).

[108] To this effect see *Ledra, supra* note 97, para. 59: 'Consequently, 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'.

[109] AG Mengozzi, *X and X* v. *Belgium, supra* note 89, para. 91. Note, however, that AG Mengozzi proceeds on the assumption that what matters for the applicability of the EUChFR is that EU action, or Member State action for that matter, fall under the scope of Union law (para. 92).

[110] M. Borowsky, *supra* note 70, para. 1; Explanations to the Charter, *supra* note 42, at 32.

[111] AG Mengozzi, *X and X* v. *Belgium, supra* note 89, para. 89f.

[112] V. Moreno-Lax and C. Costello, *supra* note 41, at 1658.

[113] V. Moreno-Lax and C. Costello, *supra* note 41, at 1658.

[114] Note, however, that the universality of human rights is not enough to justify the extraterritorial application of human rights. See S. Besson, *supra* note 12, at 858.

ever an EU actor or the Member States exercise powers or official functions (purportedly or apparently) vis-à-vis individuals.[115]

The case law of the Court of Justice regarding targeted sanctions against individuals which are located abroad supports such conception of the EUChFR's scope of application: As far as can be seen, the question whether the rights and principles under the EUChFR apply to individuals located abroad has never really occurred. Instead, the Court of Justice has simply examined whether the sanctions imposed on them were in violation of the EUChFR, which implies that it takes the applicability of the EUChFR with regard to these individuals for granted.[116] What appears to matter for the Court is whether the individual relying on a right of the EUChFR is covered by the personal scope of that right.[117] This implies that the scope of application of the EUChFR would be defined by 'personal relations' between EU actors/Member States, as the duty bearers under the EUChFR, and one or more individuals, as the beneficiaries under the EUChFR, that are established via the exercise of powers or official functions. Even though the prescription of extraterritorial targeted sanctions that are enforced on the own territory of a State is often not framed as an extraterritorial issue,[118] it is not obvious why the EUChFR should not also apply to extraterritorial enforcement measures that are either adopted by EU actors or the Member States in order to enforce EU legislation. It would, in fact, be contrary to the repeated emphasis that the drafters of the Charter put on the EUChFR's applicability to the Common Foreign and Security Policy (hereafter, CFSP) and to Police and Judicial Cooperation in Criminal Matters, now Area of Freedom Security and Justice (hereafter, AFSJ), as they considered these

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[115] In this sense, Article 51 EUChFR would establish a scope of application that is similar to the 'personal model' of jurisdiction as advocated by, *inter alia,* R. Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention of Human Rights', in F. Coomans and M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp/Oxford: Intersentia 2004) 83-123.

[116] To this effect see, for instance, ECJ, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat* v. *Council* [2008] ECLI:EU:C:2008:461, paras. 281-285. See also ECJ, Case C-130/10, *European Parliament* v. *Council* [2012] ECLI:EU:C:2012:472, paras. 83f, which, however, concerned a dispute on the legal basis of an EU regulation imposing sanctions against individuals associated with Al-Qaeda and the Taliban.

[117] To this effect see ECJ, C-200/13 P *Council* v. *Bank Saderat* Iran [2016] ECLI:EU:C:2016:284, para. 47: '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: ECJ, Case C-176/13 P *Council* v. *Bank Mellat* [2016] ECLI:EU:C:2016:96, para. 49; *Bank Saderat Iran* v. *Council, supra* note 94, paras. 34-44.

[118] To this effect see *Bank Saderat Iran* v. *Council, supra* note 94, para. 38. In that regard, it is also possible to refer to the case law of the ECtHR, for instance: ECtHR, *Al Dulimi and Montana Management Inc.* v. *Switzerland*, Application No. 5809/08, 26 November 2013, paras. 87-92; and ECtHR, *Nada* v. *Switzerland*, Application No. 10593/08, 12 September 2012, paras. 117-122 (note, however, that in both cases, the ECtHR has indicated that 'jurisdiction' within the meaning of Article 1 ECHR is primarily territorial). See also the fact sheet issued by the Press Unit of the ECtHR, 'Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights', Factsheet (July 2018), available at <https://www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf>, which does not include targeted sanctions that are enforced on the territory of States parties to the ECHR.

areas to most likely raise fundamental rights issues.[119] Since extraterritorial enforcement measures such as civil and military missions form an integral part of the CFSP,[120] and also the AFSJ has a considerable extraterritorial dimension,[121] it can only be assumed that the drafters' intention was to include such measures in the EUChFR's scope of application. This reading of the territorial scope of the EUChFR is in accordance with the wording of Article 51 EUChFR, the objective of a complete and comprehensive applicability of the Charter in respect of the Union, as well as the implications were the Charter not to apply to the Union's extraterritorial exercise of prescriptive *and* enforcement powers with regard to the Member States' obligations under the ECHR and their own constitutions.

3. *Entirely territorially unbound?*

Having established that the Charter indeed applies extraterritorially when an EU actor or the Member States exercise powers or official functions vis-à-vis individuals to whom the Charter applies, it needs to be examined whether the Charter's scope of application is really as territorially unbound as it appears in light of the wording of Article 51 EUChFR. However, before turning to this question, it is useful to distinguish between two categories of fundamental rights, namely those establishing positive obligations and those establishing negative obligations. While the latter require their addressees *to refrain from* violating an individual's rights without justification themselves, positive obligations require *to ensure* an individual's rights, which includes preventing violations of those rights by third parties.[122] Even though the Court of Justice has not yet had the chance of developing a full-fledged jurisprudence on positive obligations under the EUChFR,[123] it is still possible to differentiate between positive and negative obligations under the Charter. This applies all the more when considering that Charter rights which correspond to ECHR rights have the same meaning and scope of the latter (Article 52(3) EUChFR), as determined, *inter alia,* by the ECtHR,[124] which over the years has developed a rich case law on positive obligations under the ECHR.[125] The distinction between positive and negative Charter obligations also corresponds to the wording of Article 51(1) EUChFR which stipulates that the institutions, bodies, offices and agencies of the Union

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[119] M. Borowsky, *supra* note 70, para. 16.

[120] See Articles 42(1) and 43 TEU.

[121] For instance, the regulation by which Frontex was established was based on an AFSJ legal basis. See Regulation (EU) 2016/1624 of the European Parliament and the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ [2016] L 251/1, 16.9.2016.

[122] See M. Milanovic, *supra* note 48, at 209.

[123] See S. Greer *et al.*, H*uman Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges* (Cambridge: Cambridge University Press 2018), at 320f.

[124] Explanations to the Charter, *supra* note 42, at 33.

[125] For more details on this issue see A. Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing 2004).

as well as the Member States, in so far as the Charter applies to them, are bound to *respect, observe and promote* the rights and principles of the Charter.[126]

With that said, the question is whether the extraterritorial scope of the EUChFR should apply to both negative and positive obligations under the Charter. The previously given example of EU targeted sanctions against individuals situated abroad confirms that the EU and its Member States are bound by negative Charter obligations, also in an extraterritorial setting. However, while it appears reasonable that the Union and the Member States should be bound to refrain from violating Charter rights and principles when actively exercising powers vis-à-vis individuals irrespective of where they are, it can be questioned whether the same should also apply with regard to their positive Charter obligations. After all, positive obligations to ensure fundamental rights require not only control over the addressees of the obligations, but also a certain degree of control over an area or territory, which allows the addressees 'to create institutions and mechanisms of government, to impose its laws, and punish violations thereof accordingly'.[127] For instance, the right to life under Article 2 EUChFR contains the positive obligation to adopt a framework of laws, precautions, procedures and means of enforcement in order to protect life.[128]

Against this backdrop Milanovic has proposed a "split" scope of application of human rights treaties: obligations to ensure fundamental rights should only apply where the addressees of these positive obligations enjoy *de facto* effective overall control over territories or areas, whereas no such limitations would be foreseen in respect of obligations to ensure fundamental rights. In other words, negative obligations would be territorially unbound, whereas positive obligations would not.[129] Even though Milanovic has developed this model with regard to human rights treaties that rely on jurisdiction as a threshold criterion for defining their scope of application, the rational of his approach can be applied *mutatis mutandis* to other human rights treaties as well, including the EUChFR. After all, the problem regarding the effectivity of an over-extensive territorial scope of positive obligations also concerns the Union and its Member States, which cannot reasonably be expected to attend their positive obligations under the Charter in respect of territories or areas where they cannot enact the framework necessary to do so.

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[126] For a similar view see H. Kaila, *supra* note 72, at 298.

[127] M. Milanovic, *supra* note 48, at 210. Note, however, that there are also positive obligations which do not necessarily require control over territory but with regard to which control over the duty bearer's own agents is enough, such as the positive obligation under the right to life to conduct an investigation into a possible taking of life by those agents. With regard to such positive obligations, which basically reinforce the negative obligation of the duty bearer to respect the right to life, it appears reasonable to apply the same scope of application as with regard to the negative obligations they reinforce. See M. Milanovic, *supra* note 48, at 216.

[128] See ECtHR, *LCB* v. *United Kingdom*, Appl. No. 23413/94, 9 June 1998, para. 36; ECtHR, *Osman* v. *United Kingdom*, Appl. No. 23452/94, 28 October 1998, para. 115; ECtHR, *Öneryildiz* v. *Turkey*, Appl. No. 48939/99, 18 June 2002, paras. 91-95. According to the Explanations to the Charter, *supra* note 42, at 17 and 33, the meaning and scope of Article 2(1) EUChFR corresponds to Article 2(1) ECHR.

[129] For details see Milanovic, *supra* note 48, at 209-222.

That is, however, not to say that the application of this split scope of application to the EUChFR is entirely unproblematic. While the proposed, territorially unbound scope of application in respect of negative obligations goes well with the wording and objectives of Article 51 EUChFR, it is true that the approach of limiting the territorial scope of application with regard to positive obligations would amount to a teleological reduction of said provision: Article 51(1) EUChFR requires the addressees of the Charter to ensure both the *respect for* and the *promotion of* rights and principles under the Charter, i.e., it does not make a distinction between negative and positive obligations with regard to the Charter's scope of application. However, as pointed out by Advocate General Wahl in the *Ledra* case, the requirement to promote Charter rights and principles cannot be interpreted as a duty 'to impose the standards of the EU Charter on acts which are adopted by other entities or bodies acting outside the EU framework'.[130] Even though AG Wahl made this statement with regard to an international agreement concluded between Member States in an area of retained Member State competence, the same should apply vis-à-vis third States.[131] To argue the contrary would raise tricky issues under public international law, in particular by the principle of *pacta tertiis nec nocent nec prosunt*: from the perspective of third States, the EUChFR is an international agreement concluded between the Member States of the Union, i.e., a *pacta tertiis,* which neither creates rights nor obligations for the former without their consent.[132] That said, it cannot be expected that third States will always consent to measures that the Union or its Member States adopt on the formers' territories in order to implement their positive obligations. The universality of human rights, which is sometimes given as a reason for the extraterritorial scope of application of human rights treaties,[133] as such cannot be used as an argument to impose fundamental rights standards enshrined in an international treaty on States that are not party to that treaty.[134]

In light of these findings, a limitation to the Charter's territorial scope of application with regard to positive Charter obligations seems only justified. This applies all the more when considering that the proposed limitation to the territorial scope of the Charter does not appear to establish a standard that falls below that developed by the ECtHR with regard to the ECHR. If anything, it

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[130] AG Wahl, Opinion to Joined Cases C-8/15 P, C-9/15 P and C-10/15 P, *Ledra Advertising* v. *Commission and ECB* [2016] ECLI:EU:C:2016:290, para. 86.

[131] *cf* ECtHR, *Soering* v. *United Kingdom*, Appl. no. 14038/88, Judgment of 7 July 1989, para 86: 'the Convention does not govern the actions of States not Parties to it, *nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States*' (emphasis added).

[132] Article 34 VCLT. Also issues under the principle of non-intervention and, possibly, the prohibition of the use of force may be raised, depending on the measures that are envisaged in order to implement positive Charter obligations (Article 2(1) and (4) UN-Charter 1945). This is at least the case with regard to the Member States, as it is only them which are directly bound by the UN-Charter.

[133] See, for instance, R. Lawson, 'Really out of Sight? Issues of Jurisdiction and Control in Situations of Armed Conflict under the ECHR', in A. Buyse (ed.), *Margins of Conflict: The ECHR and Transitions to and from Armed Conflict* (Antwerp: Intersentia 2011), at 75.

[134] *cf* S. Besson, *supra* note 12, at 859.

appears that even a teleologically reduced reading of Article 51 EUChFR would provide a broader territorial scope than that of the ECHR, thus accommodating both the intention to provide better fundamental rights protection under the Charter and the necessary consistency between the EUChFR and the ECHR. For all these reasons, the proposed reading of Article 51 EUChFR is considered the most appropriate solution for determining the Charter's territorial scope of application.

D. **Lessons regarding the overall research subject**

Returning to the overall research subject, the question now is whether the EUChFR applies to negative effects that EU action has on the human rights situation on foreign territory. That would only be the case if the Charter contains rights which establish positive obligations *to ensure* the fundamental rights-positions that those rights confer on individuals against interference from third parties, and if those positive obligations are territorially unbound. It is beyond the scope of this paper to establish the substance and extent of each and every positive obligation that the Charter contains. Suffice it to say here that arguably most of the Charter's rights will entail some sort of obligation to secure fundamental rights from interference by third parties.[135] When applying the above proposed scope of application to the Charter, it is also not necessary to go into details in that regard, as extraterritorial effects of EU action would only be subject to the fundamental rights protection offered by the Charter in case the EU or its Member States exercise effective overall control over the territory or area in which these effects occur. Only then would they be bound to abide by relevant positive obligations, as the case may be.

IV. BEYOND EXTRATERRITORIALITY: REFRAMING THE DEBATE

A. **A territorial due diligence obligation to examine the human rights situation on foreign territory?**

Having established that the EUChFR only applies to effects that EU action has on the human rights situation on foreign territory in case the EU exercises effective control over that territory and to the extent that such effects are covered by positive obligations under the Charter, it can be asked whether there are other legal avenues under EU law to regulate such negative effects of EU action. An option proposed by Ryngaerts is the establishment of a due diligence obligation of the EU to examine the human rights situation in the territory of a

[135] This is at least the case with regard to the rights under the ECHR. To this effect see J.-F. Akandji-Kombe, 'Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights', *Human rights handbooks* No. 7 (Council of Europe, Directorate General of Human Rights 2007), at 8 and 14-16. Given that the Charter rights which correspond to ECHR rights have the same meaning and scope of the latter (Article 52(3) EUChFR), the same applies at least to these Charter rights.

State with which the EU wants to conclude an international agreement in order to ensure that this will not have negative effects on the enjoyment of human rights in that State.[136] Indeed, the findings of the General Court in *Front Polisario* v. *Council* and of Advocate General Wathelet in the appeal procedure *Council* v. *Front Polisario* point in that direction, as will be discussed further below.

In his proposal, Ryngaert draws from a case that was tried before the ECtHR, namely *Soering* v. *United Kingdom*, which concerned the question whether the extradition of a person to a State where that person faces the death penalty raises issues under Article 3 ECHR, which prohibits torture and inhuman or degrading treatment.[137] The ECtHR answered in the affirmative, ruling that 'the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 [ECHR], and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country'.[138] In doing so, the ECtHR established, on the basis of Article 3 ECHR, a due diligence obligation to take into account foreseeable consequences on the physical integrity of a person on foreign territory, if the person were extradited. Interestingly, the ECtHR did not frame this due diligence obligation as an extraterritorial application of Article 3 ECHR. According to the Court:

> [Article 1 ECHR,] which provides that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I', sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to 'securing' […] the listed rights and freedoms to persons within its own 'jurisdiction' […] These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction.[139]

This finding of the ECtHR implies that it regards the due diligence obligation in Article 3 ECHR as a *territorial* obligation, the material scope of which also comprises effects which might occur outside the territory of State parties to the ECHR. In other words, the ECtHR focusses on the conduct that is required under Article 3 ECHR, i.e., an assessment of possible extraterritorial effects of a decision that is taken on the territory of a State party to the ECHR, rather than the effects that could occur on foreign soil. This is not so much an artifice as it would appear at first sight. It is possible to refer to many instances in which States, but also the EU, have successfully 'extended the territorial application' of their laws,[140] by relying on the fact that certain *conduct* or *effects* occurred

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[136] C. Ryngaert, 'EU Trade Agreements and Human Rights', *supra* note 39.

[137] *Soering* v. *United Kingdom*, *supra* note 131.

[138] *Soering* v. *United Kingdom*, *supra* note 131, para 91.

[139] *Soering* v. *United Kingdom*, *supra* note 131, para. 86.

[140] Terminology borrowed from J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', 62 *American Journal of Comparative Law* 2014, 87-126. See also J. Scott, 'The Global Reach of EU Law', in M. Cremona and J. Scott (eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: Oxford University Press 2019), at 21-63.

on their territory.[141] For instance, the Court of Justice regarded the applicability of the EU Emissions Trading System to airport operators which perform flights that depart from or arrive at airports located within EU territory as justified, namely also in respect of those parts of the flight that take place outside of EU airspace. It based this finding on both conduct and effects occurring on EU territory, i.e., the criterion of departing from or arriving at an airport situated in one of the Member States, and the fact that the whole flight contributes to the pollution of the air, sea or land territory of the Member States.[142]

Against this backdrop, it is interesting to see if it is also possible to reframe the debate in a similar manner in respect of the EU's fundamental rights obligations, as that might be a promising way to deal with the effects of EU action on the fundamental rights situation abroad. As mentioned beforehand, it is possible to resort to the findings of the General Court in *Front Polisario* v. *Council* and Advocate General Wathelet in *Council* v. *Front Polisario* in that regard. In *Front Polisario* v. *Council*, the former established the aforementioned duty of the Union institutions to 'examine, carefully and impartially, all the relevant facts' before the conclusion of an international agreement with a third State, 'in order to ensure that [the agreement does not entail] infringements of fundamental rights'.[143] That duty was subsequently confirmed by Advocate General Wathelet in the appeal procedure, who found that the EU is indeed under an obligation 'under EU law to examine the general human rights situation in the other party to the international agreement, and more specifically to study the impact which that agreement could have on human rights'.[144] A similar, yet *prima facie* non-legally binding due diligence obligation was formulated by the Ombudsman in the context of the negotiations of the EU-Vietnam Free Trade Agreement. According to her, the EU institutions and bodies are under a duty to consider the possible impact of their actions on fundamental rights – also in the context of international treaty negotiations.[145] Leaving the issue of legal basis aside for a moment, it can be argued that the obligation to examine possible effects of the conclusion of an international agreement with a view to ensuring that it does not entail infringements of fundamental rights abroad is not so much about giving extraterritorial effect to the EUChFR or other international fundamental rights instruments.[146] Rather, similar to the approach of the ECtHR in *Soering* v. *United Kingdom*, it is possible to construe it as a *territorial* due diligence obligation.[147] I.e., instead of focussing on the effects of the conclusion of an international agreement on the human rights situation abroad, the due diligence

[141] C. Ryngaert, 'EU Trade Agreements and Human Rights', *supra* note 39, at 384.

[142] ECJ, Case C-366/10 *Air Transport Association of America et al.* [2011] ECLI:EU:C:2011:864, paras. 124-129. For a critical discussion see G. De Baere and C. Ryngaert, 'The ECJ's Judgment in Air Transport Association of America and the International Legal Context of the EU's Climate Change Policy', 18 *European Foreign Affairs Review* 2013, 389-410.

[143] *Front Polisario* v. *Council, supra* note 4, para. 228.

[144] AG Wathelet, *Council* v. *Front Polisario, supra* note 17, para. 257.

[145] European Ombudsman, Decision EU-Vietnam Agreement, *supra* note 6, para. 10.

[146] For a different view regarding the General Court's approach see AG Wathelet, *Council* v. *Front Polisario, supra* note 17, para. 270.

[147] See also C. Ryngaert, 'EU Trade Agreements and Human Rights', *supra* note 39, at 390.

obligation formulated by the General Court and Advocate General Wathelet can be based on *territorial conduct*, namely the decision on the conclusion of an international agreement and the previous preparations for that decision take place on EU territory. It is this territorial conduct that triggers the territorial due diligence obligation of the EU to take into account the effects that the conclusion of an international agreement could have on the fundamental rights situation in foreign territory.[148] In order to fulfil this obligation, the Union institutions must evaluate, taking into account all the relevant facts, the human rights situation in the territory of the other party to the international agreement, and, on the basis of that evaluation, forecast whether the agreement could have any negative effect in that regard.[149] Thus, whether or not the decision to conclude an international agreement has an actual negative effect on the enjoyment of fundamental rights abroad is irrelevant. A failure to do so would be a territorial failure, i.e., a violation of the due diligence obligation would be regarded as occurring on EU territory.[150]

The subsequent sections are dedicated to the question on the potential legal basis of such territorial due diligence obligation, and the legal and normative issues that are raised in that regard.

B. **Potential legal bases**

1. *The EU Charter of Fundamental Rights*

During the procedure of *Front Polisario* v. *Council*, the issue of fundamental rights protection became salient when the General Court turned to the question of the Council's discretion to conclude an international trade agreement with Morocco, which was also applied to the part of Western Sahara controlled by Morocco. While the General Court acknowledged that the Union institutions enjoy a wide margin of discretion with regard to such agreements, it noted that this discretion is nevertheless subject to control by the Courts of the EU. In particular, it pointed out that it is for the Union Courts to verify whether the Union institutions have committed a manifest error of assessment, in case of which the EU act in question would have to be annulled.[151] For this purpose, the Union Courts must assess whether the Union institutions have 'examined carefully and impartially all the relevant facts of the individual case, facts which support the conclusions reached'.[152] In that regard, the General Court pointed out that the protection of fundamental rights of the population of the disputed territory as enshrined in the EUChFR 'is of particular importance and is, therefore a question that the Council must examine before the approval of such an

[148] C. Ryngaert, 'EU Trade Agreements and Human Rights', *supra* note 39, at 384f.
[149] *Front Polisario* v. *Council, supra* note 4, para. 228; AG Wathelet, *Council* v. *Front Polisario, supra* note 17, paras. 256, 272 and 274.
[150] C. Ryngaert, 'EU Trade Agreements and Human Rights', *supra* note 39, at 383-385.
[151] *Front Polisario* v. *Council, supra* note 4, paras. 223-247.
[152] *Front Polisario* v. *Council, supra* note 4, para. 225.

agreement'.[153] On this basis, the General Court established that the Council was under an obligation to examine the human rights situation in the occupied part of Western Sahara before concluding a trade facilitation agreement with Morocco, the occupying State, on the fundamental rights established by the EUChFR, in particular the rights to human dignity, to life and to the integrity of the person (Articles 1 to 3 EUChFR), the prohibition of slavery and forced labour (Article 5 EUChFR), the freedom to choose an occupation and right to engage in work (Article 15 EUChFR), the freedom to conduct a business (Article 16 EUChFR), the right to property (Article 17 EUChFR), the right to fair and just working conditions as well as the prohibition of child labour and protection of young people at work (Articles 31 and 32 EUChFR).[154]

The reasoning of the General Court is not quite conclusive regarding the reasons for why the fundamental rights of the Charter were of particular importance in respect of the population of Western Sahara. As discussed beforehand, these findings could indicate that the General Court applied the Charter extraterritorially.[155] On the other hand, they could also mean that the General Court established a territorial due diligence obligation as the one defined above, namely an obligation of the Union institutions to examine the human rights situation abroad before concluding an international agreement in order to ensure that it does not entail the infringements of fundamental rights. The legal basis for this obligation appears to be the EUChFR, or at least the provisions under the Charter to which the General Court referred to explicitly. In that context, it may be asked whether Article 51(1) of the EU Charter could be the basis of such a general due diligence obligation to promote the rights and principles enshrined in the Charter. The formulation in Article 51(1) of the EU Charter, according to which the EU and the Member States shall promote the application of the rights and principles established by the Charter, could point in that direction. Yet, it is submitted that Article 51(1) of the EU Charter is on the scope of application of the Charter. Insofar, it appears farfetched to deduce any substantial standards from this provision. The better view seems to be that the General Court inferred the obligation to examine the human rights situation abroad before concluding an international agreement from the Charter rights that it expressly referred to. The fact that Article 52(3) EUChFR determines that the rights of the EU Charter that correspond to rights guaranteed by the ECHR shall have the same meaning and scope of the ECHR rights,[156] is not so much an issue in that regard seeing that it allows the Union Courts to establish a higher standard of protection under the Charter.[157]

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[153] *Front Polisario* v. *Council, supra* note 4, para. 227.

[154] *Front Polisario* v. *Council, supra* note 4, para. 228.

[155] Taking that view: AG Wathelet, *Council* v. *Front Polisario, supra* note 17, para. 270.

[156] Case C-528/15 *Al Chodor et al* [2017] ECLI:EU:C:2017:213, para 37. See also Case C-18/16 *K* [2017] ECLI:EU:C:2017:680, para 50; Case C-294/16 PPU *TC* [2016] ECLI:EU:C:2016:610, para 50.

[157] See above at III.B. The argument that Article 52(3) EUChFR provides that it is only for the EU legislator and not for the EU Courts to establish a higher standard of protection than under the ECHR is misguided. One of the aims of the Charter was to provide added value to the existing

2. *International human rights law*

A quite different approach was proposed by Advocate General Wathelet in *Council* v. *Front Polisario*, the appeal procedure to *Front Polisario* v. *Council*. While confirming the due diligence obligation established by the General Court at first instance in substance, the Advocate General contested the General Court's reliance on the EUChFR.[158] Instead, he referred to two strands of case law of the Court of Justice: The first relates to case law of the Court of Justice on the conclusion of international agreements, according to which all actions of the EU must comply with the principles of the rule of law, human rights and human dignity, 'as is clear from the provisions, read together, set out in the first subparagraph of Article 21(1), Article 21(2)(b) and (3) TEU, and Article 23 TEU'.[159] The other strand concerns the Court's settled case law that the Union must respect international law in the exercise of its powers.[160] In light of this jurisprudence, Advocate General Wathelet concluded:

> if it is not to be devoid of any practical purpose, the question of the conformity of the agreement at issue with international law must be taken into account in the prior examination of all the relevant facts to be conducted by the institutions before concluding an international agreement.[161]

The Advocate General thus appears to frame "the obligation under EU law" to examine the impact an international agreement could have on the general human rights situation in the other party to the agreement as a question of giving effect to said case law.[162] At its core, this *éffét utile* argument is about giving effect to international human rights law, or at least about not depriving it of its practical purpose. The exact legal basis for Wathelet's approach is not quite obvious. Given that he considers the obligation to examine the human rights situation to be an obligation under EU law, the primary legal basis seems to be primarily Article 21 TEU, which defines overarching objectives and principles of EU external action, and not the EU's human rights obligations under international law themselves. Several related Treaty provisions to which Advocate General Wathelet also refers to, in particular Articles 3(5) and 23 TEU and Article 205 TFEU,[163] either establish EU objectives on the international scene in a more general way (Article 3(5) TEU), or refer back to the objectives and principles of Article 21 TEU (Article 23 TEU and Article 205 TEU). Insofar they

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EU human rights standards (see above at III.B). Also, it is the EU Courts which authoritatively determine the substance and limits of Union law, including Article 52(3) EUChFR.

[158] AG Wathelet, *Council* v. *Front Polisario, supra* note 17, para. 272.

[159] AG Wathelet, *Council* v. *Front Polisario, supra* note 17, para. 255, referring to: *Air Transport Association of America et al., supra* note 142, para. 101; ECJ, Case C-263/14 *Parliament* v. *Council* [2016] ECLI:EU:C:2016:435, para. 47.

[160] ECJ, Case C-286/90 *Poulsen and Diva Navigation* [1992] ECLI:EU:C:1992:453, para. 9; ECJ, Case C-162/96 *Racke* [1998] ECLI:EU:C:1998:293, para. 45; *Kadi and Al Barakaat* v. *Council, supra* note 116, para. 291.

[161] AG Wathelet, *Council* v. *Front Polisario, supra* note 17, para. 256.

[162] AG Wathelet, *Council* v. *Front Polisario, supra* note 17, paras. 254-257.

[163] AG Wathelet, *Council* v. *Front Polisario, supra* note 17, para. 254.

can be regarded as 'supportive' legal bases rather than establishing said due diligence obligation themselves.

3. *Good administrative behaviour*

Yet another approach was chosen by the European Ombudsman with respect to a case that concerned the question whether the Commission should have carried out a human rights impact assessment in the context of negotiations of the EU on the conclusion of a free trade agreement with Vietnam.[164] The Ombudsman answered this question in the affirmative, pointing out that the observance of and respect for fundamental rights is a cornerstone of good administration. In her longstanding view, 'where fundamental rights are not respected, there cannot be good administration'.[165] According to the European Ombudsman, this implies that:

> EU institutions and bodies must always consider the compliance of their actions with fundamental rights and the possible impact of their actions on fundamental rights. This applies also with respect to administrative activities in the context of international treaty negotiations. The EU Administration should not only ensure that the envisaged agreements comply with existing human rights obligations, and do not lower the existing standards of human rights protection, but should also aim at furthering the cause of human rights in the partner countries.[166]

In order to substantiate her finding, the Ombudsman referred to Article 21(1) and (2) TEU. Although she noted that those provisions do not appear to contain an express and specific legally binding requirement to carry out a human rights impact assessment, she nevertheless took the view that carrying out such impact assessment would be in conformity with the 'spirit' of Article 21(1) and (2) TEU.[167] The refusal of the Commission to conduct a human rights impact assessment prior to the conclusion of the EU-Vietnam Free Trade Agreement without providing valid reasons for that refusal was considered by the Ombudsman as a case of maladministration.[168] This finding of maladministration does not amount to establishing a legally binding due diligence obligation to consider the impact of EU action on the fundamental rights situation abroad. The concept of maladministration is not the opposite of good administration as guaranteed in Article 41 EUChFR, which contains a series of fundamental rights, including, for instance, the right of every person to have their affairs handled impartially, fairly and within a reasonable time by the institutions and

[164] European Ombudsman, Draft recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission (hereafter, Recommendation EU-Vietnam Agreement), 26 March 2015, available at <https://www.ombudsman.europa.eu/de/recommendation/en/59398>; European Ombudsman, Decision EU-Vietnam Agreement, *supra* note 6.

[165] European Ombudsman, Decision EU-Vietnam Agreement, *supra* note 6, para. 10; European Ombudsman, Recommendation EU-Vietnam Agreement, *supra* note 164, para. 21.

[166] European Ombudsman, Decision EU-Vietnam Agreement, *supra* note 6, para. 10.

[167] European Ombudsman, Decision EU-Vietnam Agreement, *supra* note 6, para. 11.

[168] European Ombudsman, Decision EU-Vietnam Agreement, *supra* note 6, para. 28.

bodies of the Union (Article 41(2) EUChFR). Although there are overlaps between the conduct prohibited under Article 41 EUChFR and the concept of maladministration, the scope of the latter goes way beyond Article 41 EUChFR in that it also contains ethical and other legally non-binding standards of "good administrative behaviour".[169] Accordingly, the European Ombudsman's power to review maladministration complaints filed by any EU citizen or person residing in a Member State (Article 228 TFEU, Article 43 EUChFR) is not limited to review of compliance with Article 41 EUChFR, but also comprises the power to review compliance with the legally non-binding standards of good administrative behaviour.[170] The Ombudsman's findings in the case at hand were a result of the latter seeing that Article 41 EUChFR was of no relevance. In other words, the due diligence obligation of the EU institutions and bodies to consider the impact that EU action might have on the enjoyment of fundamental rights is a legally non-binding standard of good administrative behaviour that, in accordance with Article 21 TEU, also extends to external EU action. Being legally non-binding, this standard does not constitute a procedural guarantee on which individuals may rely on before a Member State or the EU courts, and a breach thereof does not vitiate the legality of the EU act in question.[171] It is only subject to the "political" control exercised by the European Ombudsman and the European Parliament, to which the Ombudsman has to report any instance of maladministration (Article 228 TFEU).[172]

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[169] See European Ombudsman, The European Code of Good Administrative Behaviour (2015), available at <https://www.ombudsman.europa.eu/en/publication/en/3510>. To this effect see also AG Slynn, Opinion to Case 64/82, *Tradax* v. *Commission* [1983] ECLI:EU:C:1983:300, who doubted 'that there is any generalized principle of law that what is required by good administration will necessarily amount to a legally enforceable rule. To keep an efficient filing system may be an essential part of good administration but is not a legally enforceable rule. Legal rules and good administration may overlap (e.g. in the need to ensure fair play and proportionality); the requirements of the latter may be a factor in the elucidation of the former. The two are not necessarily synonymous. Indeed, sometimes when courts urge that something should be done as a matter of good administration, they do it because there is no precise legal rule which a litigant can enforce'.

[170] See P. Craig, *EU Administrative Law* (Oxford: Oxford University Press, 3rd edition 2018), at 848-850.

[171] To this effect see GC, Case T-31/99, *ABB Asea Brown Boveri Ltd* v. *Commission* [2002] ECLI:EU:T:2002:77, paras. 99-104; GC, Case T-247/04, *Aseprofar and Edifa* v. *Commission* [2005] ECR II-3449, para. 56. See also J. Mendes, 'Good Administration in EU Law and the European Code of Good Administrative Behaviour', EUI Working Paper (2009), at 4, available at <http://cadmus.eui.eu/bitstream/handle/1814/12101/LAW_2009_09.pdf?sequence=3&isAllowed=y>.

[172] According to Article 228(1) TFEU, where 'the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution, body, office or agency concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution, body, office or agency concerned. The person lodging the complaint shall be informed of the outcome of such inquiries'. Article 228(2) TFEU further establishes a duty of the Ombudsman to 'submit an annual report to the European Parliament on the outcome of his inquiries'.

C. Substantive issues raised by the different approaches

All of the described approaches to establish a due diligence obligation to examine the human rights situation in foreign territory raise several legal issues regarding the adequacy of their legal bases, as well as in respect of the nature and extent of such obligation. Both aspects are discussed in the subsequent subsections. Apart from that, the approaches also raise normative issues which are outlined at the end of this chapter.

1. *The Charter as a legal basis*

First of all, it is submitted that basing the due diligence obligation to examine the fundamental rights situation on foreign territory on the fundamental rights that are enshrined in the EUChFR is hard to square with the concept of individual rights that is inherent in the Charter: Unlike other international human rights treaties,[173] the EUChFR only contains individual and no collective fundamental rights. The observance and protection of these individual rights are owed to each and every entitled person individually. They are not owed to a collective of individuals, let alone to all individuals collectively. Yet, the due diligence obligation formulated by the General Court goes in that direction in that it requires the Union institutions to examine the human rights situation on a certain, foreign territory, thus aiming at the observance and promotion of human rights of all individuals located on that territory. Depending on the number of State parties to an agreement with the EU, this obligation can, in theory, be stretched *ad infinitum*, that is to say to all individuals that are located outside the EU. Also in case the due diligence obligation formulated by the General Court were to be interpreted as an individual right the fact that it is owed to any individual residing in the territory of a State concluding an international agreement with the EU amounts to definitely doing away with any conception of fundamental rights that is based on the idea of a confined socio-political community, which presupposes a certain relationship between the addressee of fundamental rights obligations and the individuals holding the rights.[174] This is also an elementary aspect that distinguishes the due diligence obligation established by the General Court in *Front Poliscario* v. *Council* from the ones developed by the ECtHR: in *Soering* v. *United Kingdom* and *Othman (Abu Qatada)* v. *United Kingdom*, the applicants were both in the UK, i.e., on the territory of a State party of the ECHR. According to Miller, jurisdiction within the meaning of Article 1 ECHR was given in these cases 'because the wrongful act – whether it is a procedurally flawed extradition or an expulsion contemplated without sufficient guarantees of humane treatment in the receiving country – is directly connected to the individual's territorial presence in a signatory

[173] See, for instance, Article 1 International Covenant on Civil and Political Rights 1966, 999 *UNTS* p.171, and Article 1 International Covenant on Economic, Social and Cultural Rights 1966, 993 *UNTS* p. 3, which establish the right to self-determination of a people.

[174] *cf* S. Besson, *supra* note 12, at 863f.

state, and the signatory state is accordingly responsible for the conditions under which it brings someone into its country and forces him to leave'.[175]

Apart from these theoretical considerations, the due diligence obligation established by the General Court has practical implications regarding its invocation before the EU Courts, regardless of whether interpreted as a "quasi-collective right" or an individual right. Under Article 263(4) TFEU, natural or legal persons may only institute proceedings against EU acts that are directly addressed to them, or that are of direct and individual concern to them. If the EU act in question is a regulatory act, they may only do so when the act is of direct concern to them and does not entail implementing measures. Even if one were inclined to regard a collective of individuals as qualifying as a person in the sense of Article 263(4) TFEU, or to assume that the due diligence obligation constitutes an individual right, the threshold criteria for instigating proceedings before the EU courts, i.e., direct and/or individual concern, are quite high.[176] In particular, it is hard to see how the decision authorising the conclusion of an international agreement would directly affect the legal position of an individual (a collective of individuals),[177] or 'individually address' them 'by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons'.[178] That being the case, (any collective of) individuals would have a hard time to enforce the due diligence obligation established by the General Court, thereby raising issues under Article 47 EUChFR, which requires effective remedies that enable everyone to enforce their rights and freedoms under EU law, including the rights in the EUChFR.

2. *Article 21 TEU as a legal basis*

When turning to Advocate General Wathelet's approach, some remarks regarding his argumentation as to the legal basis of the EU's obligation to examine the potential impact of an international agreement on the human rights situation in foreign territory are due. It has been pointed out beforehand that the Advocate General appeared to frame this due diligence obligation as a matter of giving

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[175] S. Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention', 20 *European Journal of International Law* 2010, at 1242.

[176] The General Court had a difficult time to establish why the Front Polisario as (political) representative of the people of Western Sahara should be regarded as directly and individually concerned by the contested decision authorising the conclusion of the EU-Morocco trade facilitation agreement. See *Front Polisario* v. *Council, supra* note 4, paras. 67-114. On that issue in more detail see S. Hummelbrunner and A.-C. Prickartz, 'It's not the Fish that Stinks!', *supra* note 16, at 26f.

[177] See ECJ, Joined Cases C-445/07 P and C-455/07 P, *Commission* v. *Ente per le Ville Vesuviane* and *Ente per le Ville Vesuviane* v. *Commission* [2009] ECLI:EU:C:2009:529, para. 45.

[178] See ECJ, Case 25/62, *Plaumann* v. *Commission* [1963] ECLI:EU:C:1963:17, at 107; ECJ, Case C-583/11 P, *Inuit Tapiriit Kanatami and Others* v. *Parliament and Council* [2013] ECLI:EU:C:2013:625, para. 72.

effect to two strands of the Court of Justice's case law.[179] As regards the Court's case law according to which the EU must respect international law in the exercise of its powers, it is submitted that it does not logically follow from the EU's international human rights obligations that the EU has to examine the human rights situation in a foreign territory, seeing that they require the Union to observe and respect its human rights obligations. An argument to the contrary would only hold if the EU's international human rights obligations are either territorially unbound or comprise such due diligence obligation(s). This is, in this sweeping generality, rather unlikely, and would, in any event, require an assessment of the EU's international human rights obligations in that respect.[180] In this context, similar questions as to the appropriateness of founding such due diligence obligations on individual human rights as well as their enforceability as the ones that have been discussed in respect of the EUChFR will occur. Basically, the same arguments apply to Wathelet's finding that Article 21 TEU requires compliance with the principles of the rule of law and human rights, as well as respect for human dignity. It is submitted that, again, the appeal to conformity with these principles does not *eo ipso* entail that the EU is bound by the due diligence obligation established by the General Court. Thus, all in all, the Advocate General's *éffét utile*-argument in itself is considered insufficient to confirm the due diligence obligation that has been developed by the General Court in *Front Polisario* v. *Council*.

However, the Court's case law on Article 21 TEU shows that the Court attributes legal value to Article 21 TEU.[181] That is not to say that therefore all parts of Article 21 TEU contain hard obligations. In particular its paragraph 1, which establishes that the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, including the universality and indivisibility of human rights and fundamental freedoms, and the respect for human dignity, seems to be more of a political statement. However, the same is not necessarily true with regard to Article 21(2)(b) and Article 21(3) TEU, which stipulate that the Union shall consolidate and support the human rights and the principles of international law, and that it shall respect and pursue these principles and objectives. It is possible to interpret these provisions so as to require the Union to take

[179] See above at IV.B.2.

[180] In this context, it might be interesting to note that, thus far, the ECtHR has only established one further due diligence obligation similar to the one developed in *Soering* v. *United Kingdom*, namely on the basis of Article 6 ECHR on the right to a fair trial (ECtHR, *Othman (Abu Qatada)* v. *United Kingdom,* Appl. no. 8139/09, Judgment of 17 January 2012, paras 258-262). It should, however, be stressed that the EU is not formally bound by the ECHR.

[181] Thus far, the importance of Article 21 TEU has been mainly displayed in the context of establishing the appropriate legal basis of an external EU measure. For a detailed discussion on the role of Article 21 TEU in that context see: L. Luigi, 'Common Foreign and Security Policy and the EU's external action objectives: an analysis of Article 21 of the Treaty on the European Union', 14 *European Constitutional Law Review* 2018, 584-608; S. Hummelbrunner, 'From *Small Arms and Light Weapons* to *Pirate Transfer Agreement with Tanzania*: The impact of Articles 21(2) and 40 TEU on the choice of the appropriate legal basis', 74 *Zeitschrift für öffentliches Recht* 2019, 267-288.

account of the respect for human rights and the principles of international law when adopting measures in the sphere of external action.[182] One the basis of such "duty of consideration", an argument can be made that this entails a duty to examine the human rights situation in a foreign State before concluding an international agreement with that State in order to ensure that the envisaged agreement has no negative effects on the enjoyment of human rights.[183] To locate the legal basis of this due diligence obligation in Article 21 TEU would also have the advantage that the concerns that have been brought up in respect of basing it on human rights instruments, be it the EUChFR or other international human rights instruments, do not apply, seeing that the obligation would exist independently of these instruments. With that said, it should also be pointed out that basing the due diligence obligation on Article 21 TEU would also mean that it is not framed as an individual right. Yet, this fact would not have a major impact on the enforceability of such obligation by individuals given that under Article 263(4) TFEU individuals will have a hard time to enforce this obligation regardless of whether it is based on fundamental rights or Article 21 TEU.[184] A possible alternative would be to try to induce a national court to instigate a preliminary reference procedure under Article 267 TFEU, in which the question of a potential infringement of Article 21 TEU is brought up. Apart from that, and independent of the legal basis on which the due diligence obligation to examine human rights abroad is based, it is always possible for any Union citizen or person residing in a Member State of the EU to file a complaint with the European Ombudsman (Article 228 TFEU, Article 43 EUChFR).

3. *The European Ombudsman's approach*

This brings us to the Ombudsman's approach to the issue at hand. As mentioned beforehand, the Ombudsman framed the requirement of conducting a human rights impact assessment before concluding the EU-Vietnam Free Trade Agreement as a matter of good administrative behaviour. As regards the basis for this requirement, the Ombudsman relied on Article 21 TEU which, in her view, does not create a legally binding requirement to carry out a human rights impact assessment.[185] She therefore concluded that the 'obligation' to conduct a human rights impact assessment constitutes a legally non-binding standard of good administrative behaviour that, in accordance with Article 21 TEU, also

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[182] In that direction: M. Bulterman, 'The Contribution of the Agency to the External Policies of the European Union', in P. Alston and O. De Schutter (eds.), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Oxford: Hart Publishing 2005) 270; ECJ, Case C-268/94, *Portugal* v. *Council* [1996] ECLI:EU:C:1996:461,

[183] V. Kube, 'The European Union's External Human Rights Commitment: What is the Legal Value of Article 21 TEU?', EUI Working Papers (2016), at 27, available at <http://cadmus.eui.eu/bitstream/handle/1814/40426/LAW_2016_10.pdf?sequence=1&isAllowed=y>.

[184] Unless one were inclined to argue that the Court of Justice, in light of Article 47 EUChFR, would have to interpret the threshold of legal standing of natural and legal persons in Article 263(4) TFEU more loosely.

[185] European Ombudsman, Decision EU-Vietnam Agreement, *supra* note 6, para. 24.

extends to external EU action.[186] Yet, even when interpreting Article 21 TEU so as to establish a legally binding obligation to do so, as has been proposed beforehand, a breach thereof would not amount to a violation of the right to good administration under Article 41 EUChFR. It would "only" mean that the obligation to conduct a human rights impact assessment would be a legally binding standard of good administrative behaviour, a breach of which would be in violation of Article 21 TEU. Also, this finding would not change anything about the fact that decisions of the Ombudsman are legally non-binding. Yet, establishing a legally binding due diligence obligation on the basis of Article 21 TEU would not be entirely without merit: given that the Ombudsman has to inform the European Parliament about instances where she established a case of maladministration (Article 228(1) TFEU), the Ombudsman's finding of a violation of such obligation could be of significance insofar as the European Parliament might feel inclined to instigate an action for annulment in accordance with Article 263(2) TFEU, which it can do without needing to show any special interest in bringing the action.[187]

4. *The nature and extent of a due diligence obligation to examine the human rights situation on foreign territory*

Apart from the legal basis of a due diligence obligation to examine the human rights situation in foreign territory, other legal issues that should be addressed are the nature and extent of such obligation as well as the consequences of a breach thereof. As regards its nature, it can be held that both the General Court and Advocate General Wathelet framed the obligation to pay due diligence to the human rights situation on foreign territory as a procedural obligation with regard to which the EU courts may only 'verify whether it has examined carefully and impartially all the relevant facts of the individual case, facts which support the conclusions reached'.[188] Similarly, also the duty to conduct a human rights impact assessment as established by the Ombudsman is a procedural one. A feature that seems to distinguish the Ombudsman's approach from the ones of the General Court and the Advocate General is the fact that the duty to conduct a human rights impact assessment appears due regardless of whether specific concerns have been raised with regard to the human rights situation in the territory of the other contracting party.[189] Although the Ombudsman referred to a resolution of the European Parliament in which it specifically urged the Commission to conduct a prior human rights impact assessment in Vietnam,[190] it should be pointed out that the Parliament did so because it

[186] See above at IV.B.3.

[187] Pursuant to Article 263(2) TFEU, the European Parliament is a "privileged applicant".

[188] *Front Polisario* v. *Council, supra* note 4, para. 225. See also AG Wathelet, *Council* v. *Front Polisario, supra* note 17, para. 229, who confirmed the General Court's approach in this respect.

[189] European Ombudsman, Decision EU-Vietnam Agreement, *supra* note 6, paras. 22-24.

[190] European Ombudsman, Decision EU-Vietnam Agreement, *supra* note 6, para. 22, with reference to European Parliament, 'Resolution of 17 April 2014 on the state of play of the EU-Vietnam Free Trade Agreement' (2013/2989(RSP)), para. 25.

wanted the Commission 'to carry out impact studies on human rights in addition to those on sustainable development' in accordance with its resolution on 'Human rights, social and environmental standards in International Trade agreements'.[191] In contrast, the General Court's and Advocate General Wathelet's findings imply that an examination of the human rights situation in the territory of the contracting State could be dropped in case the Union institutions involved are able to show that there is no cause for such examination. The burden of proof, however, would lie with them.[192] In cases of doubt, it appears thus recommendable to conduct a human rights impact assessment in any event, seeing that the consequences of a violation of the due diligence obligation is a manifest error of assessment that, if so established by the EU courts, leads to the annulment of the EU act that is vitiated by that error.

As regards the extent of the due diligence obligation to examine the human rights situation in a foreign territory, a question that should be addressed is whether there are/should be any thresholds regarding the type human rights or seriousness of violations thereof. In that regard, it is noteworthy that, thus far, the ECtHR has only interpreted Articles 3 and 6 of the ECHR to contain due diligence obligations in the fashion of *Soering* v. *United Kingdom*. The reasons for this can be exemplified by the ECtHR's findings in *Othman (Abu Qatada)* v. *United Kingdom,* which concerned the question whether the expulsion of Mr. Abu Qatada to Jordan could raise issues under Article 6 ECHR because of the risk of the use of evidence obtained by torture. According to the ECtHR, this might exceptionally be the case if an expulsion or extradition decision creates the risk that the fugitive suffers a flagrant denial of justice in the requesting country.[193] This corresponds to the ECtHR's finding in *Soering* v. *United Kingdom* that a pronouncement on potential violations of the ECHR is not the rule, but may exceptionally be necessary 'in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by [Article 3 ECHR]'.[194] The emphasis on the exceptionality of the relevance of Articles 3 and 6 ECHR in the cases at hand and on the severity of the consequences that the individual would suffer if extradited or expulsed are indicative of certain reservations of the ECtHR to extend the protection under the ECHR to any human rights violations that might occur on foreign territory, even if foreseeable.

In contrast to the ECtHR, neither the General Court nor Advocate General Wathelet 'make a distinction as to the type of right or the seriousness of the infringement', the consequence being that also very minor fundamental rights

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[191] European Parliament, 'Human rights, social and environmental standards in International Trade agreements', OJ [2O12] C 99 E/31, 3.4.2012, para. 19.

[192] To this effect see AG Wathelet, *Council* v. *Front Polisario, supra* note 17, para. 261, who points out that since 'the human rights situation in Western Sahara is one of the points of dispute between the Front Polisario and the Kingdom of Morocco and for that reason was the subject of an examination by the UN Secretary-General in his annual reports on Western Sahara, it cannot be claimed that there was no cause for an impact assessment'. See also *Front Polisario* v. *Council, supra* note 4, para. 245.

[193] *Othman (Abu Qatada)* v. *United Kingdom, supra* note 180, paras 258-262.

[194] *Soering* v. *United Kingdom*, *supra* note 131, para 90.

issues are covered by the Union institutions' obligation to pay due diligence.[195] The Ombudsman, for her part, assumes a quite broad duty to conduct a human rights impact assessment, that appears to cover all types of human rights.[196] Depending on the standard of examination that is required under the due diligence obligation, a very rigid conception of the obligation to examine the human rights situation on foreign territory, i.e., one which does not differentiate between the implicated human rights or the seriousness of a violation thereof, would not only have sizable consequences on the EU's ability to conclude international agreements, but also carries with it the risk of protectionist abuse.[197] In order to mitigate these issues, Ryngaert has advocated 'a "seriousness" standard, by limiting the obligations of examination to serious violations of human/fundamental rights'.[198] That would, of course, necessitate to define what a serious human rights violation amounts to, and Ryngaert offers some useful approaches in that regard, which, however, shall not be discussed in the remainder of this paper.[199] Instead, it is submitted that the issues that are raised in this context can also be mitigated by setting the bar regarding the examination of the human rights situation in foreign territory not too high. That is not to say that mere lip service, i.e., some paperwork claiming that the human rights impact assessment showed positive results, are deemed enough to justify the conclusion of an international agreement.[200] If such rubber-stamping were enough to satisfy the due diligence obligation, there would be the risk that the obligation 'will merely serve to bolster the continuation of the *status quo* which can now be further legitimated […] through claims to be "human rights compliant"'.[201] This would not be consistent with the concept of *due diligence*, which, it would appear, requires taking into due account the human rights situation in the territory of a contracting State, and to establish potential impacts the conclusion of an international agreement could have thereupon. In order to be able to establish whether due diligence was exercised, the final decision should state the facts and the conclusions that are derived therefrom in a transparent and comprehensible manner. Only then are the EU Courts in a position to verify whether all the relevant facts of the individual case have been examined carefully and impartially, and whether the facts indeed support the conclusions reached.[202] The extent of judicial review would accordingly be restricted to

[195] C. Ryngaert, 'EU Trade Agreements and Human Rights', *supra* note 39, at 391.

[196] See European Ombudsman, Decision EU-Vietnam Agreement, *supra* note 6, para. 11: 'Since the 2009 sustainability impact assessment concerning ASEAN covers only certain aspects of the impact on social rights, it is not a proper substitute for a human rights impact assessment'.

[197] C. Ryngaert, 'EU Trade Agreements and Human Rights', *supra* note 39, at 389.

[198] C. Ryngaert, 'EU Trade Agreements and Human Rights', *supra* note 39, at 391.

[199] C. Ryngaert, 'EU Trade Agreements and Human Rights', *supra* note 39, at 391f.

[200] Drawing attention to this risk: G. Vidigal, 'Trade Agreements, EU Law, and Occupied Territories – A Report on Polisario v Council', *EJIL Talk!* ,1 July 2015, available at <https://www.ejiltalk.org/trade-agreements-eu-law-and-occupied-territories-a-report-on-polisario-v-council/>.

[201] R. Wilde, 'Dilemmas in Promoting Global Economic Justice through Human Rights Law', in N. Bhuta (ed.), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (Oxford: Oxford University Press 2016), at 172 (with regard to the extraterritorial application of human rights).

[202] *Front Polisario* v. *Council, supra* note 4, para. 225.

whether the facts taken into consideration were complete, and whether these facts allow the conclusions reached.[203] Of course, this standard of review is open to interpretation itself. Especially the latter criterion, i.e., the relation between facts and conclusions, gives the EU Courts some leeway. In light of the fact that where EU institutions enjoy a wide margin of discretion, as is the case in the field of external economic relations,[204] judicial review is restricted to *manifest* errors of assessment it would, however, appear appropriate if the EU Courts confined their review to obvious flaws in the reasoning of the respective Union institution.

D. The legitimacy of an EU law due diligence obligation to examine human rights on foreign territory

Apart from the legal questions that are raised by the approach of tackling the negative effects of the EU's international agreements on the enjoyment of human rights in foreign territory by means of due diligence obligations, there is also the question of legitimacy that should at least be addressed.[205] In particular, a due diligence obligation under EU law to examine the human rights situation in a foreign territory, in order to ensure that an EU international agreement does not have a negative impact thereupon, raises questions as to the EU's legitimacy to pursue this end by means of such obligation.[206]

The objections that can be raised in that regard can be framed as critique of imperial or parochial behaviour. The imperialism objection concerns the critique that economically privileged parts of the world seek 'to articulate what is in the best interests of others in less economically privileged parts of the world, […] seeking to further this through the notion of obligations, including international obligations, borne by their own states to save/assist/develop the "other"'.[207] The parochialism objection is framed in more neutral terms, but goes along the same lines: it is about the fallacy that the norms and values, and the hierarchy between them, that are valued in a particular culture or type of society, are universally valuable.[208] Both objections are based on the *Grunderkenntnis* (basic insight) that human rights are not universal in the sense of being rights of all individuals, but that they are actually culturally relative in that their scope, substance and the hierarchy between them vary from culture to culture,

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[203] To this effect see for instance ECJ, Case C-274/11, *Spain and Italy* v. *Council* [2013] ECLI:EU:C:2013:240, paras. 54-58.

[204] AG Wathelet, *Council* v. *Front Polisario, supra* note 17, para. 221, with reference to ECJ, C-122/95, *Germany* v. *Council* [1998] ECLI:EU:C:1998:94, paras. 77 and 79), and GC, T-572/93, *Odigitria* v. *Council and Commission* [1995] ECLI:EU:T:1995:131, para. 38.

[205] In other words, it is not envisaged to provide a definite answer, as there might simply be none.

[206] This question of legitimacy is basically the same as the one applying to the extraterritorial extension of human rights. Insofar, it is possible to draw on literature that deals with the issue of legitimacy in the context of the extraterritorial application of human rights.

[207] R. Wilde, *supra* note 201, at 144.

[208] A. Buchanan, *Human Rights, Legitimacy, and the Use of Force* (Oxford: Oxford University Press: 2010), at 72.

from legal system to legal system.[209] That being the case, the promotion of human rights in foreign territory raises issues of representation,[210] given that the 'beneficiaries' of these rights have neither accepted those rights nor contributed to their elaboration.[211] The argument that the State negotiating and concluding an international agreement with the EU has thereby consented to the conception of human rights that the EU wants to promote may mitigate legal problems that might arise on the basis of the *pacta tertiis*-principle or the principle of non-intervention.[212] Yet, from a normative perspective, it fails to recognise that often the EU will be in a position to dictate the terms of negotiating and concluding the agreement. That being the case, further arguments that could mitigate the above raised normative issues regarding the promotion of human rights standards by means of a due diligence obligation under EU law are due.[213]

A justification that can be brought up to this effect is that even though human rights are particular, in that the human rights to which States have committed themselves vary from State to State, there is arguably no State that has not assumed at least some basic human rights, such as the prohibitions of slavery, torture, religious persecution and the rights to subsistence and physical integrity.[214] Due to differences as to the scope, substance, and limits of these human rights in different legal systems, this argument exhibits certain weaknesses when the due diligence obligation to examine human rights in foreign territory is to ensure that the EU's human rights obligations, such as under the EU-ChFR or under international law, are complied with.[215] In particular, this approach only flies at a very abstract level, seeing that the aforementioned differences between the human rights to which the Union, on the one hand, and another State, on the other, are committed can be quite huge.[216] As a consequence, the Union would still 'unilaterally' impose its human rights standards on the other State. Besson dismisses this problem by arguing 'that human rights duties are never abstract and always need to be specified in context. As a result,

[209] *cf* A. Buchanan, *supra* note 208, at 72f; R. Wilde, *supra* note 201, at 142-145.

[210] That is not to say that such problems do not also exist in a purely "territorial" setting, seeing that also the question can be raised whether the same human rights standards are legitimate in every national situation. See R. Wilde, *supra* note 201 at 142.

[211] S. Besson, *supra* note 12, at 880, who therefore also raises the issue of the right of a people to self-determination (at 882f).

[212] See above at III.C.3. (note 132).

[213] It would appear that in respect thereof the need for justification is even stronger than with regard to the extraterritorial application of human rights treaties, since the Union does not have the same 'ties' to the individuals concerned as is the case when it exercises effective control over foreign territory or certain persons abroad. A different argument, that also allows this finding, is made by C. Ryngaert, 'Extraterritorial Obligations under Human Rights Law', *supra* note 52, at 284, who notes that in respect of negative obligations to respect human rights since 'one would be hard pressed to find another sovereign's territorial rights trampled upon by extensions of the geographical reach of human rights treaties'.

[214] For a critical discussion of that approach in the context of the extraterritorial application of human rights treaties see A. Buchanan, *supra* note 208, at72f.

[215] For possible justifications even in that scenario see A. Buchanan, *supra* note 208, at 75-97.

[216] A. Buchanan, *supra* note 208, at 73.

they are necessarily culture-specific and do not lead to different moral orderings from the ones that apply locally'.[217] Another way of avoiding this problem would be to reframe the purpose of examining the human rights situation on foreign territory: instead of ensuring that no EU human rights standards are infringed, the purpose would be to ensure that the human rights standards to which the contracting State has committed itself to are complied with. In that regard, it is interesting to note that even though Advocate General Wathelet implicitly proceeded on the assumption that the human rights to which Article 21 TEU refers to in several paragraphs are international human rights by which the EU is bound,[218] Article 21 TEU would be flexible enough to establish such due diligence obligation: according to Article 21(1) TEU, the human rights and fundamental freedoms which the Union seeks to advance in the wider world are those 'which have inspired its own creation, development and enlargement'. While these surely include the fundamental rights as enshrined in the constitutions of the Member States, the ECHR, and other international human rights instruments, the ambition of Article 21(1) TEU is not necessarily about 'exporting' exactly these human rights standards to the rest of the world. Rather, the idea is to advance 'human rights as a universal value of the entirety of humankind and to struggle for an international legal order where human rights bind all public authority, irrespective of where this authority is located, which cultural background it is stemming from or what type of constitutional order it represents'.[219] When coming back to the concept of a set of basic human rights, by which arguably every State is bound, one way of realising this idea is to incentivise third States to abide by their own human rights commitments, as, for instance, by predicating the conclusion of an international agreement with a third State on the condition of compliance with its own human rights standards.

If one accepts the above proposed reading of Article 21 TEU, another question that arises is what legitimises the Union to "enforce" the human rights standards to which a third State has committed itself to. Under international law, it is not for the Union to enforce human rights obligations of a third State.[220] Yet, claims based on the principles of *pacta tertiis* or non-intervention to this effect can arguably again be rebutted by reference to the State's consent to the negotiations and conclusion of an international agreement with the EU. From a normative perspective, this, however, is insufficient to legitimise the EU's aspirations to enforce foreign human rights standards. An argument that comes to mind in this respect is that the Union should not be complicit – not in a legal but in a moral sense – in human rights violations perpetrated by a third State. As has been pointed out by the General Court, and later confirmed by Advocate General Wathelet, with regard to the EU-Morocco trade agreement,

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[217] S. Besson, *supra* note 12, at 880.

[218] See AG Wathelet, *Council* v. *Front Polisario, supra* note 17, paras. 255-257.

[219] S. Oeter, 'Article 21', in H.-J. Blanke and S. Mangiameli (eds.), *The Treaty on European Union (TEU): A Commentary* (Berlin/Heidelberg: Springer 2013), para. 16.

[220] Except for obligations *erga omnes*. See Article 42(b) ARSIWA, *supra* note 21, and Article 43(b) DARIO, *supra* note 21. Note that the DARIO does not specifically address the right of an international organisation to invoke the responsibility of a State that has violated an obligation *erga omnes.*

'if the European Union allows the export to its Member States of products originating in that other country which have been produced or obtained in conditions which do not respect the fundamental rights of the population of the territory from which they originate, it may indirectly encourage such infringements or profit from them'.[221] The fact that this indirect encouragement might not amount to complicity as prescribed in international law, and thus would not trigger the Union's international responsibility, does not mean that it cannot be in the Union's interest to not encourage or profit from human rights violations of third States, or that such interest would not be legitimate. In that respect, it can also be referred to the Ombudsman's decision regarding the conclusion of the EU-Vietnam Agreement, in which she has framed this issue from the perspective of the citizens of the Union.[222] In her view, 'the Commission should do its utmost to assure EU citizens that it has thoroughly analysed the measures negotiated in the Free Trade Agreement in order to prevent or mitigate its negative impact on human rights in Vietnam'.[223] In other words, the Ombudsman assumes that the Union citizens have a valid interest that international agreements that the Union concludes with a third State do not have a negative impact on the human rights situation in that State.

All in all, it appears that there are good reasons that justify a due diligence obligation to examine the human rights situation in foreign territory.

V. CONCLUSIONS

The aim of this paper was to establish whether there are obligations under EU law to ensure that EU action does not have a negative impact on the enjoyment of human rights abroad. For this purpose, an assessment was conducted as to whether the EUChFR applies to negative effects that EU action has on the human rights situation on foreign territory (Section III.). It was concluded that this would only be the case if the Charter contains rights, which establish positive obligations *to ensure* the fundamental rights-positions that those rights confer on individuals against interference from third parties, if those positive obligations are territorially unbound, and if the EU or its Member States exercise effective overall control over the territory or area in which these effects occur (Section III.D.). Since the scope of application of the EUChFR with regard to negative effects on the human rights on foreign territory is thus quite restricted, it was decided to examine other possible avenues under EU law to regulate such negative effects that EU action might have. In this context, Ryngaert's proposal of a due diligence obligation to examine the human rights situation in in the territory of a State, with which the EU wants to conclude an international agreement, was taken as a starting point to reframe the debate: instead

[221] *Front Polisario* v. *Council, supra* note 4, para. 231; AG Wathelet, *Council* v. *Front Polisario, supra* note 17, para. 268.

[222] The focus on the interests of the citizens of the Union is not surprising, given that the Ombudsman handles cases of maladministration which are instigated by Union citizens (Article 228 TFEU, Article 43 EUChFR).

[223] European Ombudsman, Decision EU-Vietnam Agreement, *supra* note 6, para. 24.

of focussing on the extraterritorial application of EU human rights standards, the attention was shifted to a territorial obligation to take into account the human rights situation abroad in order to ensure that EU action, in particular the conclusion of international agreements with third States, do not entail infringements of human rights abroad (Section IV.A.).[224] Several approaches on how such a due diligence obligation could be legally embedded in EU law, that were applied in practice by the General Court, Advocate General Wathelet and the European Ombudsman respectively, were discussed to this end (Section IV.B.). All of them raised substantive legal issues (Section IV.C.) as well as the question of the legitimacy of the Union to endeavour that human rights are not violated on foreign territory (Section IV.D.).

It is submitted that an approach that best reconciles these issues is to base the due diligence obligation to examine human rights on foreign territory directly on Article 21 TEU, which requires that the Union shall consolidate and support the human rights and the principles of international law, and that it shall respect and pursue these principles and objectives (Article 21(2)(b) and Article 21(3) TEU). If it is accepted that these provisions do not contain mere political but indeed legal obligations, it is possible to interpret these provisions so as to require the Union to take account of the respect for human rights and the principles of international law when adopting measures in the sphere of external action. On the basis of such a "duty of consideration", it would be possible to establish a duty to examine the human rights situation in a foreign State before concluding an international agreement with that State in order to ensure that the envisaged agreement has no negative effects on the enjoyment of human rights. Such a duty to examine the human rights situation on foreign territory would be a procedural obligation, a violation of which constitutes a manifest error of assessment which potentially leads to the annulment of the EU act that is vitiated by that error. When reviewing whether the Union institutions have met the due diligence standard of examination required, the EU Courts will have to find a balance between not excessively limiting the Union institutions' discretion when concluding international (trade) agreements with thirds States, and a too loose due diligence standard that would create the risk of protectionist abuse or rubber-stamping any international agreement as being human rights compliant.

[224] C. Ryngaert, 'EU Trade Agreements and Human Rights', *supra* note 39.