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EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations

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Abstract

As the European Union (EU) pursues bilateral trade agreements with third states, the EU should be cognizant of the potential 'extraterritorial' impacts of these agreements on the enjoyment of human rights in third states when designing and concluding bilateral trade agreements with third states. This article develops a jurisdictional model to determine the geographic scope of EU human rights obligations in the context of the adoption of EU bilateral trade agreements. It is submitted that the doctrine's classic semantic focus on 'extraterritoriality', captured by such constructs as control, impact, or functional competence, clouds rather than illuminates matters of scope of human rights obligations in the context of trade agreements. Instead of looking for justifications for the extraterritorial application of human rights, it is suggested to turn the justificatory gaze to the internal territorial aspects of the human rights risks created by EU decisions on the conclusion of bilateral trade agreements. An internal-territorial model obviates the need for an elaborate conceptualization of 'extraterritorial' obligations.

Keywords

extraterritorial application of human rights – territory – trade agreements – European Union

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1 Introduction

As the European Union (EU) pursues bilateral trade agreements with third countries,[1] it should be cognizant of the potential 'extraterritorial' impacts of these agreements on the enjoyment of human rights in third countries when designing and concluding bilateral trade agreements with third states.[2] In more technical terms, the issue appears to be whether the human rights obligations resting on the EU have an 'extraterritorial scope' or could be given 'extraterritorial application'. This issue has taken on increased significance after the EU courts' judgments in the *Front Polisario* case,[3] even if ultimately, due to the idiosyncrasies of that case, its precedential value is somewhat limited.[4]

1 See for an overview of the current agreements and on-going negotiations: <http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/> (accessed 6 January 2018).

2 The inquiry in this article only concerns the extent to which such obligations determine the scope and content of trade agreements. It does not address questions of *implementation* of trade agreements – which are typically related to monitoring compliance with human rights clauses in trade agreements as an aspect of the EU's conditionality policy. There is an extensive literature on EU human rights conditionality. See for one of the seminal works: L Bartels, *Human Rights Conditionality in the* EU*'s International Agreements* (2005).

3 Case C-104/16 P, *Council of the European Union v Front Populaire pour la libération de la saguia-el-hamra et du rio de oro* (*Front Polisario*) (ECJ, 21 December 2016) ECLI:EU:C:2016:973; Case T-512/12, *Front populaire pour la libération de la saguia-el-hamra et du rio de oro* (*Front Polisario*) *v Council of the European Union* (GC, 10 December 2015) ECLI:EU:T:2015:953 (GC, *Front Polisario*).

4 The case concerned the conclusion of a trade agreement that may have applied to a non-self-governing territory whose people are denied the right to self-determination by an EU trading partner, i.e., not the typical scenario of EU trade agreements impacting on human rights. The CJEU did not (have to) address the issue of extraterritoriality, because it considered the EU-Morocco Agreement at issue to be not applicable to the Western Sahara in the first place. CJEU, *Front Polisario*, paras. 86–127. Since the Agreement did not have territorial application there, the need for an in-depth analysis of whether human rights or fundamental rights apply 'extraterritorially' in the context of EU trade agreements was obviated. Outside the context of EU trade agreements in respect of what are in essence occupied territories (Western Sahara being occupied by Morocco) – which trigger very specific international law doctrines of self-determination, occupation law, and the duty of non-recognition of illegal territorial situations – the issue of extraterritoriality remains salient, however. See for a critical discussion: E Kassoti, "The Council v. Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation", (Second Part) 2(1) *European Papers* (2017), pp. 23–42) <http://www.europeanpapers.eu/en/e-journal/the-council-v-front-polisario-case-court-justice-selective-reliance-on-treaty-interpretation> accessed 6 January 2018. See for Kassoti's discussion of the GC's judgment: E Kassoti, "The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)," 2(1) *European Papers* (2017), pp. 339–356) <http://www

This article develops a jurisdictional model to determine the geographic scope of EU human rights obligations in the context of the adoption of EU bilateral trade agreements. It is submitted that the doctrine's classic semantic focus on 'extraterritoriality', captured by such constructs as control, impact, or functional competence, clouds rather than illuminates matters of scope of human rights obligations in the context of trade agreements. Instead of looking for justifications for the extraterritorial application of human rights, it is suggested to turn the justificatory gaze to the internal territorial aspects of the human rights risks created by EU decisions on the conclusion of bilateral trade agreements. An internal-territorial model obviates the need for an elaborate conceptualization of 'extraterritorial' obligations.

This article approaches the issue from a *jurisdictional* perspective. It inquires whether third state citizens fall 'within the (human rights) jurisdiction' of the EU in the context of bilateral trade agreements between the EU and third states. This is a threshold question an affirmative answer to which triggers EU human rights obligations *vis-à-vis* those individuals. The article thus engages with questions of territorial and extraterritorial application of relevant human rights norms binding on the EU. It does not deny the relevance of norms of international responsibility – an argument can surely be made that the EU's responsibility can be engaged on the basis of EU trade agreements' facilitating human rights violations abroad in keeping with relevant norms of the law of responsibility[5] – but the parsimony of the argument developed in

.europeanpapers.eu/en/europeanforum/the-front-polisario-v-council-case-general-court-and-volkerrechtsfreundlichkeit> accessed 6 January 2018.

The General Court (GC) did engage with the question of human rights extraterritoriality, eventually holding, relying on the EU Charter on Fundamental Rights (CFR), that the Council had failed to fulfil its obligation to ensure that the production of products covered by a trade agreement applicable to a 'disputed territory' (more accurately perhaps: 'occupied territory') was not carried out in a manner detrimental to the population of that territory and did not entail infringements of fundamental rights of the persons concerned. See also the alternative arguments in the Opinion of Advocate General (AG) Wathelet, Case C-104/16 P, *Council of the European Union v Front Populaire pour la libération de la saguia-el-hamra et du rio de oro* (*Front Polisario*) (ECJ, 13 September 2016) ECLI:EU:C:2016:677. I will return to the GC judgment and the AG's opinion later in this article.

5 For instance, pursuant to Article 14 of the Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts (International Law Commission, Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts (DARIO), UN Doc. A/66/10 (2011)), the EU's responsibility may potentially be engaged on the basis of its aiding or assisting violations of international (human rights) law committed by its trade partner, although the absence of intent on the EU's behalf may raise doubts as to the viability of this provision in a trade context. See also Sandra Hummelbrunner and Anne-Carlijn Prickartz, "It's not the Fish that Stinks! EU Trade

this article has led the author to particularly focus on questions of jurisdiction, understood as questions regarding the geographic locus and scope of application of the EU's human rights obligations.

In terms of structure, Section 2 presents the classic conception that an international actor's human rights obligations towards 'distant others', i.e., persons on foreign soil affected by the former's actions, are *extraterritorial* obligations, the existence (or not) of which is a matter of the *extraterritorial* application of relevant human rights instruments. For the EU, the relevant instrument is the Charter on Fundamental Rights (CFR).[6] In the context of the conclusion of EU trade agreements, the challenge may then be to derive EU extraterritorial obligations from the CFR. This challenge may be worth pursuing, but it is argued that, particularly in the context of international trade agreements, the focus on extraterritoriality may be ineffective, as EU decisions on the conclusion of such agreements cause extraterritorial effects which are not captured by traditional extraterritoriality doctrines, which instead focus on extraterritorial conduct. Section 3 presents an alternative argument, namely that the extraterritoriality discourse overlooks that the relevant conduct producing extraterritorial effects – the EU decision on the conclusion of an international agreement – is in fact of a territorial nature and could thus be captured by the territoriality principle. Thereby, doubts as to the legality of giving 'extraterritorial' effect to the CFR may be dispelled. It is conceded, however, that, also when the EU's human rights obligations vis-à-vis distant others are based on the territorial application of the CFR, such an approach expands the scope of the EU's human rights obligations, and creates additional transaction costs for the negotiation, conclusion, and implementation of EU trade

Relations with Morocco under the Scrutiny of the General Court of the European Union", 32(83) *Utrecht Journal of International and European Law* 19 (2016) pp. 30–31. Also, the EU's responsibility could be grounded on Article 42 DARIO, which prohibits international organizations from recognizing as lawful a situation created by a serious breach of peremptory norms nor render aid or assistance in maintaining that situation. See on the legality of EU trade agreements in light of potential *jus cogens* violations which they could facilitate, and in particular on the European Union-Morocco Fisheries Partnership Agreement, the application of which extends to Western Sahara, in light of peremptory norms of international law: D Costelloe, *Legal Consequences of Peremptory Norms in International Law*, (2017), pp. 122–126.

6 Charter of Fundamental Rights of the European Union [2000] OJ C 364/1(CFR). The Charter of Fundamental Rights of the EU brings together in a single document the fundamental rights protected in the EU. The Charter was proclaimed in 2000, the Charter obtained the force of binding law after the entry into force of the Treaty of Lisbon (2009). However, also the Treaty on European Union (TEU), which lists in Articles 3(5) and 21 TEU human rights as among the principles of EU external action, could qualify. Consolidated version of the Treaty on European Union [2012] OJ C 326/13.

agreements. To confront this challenge, in Section 4 the introduction of limiting principles is considered. Taking a cue from the principle of coherence in the field of EU external relations,[7] it is proposed to balance human rights with free trade – both of them EU constitutional values featuring in the Treaty on European Union (TEU) – by restricting the review of trade agreements to more serious human rights violations. Section 5 concludes.

2 The Extraterritorial Application of the EU Charter of Fundamental Rights

Extraterritorial obligations have been defined as 'obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory'.[8] At first sight, the doctrine of extraterritorial human rights obligations lends itself well to the negotiation and conclusions of EU trade agreements, as EU decisions on such agreements may have effects on the enjoyment of human rights outside the EU's territory, namely in the territory of the trading partner. In a typical scenario, the trade agreement facilitates or entrenches (pre-existing) human rights violations for which the trading partner is the principal responsible party. In another scenario, trade agreements produce new human rights violations, e.g., where they dislocate the trading partner's economy in such ways that social and economic rights of particular (groups of) individuals are compromised. This article mainly focuses on trade agreements of the facilitating variety.

7 See on coherence in EU external relations: C Hillion, "Tous pour un, un pour tous! Coherence in the external relations of the European Union", in M Cremona (ed), *Developments in EU external relations law* (2008), pp 10–36, defining at p. 17 that coherence involves 'beyond the assurance that the different policies do not legally contradict each other, a quest for synergy and added value in the different components of EU policies.' See on the more general principle of coherence in EU law: J. Hettne, X. Groussot, G.T. Petursson, "General Principles and the Many Faces of Coherence: Between Law and Ideology in the European Union", in S. Vogenauer and S. Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (2017), pp 77–103. Coherence may require that the different interests and values of the EU, e.g., as mentioned in Article 3(5) TEU are balanced with each other. Cf. W.T. Douma, S. van der Velde, "Protection of Fundamental Rights in Third Countries Through EU External Trade Policy: The Cases of Conflict Minerals and Timber", in C. Paulussen et al. (eds.), *Fundamental Rights in International and European Law* (2016), p. 106 (noting that '[t]he new framework [for EU external action] is seeking a balance between trade interests and the pro-active promotion of the EU's core values').

8 Clause 8(a) of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011).

Extraterritorial obligations have so far mainly been developed in the context of international or regional human rights conventions, in particular the European Convention on Human Rights (ECHR),[9] the International Covenant on Civil and Political Rights,[10] and the International Covenant on Economic, Social, and Cultural Rights.[11] The EU is not a party to these conventions,[12] but has its own human/fundamental rights catalogue, laid down in the EU Charter of Fundamental Rights (CFR). Accordingly, it appears obvious to derive extraterritorial EU human rights obligations from the CFR in the first place.

Unlike (some) international human rights conventions,[13] the CFR remains conspicuously silent as to its territorial and jurisdictional scope. This may create opportunities for giving a relatively wide geographic ambit to the CFR.[14] Thus, Moreno-Lax and Costello have observed that 'EU fundamental rights obligations simply track all EU activities, as well as Member State action when implementing EU law'.[15] According to these authors, this interpretation is textually reinforced by Article 52(3) CFR, which provides *in fine* that the provision 'shall not prevent Union law providing more extensive protection' than the ECHR.[16] In this approach, the restrictive authority and control

9 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, entered into force 4 November 1950.

10 International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, entered into force 23 March 1976.

11 International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976.

12 The EU is a party to a human rights treaty, however, namely the Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, entered into force 3 May 2008. It signed the convention on 30 March 2007 and formally confirmed its signature on 23 December 2010. <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&lang=en> accessed 6 January 2018.

13 Article 1 European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) ETS 5; Article 2(1) International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

14 Admittedly, Article 51 CFR is explicitly devoted to 'scope'. However, this provision is a functional rather than a territorial one: it simply states that the CFR provisions are 'addressed to the institutions and bodies of the Union … and to the Member States only when they are implementing Union law.' Cf. Art. 51(1) CFR.

15 V Moreno Lax and C Costello, "The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model", in S Peers, T Hervey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (2014), p. 1658.

16 On the relationship between CFR and ECHR rights, the article sets out by providing as follows: 'In so far as this Charter contains rights which correspond to rights guaranteed

standard employed by the European Court of Human Rights (ECtHR) in respect of the extraterritorial application of the ECHR, which is mainly relevant to extraterritorial military operations in which Contracting Parties exercise territorial control or exercise public powers abroad,[17] does not apply. Instead, a mere competence-based standard prevails: where the EU exercises its powers, it owes human rights obligations to persons affected by such exercise of power, irrespective of the location of those persons.[18] The competence-based construction of the geographical reach of the CFR may seem reasonable, especially because it narrows the accountability gap arising from extraterritorial action or effects.

So far, there has been little, if any, judicial guidance on the possible 'extraterritorial' application of the CFR. That being said, in the recent *Front Polisario* case, the EU General Court (GC) appeared to *assume* the CFR's application to the Saharawi people of Western Sahara in the context of the EU Council's decision regarding the Liberalization Agreement.[19] Obviously, this judgment has

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by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention'. Art. 52(3) CFR.

17 *Bankovic and others v Belgium and others*, [2001] *echr* 89; Al Skeini and others v United Kingdom ECHR 2011-IV 99.

18 This comes close to an attribution standard which has been advocated in progressive scholarship on the extraterritorial application of human rights treaties: a person affected by the conduct of a state, falls within the latter's 'jurisdiction' as soon as the conduct can be attributed to it. Cf. VP Tzevelekos, "Reconstructing the Effective Control Criterion in Extraterrestrial Human Rights Breaches: Direct attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility", 36 *Michigan JIL 129* (2014–2015). It can be contested whether using the term 'jurisdiction' in the context of the extraterritorial application of human rights is entirely apt in the EU context: in human rights treaties, jurisdiction is specifically linked to *state action*. Note however that the CJEU has considered the customary public international law – rather than human rights-treaty based – notion of jurisdiction to be relevant to a review of EU action. See Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] ECR I-13755, para. 125 (holding that Aviation Directive 2008/101 'does not infringe the principle of territoriality or the sovereignty which the third States from or to which such flights are performed have over the airspace above their territory, since those aircraft are physically in the territory of one of the Member States of the European Union and are thus subject on that basis to the unlimited jurisdiction of the European Union.').

19 Indeed, in a crucial paragraph of the *Front Polisario* judgment, the GC held as follows: '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 is not conducted to the detriment of the population of the territory concerned, or entails 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

been set aside by the Court of Justice of the EU (CJEU). This restricts its precedential value. Still, it is worth unpacking the GC's reasoning, as it may be replicable in cases which do not bear the peculiar factual and legal characteristics of *Front Polisario*. According to the GC, when concluding an agreement with a third state, the Council must pay heed to the impact of the agreement on the enjoyment of fundamental rights in that state.[20] Put differently, the Council, and the EU institutions at large, bear extraterritorial obligations under the CFR. These obligations moreover appear to apply on a mere cause-effect basis: the EU has obligations as soon as EU conduct – in this case the facilitation of the exportation to the EU of foreign products by means of a trade agreement – may entail infringements of fundamental rights abroad.

This interpretation of the CFR is in keeping with the model suggested by Moreno-Lax and Costello. It is a far cry from the ECtHR's effective control standard.[21] Application of this standard would mean that the CFR would (only) apply 'where an activity is governed by EU law and carried out under the effective control of the EU and/or its Member States but outside their territory.'[22] Reliance on the ECtHR's extraterritoriality standard is understandable, as the ECtHR is the law-applying agency that has engaged in most depth with extraterritorial human rights obligations. However, given the EU's competences, the kind of extraterritoriality cases arising under the CFR may differ considerably

(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).' (GC, *Front Polisario*, para. 228).

20 GC, *Front Polisario*, para. 228.

21 Note, however, that the Advocate General in *Front Polisario* espoused the ECtHR's effective control standard, following arguments made *inter alia* by the Commission. AG opinion, *Front Polisario*, para. 270. In so doing, he apparently gave effect to Article 52(3) CFR, which create synergies with the ECHR. In footnote 128, the AG cites the main ECtHR cases regarding the extraterritorial application of the ECHR (*Loizidou*, *Al Skeini, Al Jedda*).

22 AG, *Front Polisario*, para. 270. Applying the standard to the case, the AG continued that 'since in this case neither the European Union nor its Member States exercise control over Western Sahara and Western Sahara is not among the territories to which EU law is applicable, there can be no question of applying the Charter of Fundamental Rights there.' Ibid para. 271. The AG added that this was the case 'even though, as the Front Polisario claims, a number of Saharawis are Spanish nationals.' The *Front Polisario* arguably referred to a number of Saharawi's Spanish nationality (see para. 251) to trigger application of the passive personality principle. This principle, a staple of the public international law of jurisdiction, has, unlike the territoriality principle, not had traction in the law governing the extraterritorial application of human rights.

from those arising under the ECHR. It is recalled that the ECtHR cases have so far mainly concerned extraterritorial military operations conducted by ECHR Contracting Parties, a physical reality which directly influenced the ECtHR's choice of relevant extraterritoriality standards: effective territorial control, or at least the exercise of public powers abroad determines the reach of the ECHR. Such standards may admittedly be of relevance to the EU to the extent that it deploys military or police missions abroad, but normally the EU will not engage in such extraterritorial *conduct*, but rather take decisions that may have extraterritorial *effects*. The international trade agreements with which we are concerned in this article are a case in point. When concluding such agreements, the EU does not engage in extraterritorial conduct; rather, such agreements may cause adverse effects on foreign-based persons' enjoyment of human rights. It is then almost inevitable that the transposition of the ECtHR's effective control standard – primarily aimed at extraterritorial conduct – yields the non-applicability of the CFR in the context of trade agreements. In fact, for such agreements, an *impact* rather than control standard – in essence the GC's approach in *Front Polisario* – would appear appropriate.[23]

Tying extraterritorial obligations to mere 'impacts' has nonetheless engendered a great deal of opposition. Understandably, there is little, if any, state or institutional practice supporting an impact standard, as this would dramatically extend the scope of states', or the EU's, human rights obligations. Moreover, also from a political theory perspective, this standard may appear questionable, as it does away with the notion of a bordered political community. Instead, it creates politico-legal relationships between the duty-bearer (the EU in the case) and the duty-holder (foreign-based persons) without the former possessing any democratic legitimacy *vis-à-vis* the latter. Therefore, authors such as Besson and Ganesh have, on the basis of theories of democracy, citizenship, and self-determination, rejected 'factual' extraterritoriality, and suggested limiting the extraterritorial application of human rights to situations of *normative* control being exercised over persons.[24]

23 Admittedly, in *Ilaşcu And Others v Moldova And Russia* ECHR 2004-VII 179, the ECtHR employed a 'decisive influence' standard in addition to an 'effective control' in the context of the influence exercised by the Russian Federation over the territory of Transnistria, but one faces difficulties arguing that the EU, via its Liberalization Agreement which it concluded with Morocco, exercises 'decisive influence' over the situation of the Saharawi. At most, the EU *affects* or *impacts* their situation. See for a discussion of the extraterritoriality of human rights in the context of economic relations: C. Ryngaert, "Jurisdiction: Towards a Reasonableness Test", in M. Langford, W. Vandenhole, M. Scheinin, W. van Genugten (eds.), *Global Justice, State Duties* (2013), pp. 192–211.

24 S Besson, "The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to", 25 *Leiden JIL*

What unites all these approaches, in spite of their differences – effective control, factual impact, normative control – is that they tend to place the notion of *extraterritoriality* centre-stage: they seek to provide a theory that legitimates the imposition of – as the case may be – broader or narrower extraterritorial human rights obligations on states, or the EU, including in the context of the EU concluding trade agreements. The next Section 3, however, questions this received wisdom that human rights obligations which the EU may possibly have *vis-à-vis* distant others in the context of the conclusion of international trade agreements are necessarily to be characterized as 'extraterritorial'. It is argued that the EU's human rights obligations in the context of such agreements are based on due diligence requirements and duties of care, obligations that have a *territorial* character. Territorializing human rights obligations goes a long way to soothing doctrinal concerns over the geographic scope of the CFR. Reasoning on the basis of territorial obligations obviates the need for complicated doctrinal constructions of extraterritorial obligations, e.g., regarding the quantity and quality of normative and factual connections between the duty-bearer – the EU in the case – and a foreign-based rights-holder required to trigger the former's impact-based extraterritorial obligations. Reasoning on the basis of territorial obligations also allows us to make sense of the GC's CFR-based human rights verification standard in *Front Polisario* as being based on territoriality rather than extraterritoriality.[25]

3 Territorializing Extraterritorial Obligations

Doctrinal fascination with extraterritoriality in respect of the reach of human rights obligations has diverted attention from the fact that violations of such obligations may very well occur *on the territory* of the human rights obligor – in the case the EU – even if the effects of such violations are felt abroad. What

857 (2012); A Ganesh, "The European Union's Human Rights Obligations towards Distant Strangers", 37 *Michigan JIL* 475 (2015–2016).

25 In fact, nowhere in its judgment did the GC explicitly state that the CFR gives rise to 'extraterritorial' obligations. It was the Council and the Commission which characterized the GC's verification standard as extraterritorial (AG, para. 270), and it was the AG who, on that basis, considered reliance on the basis of the CFR to be vitiated by an error of law (AG, para. 272). The AG, however, left the GC's verification standard (GC, para. 228) substantively intact, as he derived it from Articles 3(5), 21 and 23 TEU, which also refer to the EU's obligation to respect international law. Lorand Bartels had earlier signaled that 'extraterritorial' human rights obligations could be derived from these provisions. See L Bartels, "The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects", 25(4) *ejil* 1071–1091 (2014), p 1074.

ultimately matters for obligations to be characterized as territorial is whether a sufficiently strong territorial nexus between the EU and the state of affairs at issue could be discerned. The law of jurisdiction, which has engaged at length with the outer bounds of the territoriality principle, offers countless examples of states successfully invoking territoriality to address transnational issues which have connections with multiple states, in *inter alia* criminal law,[26] climate change law,[27] the law of the sea,[28] and data protection law.[29] One should bear in mind that the principle of territoriality does not require that the relevant state of affairs be exclusively located on the state's (or the EU's) territory. Rather, what is relevant is whether (substantial) *conduct* or *effects* could be located on the territory. For territoriality to apply, it suffices that territorial effects could be identified, even absent any territorial conduct,[30] or conversely that territorial conduct could be identified, even absent any territorial effects.[31] The former is sometimes denoted as *objective territoriality*, and the latter as *subjective territoriality.*[32]

Especially the latter modality of territoriality, which operates on the basis of *territorial conduct*, is relevant for the question of the EU's human rights obligations in the context of the conclusion of international trade agreements with third countries. When reasoning on the basis of subjective territoriality, it is irrelevant whether human rights are possibly violated outside EU territory (e.g., in Western Sahara), or in other words what the *effects* of the trade agreement are. What matters is that a decision on the conclusion of the international agreement, and preparations for this decision, have been made by the EU *on*

26 C Ryngaert, "Territorial Jurisdiction over Cross-Frontier Offences – Revisiting a Classic Problem of International Criminal Law", 9 *International Criminal Law Review* 187 (2009).

27 NL Dobson and C Ryngaert, "Provocative Climate Protection: EU "Extraterritorial" Regulation of Maritime Emissions", 66(2) *iclq* 295 (2017).

28 In particular jurisdiction by port states over, *e.g.*, illegal, unregulated and unreported fishing on the high seas, or marine pollution (or discharges), which is typically exercised on the basis of the territoriality principle, the vessels being 'in port'. See the special issue of the International Journal of Marine and Coastal Law on port state jurisdiction: 31(3) *International Journal of Marine and Coastal Law* (2016).

29 See the symposium issue on extraterritoriality and EU data protection: 5(4) International Data Privacy Law (2015) <https://academic.oup.com/idpl/issue/5/4> accessed 6 January 2018.

30 Cf the effects doctrine in US antitrust law. *United States v. Alcoa*, 148 F.2d 416, 443 (2d Cir. 1945).

31 Cf the (by now historic) conduct test in US securities regulation: *SEC v Kasser*, 548 F2d 109 (3d Cir 1977); *Zoelsch v Arthur Andersen & Co.*, 824 F2d 27 (DC Cir 1987).

32 See for the initial distinction between conduct (subjective territoriality) and effects (objective territoriality): JB Moore, "Report on Extraterritorial Crime and the Cutting Case", *US For Rel* 575, 770 (1887).

EU territory. Because such a decision can be located on EU territory, territorial human rights obligations are triggered which require that the EU adequately take into account, before the adoption of the decision on the conclusion of the agreement, the agreement's compatibility with human rights law, or the latter's effects on the enjoyment of human rights. When the EU fails to do so, it has committed a *territorial* failure: it did not properly do its homework in Brussels, with the attendant adverse consequences. It is this territorial failure which triggers the 'territorial extension'[33] of EU law as regards EU human rights obligations.

This approach in fact finds support in ECtHR case-law with respect to extraterritorial cases. While the doctrine on extraterritoriality as interpreted by the ECtHR has mainly focused on the effective control standard in a military context, there is other relevant ECtHR case-law which not only ties a finding of jurisdiction to state authorities' acts producing effects outside their own territory,[34] but which specifically concerns territorial due diligence failures producing extraterritoriality effects. The main precedent here is *Soering v United Kingdom*,[35] in which the Court held as follows:

> 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.[36]

Soering stands for the principle that a state's responsibility will be engaged when there is a foreseeable risk that, as a result of a territorial state's decision (in the specific case of *Soering*, the decision to extradite), an individual's

33 I borrow from J Scott, "Extraterritoriality and Territorial Extension in EU Law", 62(1) *Am J Comp L* 87 (2014).

34 ECtHR, *Drozd and Janousek v France and Spain, Admissibility and merits*, App No 12747/87, A/240, [1992] ECHR 52, para. 91 ('The term "jurisdiction" is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory.'). See for a critique of this potentially sweeping cause-effects model of jurisdiction: M Milanovic, "Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age", 56 *Harvard Int'l LJ* 81 (2015) p. 126 (considering this as not 'a sound way of conceptualizing the application of human rights treaties since in every case one can draw some kind of causal link between a territorial act … and extraterritorial consequences').

35 ECtHR, *Soering v. The United Kingdom*, Appl. no. 14038/88, Judgment of 7 July 1989.

36 *Id.*, para. 91.

human rights outside the territory will be violated by another state. *Soering* does not typically feature in accounts of extraterritorially. The reason for this is quite straightforward: *Soering* is, jurisdictionally speaking, based on *territoriality*, as the Court itself pointed out.[37] As Sarah Miller observed, '[j]urisdiction extends in [cases like *Soering*], in other words, 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 state, and the signatory state is accordingly responsible for the conditions under which it brings someone into its country and forces him to leave.'[38]

The problem in extending the territorial principle as it was applied in *Soering* to our case of human rights violations facilitated by international trade agreements concluded by the EU is obviously that the individuals concerned (the victims of human rights violations in the partner country) are not, and have never been, present on EU territory. This lack of *actual presence* need however not be fatal to a finding of jurisdiction. As Miles Jackson has argued in the context of state complicity in torture abroad (e.g., where one state gives information to another state, on the basis of which a person is tortured abroad by the latter state, without that person ever having been on the territory of the former), it would be absurd for one specific form of complicity to be prohibited under the principle in *Soering*, but to ignore 'equally consequential forms', especially in light of the universal recognition of human rights.[39] Arguably, such an 'equally consequential form' is the EU's facilitation of serious human rights violations as a result of it concluding trade agreements. To prevent that lack of jurisdiction allows the EU to facilitate human rights violations abroad which it cannot facilitate in the EU itself,[40] a form of extended territorial jurisdiction may have to be accepted in such a case. Thus,

37 *Id.*, para. 86 ('Article 1 (art. 1) of the Convention, which provides that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1", 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 (art. 3) for all and any foreseeable consequences of extradition suffered outside their jurisdiction.').

38 S Miller, "Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention", 20(4) *EJIL* 1223 (2009) p. 1242.

39 M Jackson, "Freeing *Soering*: The ECHR, State Complicity in Torture, and Jurisdiction", 27(3) *EJIL* 817 (2016) p. 828.

40 Paraphrasing *Id.*, p. 828.

individuals which may foreseeably be harmed by EU action could be considered as constructively or virtually present on EU territory for jurisdictional purposes.[41]

On a comparative note, taken from the economic field, territorial due diligence or duty of care rules are also relied on in domestic tort and criminal law to remedy *prima facie* extraterritorial human rights violations by multinational corporations under the territoriality principle.[42] Corporations, like the EU when it concludes international trade agreements, do not themselves commit overseas human rights violations, but may facilitate such violations by failing to exercise sufficient care and diligence with respect to the human rights-unfriendly activities of their partners, subsidiaries, branches, offices or suppliers in the case of corporations. Such organizational failures by corporations can be situated on the territory of the parent corporation's home state, or on the territory of the state where it has its centre of main interest,[43] thus triggering the exercise of territorial jurisdiction, regardless of the extraterritorial effects of such failures. By the same token, in the case of the EU's international trade agreements, institutional failures by the EU – which is self-evidently headquartered on EU territory (in Belgium) – to carry out a proper due diligence inquiry can be deemed to occur on EU territory, thus triggering the applicability of *territorial* human rights obligations.

41 See on the notion of constructive presence for purposes of exercising territorial jurisdiction notably NM Poulantzas, *The Right of Hot Pursuit in International Law* (2002), pp. 244–251 (discussing how states have considered unlawful acts committed in territorial waters by small craft belonging to a vessel outside territorial waters, to be in fact territorially perpetrated by such a vessel). The term *virtual* (*territorial*) *jurisdiction* has, most relevantly, suggested to ground state obligations under Article 8 ECHR regarding the right to privacy *vis-à-vis* persons that are located outside the territory, e.g., when a state intercepts their communications taking place or originating outside the country: jurisdiction obtains when the state is in control of a digital infrastructure which is brought to bear as soon as foreign communications pass through the territory. F Bignami & G Resta, "Human Rights Extraterritoriality: The Right to Privacy and National Security Surveillance in Community Interests Across International Law", (E Benvenisti & G Nolte (eds.) forthcoming 2018), <https://ssrn.com/abstract=3043771>, p. 16.

42 See for transnational duty of care violations in tort law, *e.g.*, the UK cases of *Lubbe v Cape Plc* [2000] UKHL 41; *Connelly v RTZ Corporation Plc* [1997] UKHL 30, [1999] CLC 533. See for such jurisdiction over, and liability with respect to corporate human rights violations under criminal law: C Ryngaert, "Accountability for Corporate Human Rights Abuses: Lessons from the Possible Exercise of Dutch National Criminal Jurisdiction over Multinational Corporations", *Criminal Law Forum*, (2017) <https://link.springer.com/article/10.1007/s10609-017-9330-y> accessed 6 January 2018.

43 A Schneider "Corporate Criminal Liability and Conflicts of Jurisdiction", in D Brodowski, M Espinoza de los Monteros de la Parra, K Tiedemann, J Vogel (eds), *Regulating Corporate Criminal Liability* (2014), pp. 249–260.

It is of note that such territorial human rights obligations are of a procedural rather than a substantive variety: they require that the EU adopt suitable human rights-sensitive processes, in particular carry out human rights impact assessments, when negotiating international trade agreements. These obligations are territorial rather than extraterritorial, as they pertain to the procedural quality of Brussels-based institutional decision-making processes that may create human rights risks. Doctrinally speaking, it is of no moment that such processes may give rise to substantive rights violations that are located outside the territory. It suffices that the conduct giving rise to, or at least facilitating the extraterritorial human rights violation, can be situated on EU territory.[44]

Concluding, EU institutional failures to carry out a proper human rights impact or due diligence inquiry with respect to international trade agreements can be located in the EU itself. This provides a territorial nexus, as a result of which the nettlesome issue of *extraterritorial* application does not arise. Accordingly, the language of extraterritorial human rights obligations in which the discussion is normally couched, appears as deceptive. While such obligations may eventually pertain to extraterritorial effects, the conduct facilitating such effects may be plainly territorial. That means that territorial obligations and rights under EU law apply, in particular as laid down in CFR norms, without the need for an extraterritoriality doctrine arising. As a result, the GC's statement in *Front Polisario* that '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 is not conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights [laid down in the CFR]' could be justified on the basis of territoriality rather than extraterritoriality. Indeed, it is posited that the EU has *territorial* obligations under the CFR to conduct a human rights verification test every time it takes decisions that could have an adverse human rights impact.

In the broader scheme of things, obviously, the identification of a territorial nexus regarding EU human rights obligations in the context of international trade agreements cannot negate that the substantive human rights violations which procedural human rights obligations seek to prevent are, or are at risk

44 On a comparative note, in some criminal law systems, territorial acts of aiding and abetting (complicity) are captured by the territoriality principle, even if the principal offense takes places abroad. C Ryngaert, "Territorial Jurisdiction over Cross-Frontier Offences – Revisiting a Classic Problem of International Criminal Law", 9 *International Criminal Law Review* 187 (2009).

of, being committed *abroad*. Thus, the use of a territorial nexus cannot hide that the EU is somehow extending its regulatory arm beyond EU territory with a view to influencing or modifying behaviour abroad. This holds even if the obligations, from a jurisdictional perspective, may be grounded in territoriality, and, from an international responsibility perspective, may only be 'negatively' based on a desire not to become complicit in, or not to facilitate human rights violations.[45] This raises the question whether there is merit in nuancing the EU's procedural human rights obligations in the context of international trade agreements, in order to make them workable for EU trade negotiators, and to render international trade – an EU value in itself for that matter –[46] not outright impossible. This is the subject of the next and final substantive Section.

4 Mitigating the 'Extraterritorial' Reach of EU Human Rights Law

Whether one grounds the EU institutions' obligations to conduct a human rights impact assessment prior to concluding an international agreement on the extraterritorial application of the CFR, on the values on which the EU grounds its external action, or on the territoriality principle as was propounded, it needs to be admitted that the upshot is that the EU would henceforth be under an obligation to ensure that international agreements – especially when they provide for enhanced market access to third country products – do not entrench or encourage human rights violations taking place in the third (contracting) state. The consequences of this are sizable. For instance, each time the EU is negotiating a trade agreement, it may have to ascertain whether the products falling within the scope of the agreement, have not been produced in circumstances that violate labour rights, or whether the proceeds of international trade do not strengthen measures of repression taken by a ruling autocratic clique intent on consolidating power. If the used standard of review were to be strict, e.g., based on a rigorous application of the CFR, international agreements may become difficult to conclude, as human rights protection in third states is typically lower than in the EU. At the same time, the risk of protectionist abuse, possibly in violation of commitments under the law of the World Trade Organization, may loom large too, where states trump up allegations of

45 See the introduction above on the relevance of the law of international responsibility for EU trade agreements.

46 Article 3(5) TEU lists 'free and fair trade' as an EU value or interest, alongside a number of other values or interests, such as human rights and international law.

human rights violations to deny foreign products access to their markets in order to shield their own industry from unwelcome foreign competition.[47]

The GC in *Front Polisario* appears to have understood the risk that a human rights clause could become 'over-exclusive'. It did not as such prohibit the EU institutions from entering into international agreements with states with poor human rights records. Rather, because EU institutions enjoy wide discretion in the conduct of international economic relations, EU courts are only allowed 'to verify whether the institution has committed a manifest error of assessment.'[48] In this approach, EU institutions' human rights obligations are procedural due diligence obligations, which require the institution to '[examine] carefully and impartially all the relevant facts of the individual case, facts which support the conclusions reached.'[49] How demanding this examination will or should be, obviously remains to be seen. Bearing in mind that in *Front Polisario* the Council had not paid proper, if any, attention to the human rights situation in the Western Sahara prior to concluding the trade agreement, it could just as well be that submitting some paperwork touting the positive results of human rights impact assessments suffices to push through a politically desirable agreement.[50] On the other hand, a more 'activist' EU judiciary may unmask window-dressing strategies of the competent EU institution, and readily find a violation of human rights due diligence obligations. It is recalled in this context that as regards terrorist sanctions – in respect of which EU courts since the *Kadi* case[51] have required more fundamental rights guarantees – the GC, in the 2014 *Yusef* case, denounced the Commission for still considering itself to be strictly bound by the findings of the UN Sanctions Committee and for implementing its review procedure to remedy violations of fundamental rights in a 'formal and artificial' manner.[52]

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47 There is a large literature on the interface between human rights and the law of the World Trade Organization, which also highlights the risk of protectionist abuse by developed countries. E.g., S Joseph, *Blame it on the WTO? A Human Rights Critique* (2011); P Hilpold, "WTO Law and Human Rights: Bringing Together Two Autopoietic Orders", 10 *Chinese Journal of International Law* (2011) pp. 232–372; J Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Human Rights* (2008).

48 GC, *Front Polisario*, para. 225.

49 Ibid para. 225.

50 G Vidigal, "Trade Agreements, EU Law, and Occupied Territories – A Report on Polisario v Council" (1 July 2015) *EJIL Talk!* < https://www.ejiltalk.org/trade-agreements-eu-law-and-occupied-territories-a-report-on-polisario-v-council/> accessed 6 January 2018.

51 Case C-402/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351.

52 Case T-306/10, *Hani El Sayyed Elsebai Yusef v Commission* [2014] OJ C 142, paras. 103–104.

In any event, whether or not judicial review will be token or thorough, in the GC's scheme, the EU institutions' obligation to examine all the relevant facts in order to ensure that the production of goods for export does not entail infringements of human rights, does not make a distinction as to the type of right or the seriousness of the infringement. On its face, the obligation of due regard also covers relatively 'minor' violations. To ease the burden on EU institutions, one could alternatively consider using a 'seriousness' standard, by limiting the obligations of examination to serious violations of human/fundamental rights. Obviously, the question then arises on what basis an objective distinction between 'ordinary' and 'serious' violations could be drawn. One could in this respect entertain the idea that only a short list of *jus cogens* norms, or perhaps also international norms giving rise to *erga omnes* obligations,[53] should be included in the EU institutions' human rights checklist when negotiating agreements with their foreign counterparts.[54] Alternatively, one could rely on the concept of 'minimal core obligations', which was earlier espoused by the Committee on Economic, Social and Cultural Rights, which supervises compliance with the eponymous Covenant. Under this concept, states would only have international obligations towards individuals outside their territory 'to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant'.[55] The question remains obviously when exactly an obligation rises to the level of a core obligation.[56] Somewhat relatedly, one could rely on the suggestion of the Article 29 Working Party, an EU advisory body on issues of data protection, which held, in the context of transfers of data from the EU to third countries, that only EU principles which constitute 'the essence' of a fundamental right (in the case of data protection)

53 See AG, *Front Polisario*, para. 259.

54 On a comparative note, it is observed that the exercise of universal (criminal) jurisdiction by bystander states (third parties to the breach) is also limited to a number of more serious crimes, which typically qualify as violations of peremptory norms or *erga omnes* obligations. See on the link between universal jurisdiction and the nature of an act: R Hesenov, "Universal Jurisdiction For International Crimes – A Case Study" 19 *European Journal on Criminal Policy and Research* 275–283 (2013). Note, however, that universal jurisdiction does not automatically follow from the qualification of an offense as of a *jus cogens* or *erga omnes* nature. Rather, a specific jurisdictional authorization under international treaty or customary law is required.

55 E.g., CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4), paras. 43–45.

56 This applies even if the CESCR has given an overview of core obligations regarding, e.g., Article 12 CESR (Ibid. para. 43).

should be presumed to apply extraterritorially.[57] Again, what belongs to the 'essence' of a right may not be readily clear, however.[58]

On a final note, some may perhaps argue that a human rights verification test should not only be conditioned by a seriousness requirement, but should also be restricted to a special class of international trade agreements, namely those covering 'disputed territories', i.e., non-self-governing territories claimed by a third state.[59] Such an argument could be based on a narrow reading of the GC's judgment in *Front Polisario*, which, on the facts of the case, concerned the 'disputed' (more correctly 'occupied') territory of Western Sahara. This restriction of the human rights verification test should be rejected, however, on the ground that it renders the inhabitants of a 'disputed' territory better off than the inhabitants of a non-disputed territory, who may be equally adversely affected by an EU trade agreement.[60] This distinction between individuals, only based on the status of a particular territory, flies in the face of the universal application of human rights.[61]

5 Conclusion

This article has ascertained whether the EU has human rights obligations towards foreign persons potentially affected by EU trade agreements in third countries. It has proposed to conceive of such obligations not as extraterritorial, but rather as intra-territorial ones. In this respect, it has drawn particular attention to the location, on the EU's territory, of the EU's potential violations of due diligence obligations in respect of human rights abroad. In practical

57 Article 29 Working Party, 0836-02/10/EN WP 179, Opinion 8/2010 on applicable law adopted on 16 December, 2010 available at <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp179_en.pdf> accessed 6 January 2018, p. 32.

58 C Kuner, "Extraterritoriality and Regulation of International Data Transfers in EU Data Protection Law", 5 *International Data Privacy Law* 235 (2015) p. 243.

59 GC, *Front Polisario*, paras. 231–246. Only a limited number of territories may qualify as such (e.g., Western Sahara, the Palestinian Territories, the Crimea, Northern Cyprus).

60 T Fleury-Graff, "Accords de libre-échange et territoires occupés: a propos de l'arrêt TPIUE, 10 décembre 2015, Front Polisario c. Conseil", 120 Revue générale de droit international public 263 (2016) p. 276. Such a test would benefit, for instance, the Saharawi people of Western Sahara, while not creating obligations toward other persons living on Moroccan territory.

61 That being said, the issue seems to have largely lost its relevance now that the CJEU in *Front Polisario* has obviated the need for the EU to conduct a human rights verification test in respect of EU trade agreements governing products from non-self-governing ('disputed') territories, as EU agreements cannot even apply to such territories, in light of the law of treaties and the right to self-determination.

terms, for the EU to be diligent it should conduct *ex ante* human rights impact assessments, i.e., when designing and negotiating the international agreement, and preferably also *ex post*, i.e., during the implementation phase of the agreement.[62] However, in order to prevent undesirable knock-on effects on the EU's capacity to enter into international law agreements, it has been suggested to restrict the review of agreements in light of a limited category of 'fundamental' or 'essential' human rights. These considerations can inform the EU's negotiation of international agreements as well as the EU courts' review of these agreements in light of human rights.

62 *Ex post* assessments could take place in the context of monitoring compliance by the partner country with a human rights clause inserted into the agreement. Cf. S Velluti, "The Promotion and Integration of Human Rights in EU External Trade Relations", 32(83) *Utrecht Journal of International and European Law* 41 (2016) p. 59 (explaining that the EU already conducts sustainability impact assessments, but advocating the increased use of human rights impact assessments 'to systematically identify, predict and respond to the potential human rights impact of trade agreements', while nonetheless noting the difficulty of developing appropriate human rights indicators that have the required contextual specificity, which is tailored to the problems of the country concerned').