

## [Introduction] Extraterritoriality of EU law and human rights after Lisbon: the case of trade and public procurement

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# Europe and the World: A law review



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Special issue: *Extraterritoriality of EU Law and Human Rights after Lisbon*

Article

## Extraterritoriality of EU law and human rights after Lisbon: The case of trade and public procurement

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### Abstract

The paper introduces the theme and topics of this Special Issue on the extraterritoriality of EU law and human rights in the fields of trade and public procurement since the entry into force of the 2009 Treaty of Lisbon. It briefly explores the meaning of extraterritoriality in international (human rights) law and the EU legal order highlighting the complexity of such notion in both legal systems. In so doing, it provides the context and focus of analysis of the collection of papers that make up this Special Issue, which addresses a number of topical questions concerning the extraterritorial conduct of the EU, as well as the extraterritorial effects of EU law in those specific fields, from the perspective of human rights.

**Keywords:** EU law; international law; extraterritoriality; jurisdiction; human rights; international trade; public procurement

## 1. Setting the context and focus of analysis

This Special Issue comprises selected papers presented at a two-day workshop on the theme of extraterritoriality, human rights and the European Union (EU) after the entry into force of the 2009 Treaty of Lisbon, held at the University of Sussex School of Law in July 2017 with the participation of EU law and international human rights law scholars and practitioners from the United Kingdom (UK) and Europe.<sup>1</sup> The workshop explored a variety of questions concerning, inter alia, the human rights obligations of the EU in relation to its external action, the justiciability within the EU order of extraterritorial human rights violations, the extraterritorial conduct of the EU, and the reach of its policies and laws from the perspectives of international and EU law. These questions remain central to the papers included in this Special Issue, which focuses on two broad areas of EU law, namely trade and public procurement. This Special Issue does not intend to provide a comprehensive account of the issues raised by extraterritoriality, human rights and the EU but rather, and more modestly, the aim is to contribute to the debate on the extraterritorial effects produced by the laws and conduct of the EU, while recognising that there is space, and indeed need, for further and more systematic research in this area.

‘Extraterritoriality’ is a complex and multidimensional legal problem. A *prima facie* clear-cut case of extraterritoriality is when a state acts outside its borders, that is, when actions that are attributable to a state under international law take place outside its territory. The situation becomes more complicated when the conduct at stake consists in an omission, that is, in the context of human rights, when a state proves to be negligent in its duty to offer protection to persons and for situations occurring outside its territory. This complexity is due to the lack of clarity and legal certainty regarding the criteria as to when states have a duty to protect beyond their borders and the limits thereof. However, extraterritoriality may also be said to extend to other less clear-cut and more nuanced situations. For example, a growing number of EU rules aim to produce legislative effects in third countries.<sup>2</sup> A state or the EU may exercise prescriptive jurisdiction by enacting a law that regulates an area in a way that exceeds its borders, when imposing, for instance, obligations on its nationals operating overseas<sup>3</sup> or on any person, irrespective of nationality, when its conduct is somehow connected with its order (e.g. when the conduct produces effects within the EU).<sup>4</sup> The former scenario (concerning nationals) is easier to associate with extraterritoriality,<sup>5</sup> and may even correspond to a duty that international human rights law imposes on states under the aforementioned concept of extraterritorial protection.<sup>6</sup> In similar terms, questions can be raised as to whether human rights conditionality in EU international agreements falls under the concept of extraterritoriality.<sup>7</sup> Terms such as

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<sup>1</sup>The workshop was entitled ‘Extraterritoriality of EU Law and Human Rights after Lisbon: Scope and Boundaries’. Full details are available at <[www.sussex.ac.uk/webteam/gateway/file.php?name=workshop-programme-june-2017-sv-\(002\).pdf&site=266](http://www.sussex.ac.uk/webteam/gateway/file.php?name=workshop-programme-june-2017-sv-(002).pdf&site=266)> accessed 15 February 2018. The workshop was possible thanks to the generous support of the School of the Law, Politics and Sociology of the University of Sussex and the Sussex European Institute.

<sup>2</sup>R Dover and J Frosini, ‘The Extraterritorial Effects of Legislation and Policies in the EU and US’, Study for the European Parliament, Directorate-General for External Policies of the Union, Directorate B, Policy Department, Brussels, May 2012 <<http://edz.bib.uni-mannheim.de/daten/edz-ma/ep/12/EST73891.pdf>> accessed 30 January 2018.

<sup>3</sup>J Scott, ‘Extraterritoriality and Territorial Extension in EU Law’ (2014) 62 *American Journal of Comparative Law* 1 87, at 94–5, 115 (especially footnote 108).

<sup>4</sup>*ibid.*, 95–6.

<sup>5</sup>*ibid.*, 94–5.

<sup>6</sup>See, for instance, analysis on active nationality as a jurisdictional basis for home states to regulate and sanction the conduct of investors when they act overseas in a way that raises concerns from the perspective of human rights. VP Tzevelekos, ‘In Search of Alternative Solutions. Can the State of Origin be Held Internationally Responsible for Investors’ Human Rights Abuses which are not Attributable to it?’ (2010) 35 *Brooklyn Journal of International Law* 155, 216–8. See also R McCorquodale, ‘Spreading Weeds Beyond Their Garden: Extraterritorial Responsibility of States for Violations of Human Rights by Corporate Nationals’ (2006) 100 *American Society of International Law Legal Proceedings* 95 and S Deva, ‘Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should “Bell the Cat”’ (2004) 5 *Melbourne Journal of International Law* 37.

<sup>7</sup>For detailed analysis, see Clair Gammage’s contribution in this Special Issue.

‘external governance’,<sup>8</sup> ‘externalisation’,<sup>9</sup> ‘extra-territorialisation’,<sup>10</sup> ‘Brussels effect’,<sup>11</sup> ‘extraterritorial effects’,<sup>12</sup> ‘global reach’ of EU law<sup>13</sup> and ‘territorial extension’<sup>14</sup> all refer to the idea of the EU’s practice and regulatory impact in various areas beyond its territorial borders. To put it shortly, extraterritoriality has many names and different faces. As is the case with all ‘umbrella’ terms, extraterritoriality is wide-ranging and multidimensional, and it is conceptualised and framed in many different ways, thus remaining an essentially contested concept.

Complexity in the conceptualisation and delimitation of extraterritoriality translates into complexity in the relevant legal framework. In the sections that follow, we provide an overview of the legal framework from the perspective of international human rights law and the EU legal order. This will help readers to understand the contours within which the papers in this Special Issue are situated, as well as the intricacy and range of the questions raised. We then provide an outline of the papers that make up the Special Issue. The concluding section brings together the main points summoned in the introduction and highlights the need for future research in this area.

## 2. Understanding extraterritoriality in international law and in the EU legal order

As one of the core elements of statehood – territory – is inextricably linked with sovereignty. For this reason, jurisdiction is primarily territorial.<sup>15</sup> In principle, the sphere of power of the sovereign state – including its competence to exercise legislative, judicial and executive authority – applies within the confines of its own territory. However, territory is not the only basis of jurisdiction. Traditionally, states may exercise jurisdiction (i.e. sovereign power) over persons and situations by reason of various bases, such as passive and active nationality.<sup>16</sup> With the exception of universal jurisdiction, the common feature of the ‘traditional’ jurisdictional bases is the existence of a link between the state and the person/situation over which it exercises its powers. The link ensures that the state has a legitimate interest to exercise its powers, which may overlap with the jurisdiction/powers exercised by another state. Indeed, within an increasingly globalised world it is not uncommon that two or more states (would be expected to) exercise parallel (i.e. overlapping) jurisdiction.<sup>17</sup> By prioritising territory, thus rendering extraterritorial jurisdiction exceptional, the aim is to minimise the interference of the exercise of jurisdiction by one state with the sovereignty of another state – in conformity with sovereign equality. Besides, public international law sets certain limits as to how and when a state may exercise extraterritorial jurisdiction. For instance, although prescriptive jurisdiction is in principle unlimited, laws cannot be enforced on the territory of another state without its consent.

When it comes to international human rights law, jurisdiction has been further circumscribed by the criterion of effective control. According to a standard initially established by the European Court of

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<sup>8</sup>S Lavenex and F Schimmelfennig, ‘EU Rules beyond EU Borders: Theorizing External Governance in European Politics’ (2009) 16(6) *Journal of European Public Policy*.

<sup>9</sup>B Frelick, IM Kysel and J Podkul, ‘The Impact of Externalisation of Migrant Controls on the Rights of Asylum Seekers and Other Migrants’ (2016) 4(4) *Journal of Migration and Human Security* 190.

<sup>10</sup>J Rijpma and M Cremona, ‘The Extra-Territorialisation of EU Migration Policies and the Rule of Law’ EUI Working Papers, Law 2007/01.

<sup>11</sup>A Bradford, ‘The Brussels Effect’ (2012) 107(1) *Northwestern University Law Review* 1.

<sup>12</sup>L Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (2015) 25(4) *European Journal of International Law* 1071.

<sup>13</sup>E Fahey, *The Global Reach of EU Law* (Routledge 2017).

<sup>14</sup>Scott (n 3).

<sup>15</sup>See for instance, ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 9 July 2004, para 109 and ECtHR, *Banković and others v Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, The Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, Application No. 52207/99, 12 December 2001, para 59. See also the references that the ECtHR makes to scholars supporting this point of view.

<sup>16</sup>On the bases of jurisdiction see for instance, C Stalker, ‘Jurisdiction’ in MD Evans (ed), *International Law* (4th edn, Oxford University Press 2014). See also R Higgins, *Themes and Theories* (Oxford University Press 2009) 801–10; C Ryngaert, *Jurisdiction in International Law* (Oxford University Press 2008) chs 3 and 4.

<sup>17</sup>For an argument in favour of reasonable jurisdiction and a distinction between primary and subsidiary jurisdictional bases, see Ryngaert, *ibid*, ch 5. See also Tzevelekos (n 6) 207, 215–30.

Human Rights (ECtHR), for a state to be responsible for extraterritorial human rights breaches, it must first be established that it exercises jurisdiction.<sup>18</sup> The condition for establishing extraterritorial jurisdiction is that the state be found to exercise effective control<sup>19</sup> over a person or a territory, that is, over the situation raising concerns from the perspective of human rights law. In a sense, this is tantamount to establishing that a state has an obligation under international human rights law to respect or protect human rights outside its borders. Respect corresponds to negative obligations, that is, the state is expected to abstain from causing a wrongful result through conduct directly attributable to it.<sup>20</sup> Protection corresponds to positive obligations associated with the principle of due diligence.<sup>21</sup> States are expected to be proactive to the best of their ability with a view to protect human rights that are endangered or breached because of the conduct of actors/persons whose conduct is not attributable to them (i.e. to states) or from natural/social phenomena that cannot be personified, such as a natural disaster.

In more recent case law, the ECtHR has slightly mitigated the effective control criterion by establishing, for instance, a presumption that states exercise jurisdiction in case of military occupation as they exercise authority over a territory.<sup>22</sup> Moreover, the ECtHR appears to be stricter regarding effective control as a precondition for the exercise of extraterritorial jurisdiction in the case of negative obligations to respect human rights.<sup>23</sup> The criterion of effective control has been criticised in scholarship, but academic opinions on that issue are divided.<sup>24</sup> In November 2017, the Inter-American Court of Human Rights delivered an advisory opinion departing from the effective control criterion and associating the extraterritorial effects human rights rules can produce with causality.<sup>25</sup> Thus, ‘the persons whose rights have been breached are under the jurisdiction of the State of origin if there is a causal link between the fact that originates in its territory and the impairment of human rights of persons outside its territory’.<sup>26</sup>

When this rather complicated and, to some degree, fragmented legal framework is applied in the context of a *sui generis* international legal person such as the EU, there is a further difficulty represented by questions of attribution and allocation of responsibility between the EU and its member states.<sup>27</sup> Yet, this is not the only issue. With the international role of the EU becoming increasingly important, there

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<sup>18</sup>ECtHR, *Ilaşcu and Others v Moldova and Russia*, Application No. 48787/99, 8 July 2004, para 311.

<sup>19</sup>E.g. *Banković* (n 15) para 71.

<sup>20</sup>Direct attribution is juxtaposed to the concept of indirect attribution, which refers to indirect responsibility for lack of due diligence. See J Salmon (ed), *Dictionnaire de Droit International Public* (Bruylant 2001) 996.

<sup>21</sup>For instance, see Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 29 March 2004, para 8.

<sup>22</sup>ECtHR, *Al-Skeini and Others v the United Kingdom*, Application No. 55721/07, 7 July 2011, para 149.

<sup>23</sup>See for instance, ECtHR, *Rantsev v Cyprus and Russia*, Application No. 25965/04, 7 January 2010, paras 207–8. The case concerned, inter alia, Russia’s failure to prevent and investigate the death of one of its citizens who lost her life overseas. See also, *Ilaşcu* (n 18) para 331.

<sup>24</sup>For an overview of the main academic opinions on this issue, see A Ovazza, E Celoria, I Fevola, K Sivakova, R Zanatta, ‘Report on Jurisdiction Research’ <[www.academia.edu/15262824/Extraterritorial\\_application\\_of\\_Human\\_Rights\\_Treaties\\_new\\_challenges\\_The\\_link\\_between\\_human\\_rights\\_law\\_and\\_the\\_law\\_of\\_the\\_sea\\_concerning\\_a\\_States\\_omission\\_in\\_search\\_and\\_rescue\\_operations\\_in\\_the\\_Mediterranean\\_sea](http://www.academia.edu/15262824/Extraterritorial_application_of_Human_Rights_Treaties_new_challenges_The_link_between_human_rights_law_and_the_law_of_the_sea_concerning_a_States_omission_in_search_and_rescue_operations_in_the_Mediterranean_sea)> accessed 28 March 2018. For a critique of the effective control criterion as a precondition for extraterritoriality in human rights law, see VP Tzevelekos, ‘Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches. Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility’ (2015) 36 *Michigan Journal of International Law*.

<sup>25</sup>I-ACHR, Advisory Opinion *OC-23/17*, The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights) 15 November 2017. On the effects a conduct produces overseas as a basis of extraterritoriality, see C Ryngaert, ‘Jurisdiction: Towards a Reasonableness Test’ in M Langford, et al. (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013) 195.

<sup>26</sup>*OC-23/17* (n 25) para 101 (our translation). For a comment, see A Berkes, ‘A New Extraterritorial Jurisdictional Link Recognised by the IACtHR’ *EJIL:Talk!* <[www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/#more-16059](http://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/#more-16059)> accessed 29 March 2018.

<sup>27</sup>The literature on this question is abundant. See, for instance, C Tomuchat, ‘Attribution of International Responsibility: Direction and Control’ in M Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart 2013); PJ Kuijper and E Paasivirta, ‘EU International Responsibility and its Attribution: From the Inside Looking Out’ in M Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart 2013); J d’Aspremont, ‘A European Law of International Responsibility? The Articles on the Responsibility of International Organisations and the EU’ in V Kosta et al. (eds), *The EU Accession to the ECHR* (Hart 2014).

has been a growing realisation that EU external action can have a significant impact on much more than economic activity and that it can raise profound questions of social and environmental concern as well as having significant effects in respect of human rights beyond the borders of EU member states. Outside of the 2008 UN Convention on the Rights of Persons with Disabilities,<sup>28</sup> the EU is not formally bound by any multilateral or regional human rights treaty. However, fundamental human rights are part of general international law, which binds international organisations,<sup>29</sup> including supranational legal persons such as the EU.<sup>30</sup> Compliance with international law is presented as one of the principles that inspired the creation of the Union with principles such as democracy, the rule of law, human rights and fundamental freedoms.<sup>31</sup> Respect for international law should thus be viewed as one of the Union's fundamental constitutional principles. In *ATAA* (Air Transport Association of America), the Court of Justice of the EU (CJEU) linked the compliance with international law with the obligation set out in Article 3(5) TEU to reaffirm that the EU is bound not only by the international agreements it is a party to, but also by international customary law.<sup>32</sup>

Extraterritoriality regarding the EU and human rights is not only raising significant issues from the perspective of international law, but also from the perspective of the EU legal order. The changes introduced by the 2009 Treaty of Lisbon made it unequivocally clear that the EU intends to have a significant role outside its territory (as per Article 52 Treaty on European Union (TEU) and Article 355 Treaty on the Functioning of the European Union (TFEU)), not only in relation to the external dimension of the Single Market, but also in relation to normative objectives of global justice such as human rights. According to Article 2 TEU, the respect for human dignity and human rights features among the values of the EU. Article 21(2)(b) and (d) TEU includes among the objectives of EU external action human rights and sustainable economic, social and environmental development of developing countries. Furthermore, according to Article 21(2)(b) TEU, one of the goals of the EU in its external action is to 'consolidate and support democracy, the rule of law, human rights and the principles of international law.' These goals apply both to the Union's external action and the external aspects of its other policies.<sup>33</sup> Article 21(3) TEU refers to the external aspects of the Union's other policies and arguably extends the scope of application of the EU's external human rights obligations.<sup>34</sup> Article 3(5) TEU refers, inter alia, to the Union upholding and promoting its values in its relations with the wider world. Moreover, from a combined reading of Articles 3(5) and 21 TEU, the EU emerges not only as a passive norm recipient, but also as a shaper and generator of international rules. Thus, in contrast to the pre-Lisbon era, the treaties present the EU as an international actor that is committed to protect and promote collective interests and values in accordance with and by means of international law.

However, the EU does not have a general competence in the field of human rights, that is, conferred competence within the meaning of Article 5(1) and (2) TEU.<sup>35</sup> Moreover, the above provisions do not require the EU to pursue these objectives in any specific way. Quite the opposite, the treaties give little specific guidance on how international law should be applied within the EU legal order.<sup>36</sup> Thus far, the

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<sup>28</sup>The EU ratified this convention in 2010. See <[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-15&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&clang=_en)> accessed 29 March 2018. See also, United Nations Human Rights Office of the High Commissioner, 'The European Union and International Human Rights Law', 22 <[www.europe.ohchr.org/Documents/Publications/EU\\_and\\_International\\_Law.pdf](http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf)> accessed 29 March 2018.

<sup>29</sup>ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) 20 December 1980, para 37. Among other scholars, see K Daugirdas, 'How and Why International Law Binds International Organizations' (2016) 57 (2) *Harvard International Law Journal*.

<sup>30</sup>United Nations Human Rights Office of the High Commissioner (n 28) 23.

<sup>31</sup>TEU, art 21(1).

<sup>32</sup>Case C-366/10 *Air Transport Association of America v Secretary of State for Energy and Climate Change* [2011] ECLI:EU:C:2011:864, para 101; see also paras 102–30.

<sup>33</sup>TEU, art 21(3); Bartels (12) 1074–5.

<sup>34</sup>Bartels (12) 1074–5.

<sup>35</sup>See also TFEU, art 7; for a discussion of the problems raised by the EU's lack of a general competence in the field of human rights for EU external trade relations, see S Velluti 'The Promotion and Integration of Human Rights in EU External Trade Relations' (2016) 32(83) *Utrecht Journal of International and European Law* 41.

<sup>36</sup>For further analysis, see the contributions to the Special Issue, V Moreno-Lax and P Gragl (eds), 'EU Law and Public International Law: Co-implication, Embeddedness and Interdependency' (2016) 35(1) *Yearbook of European Law* 455 and following.

CJEU has failed to make significant use of existing provisions that put emphasis on the EU's commitment to comply with international law or has applied provisions dealing with international law in a restrictive or narrow manner.<sup>37</sup> As a consequence, there is little guidance as to how the EU is to exercise its powers and implement its policies and laws, particularly those of a non-economic nature, outside its borders.

This rather general and unclear framework translates into a number of questions. Does the EU have a duty to respect and protect human rights extraterritorially? If yes, what is the legal basis for this duty? Does it stem from international law – leading to the EU's international responsibility? Does it stem from EU law – leading to liability established under key principles of EU law? This is associated with the questions that exist as to the exact extent of the obligations established by Articles 3(5) and 21 TEU and whether they can be interpreted as encompassing an obligation to respect and protect human rights (extraterritorially). If we accept that the EU does not have a specific competence under EU law in the field of human rights and thus is not authorised to protect human rights externally outside the confines of the Common Foreign Security Policy (CFSP), would it be possible to rely on the doctrine of implied powers?<sup>38</sup> Does the EU Charter of Fundamental Rights (EUCFR) establish any obligations to respect and/or protect human rights extraterritorially? If so, under what conditions? And what are the limits of such extraterritorial effects?

A related and equally complex question concerns the legal standing of private applicants under Article 263 TFEU and, in particular, individuals in third countries affected by the extraterritorial effects of EU legislation or, more generally, conduct. Can they challenge the legality of the measures/laws affecting their human rights? This is a question connected with both the stringent rules on legal standing and the lack of clarity as to what the exact human rights obligations of the EU are. In this context, it is also not clear whether the EUCFR has extraterritorial effects. *Front Polisario*<sup>39</sup> (discussed in this Special Issue by Berkes and at great length by Ryngaert and Fransen) is illustrative. The case shows how certain aspects of EU law and, in particular, EU international agreements cannot be interpreted without reference to the general rules of public international law. *Mutatis mutandis*, it is quite telling about the impact EU law can have on international law and how the practice of the EU institutions contributes to the shaping of public international law. *Front Polisario* highlights the links between fundamental rights and trade policy, but also the uncertainty of the weight that ought to be given to fundamental rights. It confirms the need to develop a clearer methodology for ensuring that trade policies comply with (international) human rights obligations, as well as a clearer framework for judicial review given that the General Court (GC) and the CJEU gave contrasting messages in their respective rulings.<sup>40</sup>

<sup>37</sup>While the CJEU has long held that the EU must respect international law in the exercise of its powers and that international law forms an integral part of EU law (see e.g. Case C-162/96 *Racke v Hauptzollamt Mainz* ECLI:EU:C:1998:293, para 45; Case C-286/90 *Anklagemindigheden v Poulsen* ECLI:EU:C:1992:453; Case 181/73 *Haegeman* ECLI:EU:C:1974:41, para 5), at the same time, it has also forcefully held that the validity of EU law cannot be challenged on the basis of international law, thereby denying giving direct effect to international law, both in the trade and non-trade sphere (with very limited and narrowly interpreted exceptions), e.g. Joined Cases 21/72-24/72 *International Fruit Company NV and others* ECLI:EU:C:1972:115, para 28; Case C-280/93 *Germany v Council* ECLI:EU:C:1994:367, para 112; Case C-308/06 *Intertanko and Others*, ECLI:EU:C:2008:312, para 65. The CJEU's resistance is most vividly exemplified by the *Kadi* decisions, Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat International Foundation v Council and Commission (Kadi I)* ECLI:EU:C:2008:461; Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P *Commission and Others v Yassin Abdullah Kadi (Kadi II)* ECLI:EU:C:2013:518 as well as by Opinion 2/13 on the compatibility with EU law of the draft agreement for EU accession to the European Convention of Human Rights and Fundamental Freedoms (ECHR), ECLI:EU:C:2014:2454.

<sup>38</sup>On this point, Eeckhout maintains that if respect for human rights is a condition for the lawfulness of Community (now Union) acts it could be argued that the EU institutions have the duty, and therefore the power, in all areas in which they might exercise conferred competences to ensure that their acts do not violate fundamental rights. In Eeckhout's words, '[t]hat there must be some measure of competence to conclude human rights treaties follows, in the current state of EU law, simply from the *AETR* principle', see P Eeckhout, *EU External Relations Law* (OUP 2012) 99–100. Eeckhout defines this type of power as 'functional human rights competence'. See P Eeckhout, 'The EU Charter and the Federal Question' (2002) 39(5) *Common Market Law Review* 945, 984.

<sup>39</sup>Case T-512/12 *Front populaire pour la libération de la saquiaelhamra et du rio de oro (Front Polisario) v Council of the European Union* [2015] ECLI:EU:T:2015:953 and Case C-104/16 P *Council of the European Union v Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario)* [2016] ECLI:EU:C:2016:973.

<sup>40</sup>In the *Front Polisario* action for annulment case, the GC (Case T-512/12) recognised the standing of *Front Polisario*, a national liberalisation movement for the Sahrawi people living in Western Sahara, and granted the partial annulment of

To conclude, the increased global presence of the EU poses many challenges and open questions about the way the EU exercises its powers externally, whether it can lawfully exercise these powers, the effects of its own laws on human rights and, significantly, its relationship with international law. While it is certain that the extraterritorial effects of EU law and the extraterritorial conduct of the EU may have redistributive implications and an important impact on human rights, identifying and understanding the exact contours of these effects and implications poses a significant challenge.

### 3. The contributions to this Special Issue

In light of the rationale outlined above, this Special Issue brings together five contributions in the fields of trade and public procurement, each addressing a different question about the extraterritoriality of EU law, the relationship between EU and international law where relevant and its human rights implications. These areas of law and policy have been selected for the multifaceted nature of the problems that they present us with, forcing us to constantly rethink the notion of extraterritoriality and the related human rights implications.

When drafting their papers for the workshop in their respective fields of EU and international law, authors were asked to consider a series of points. First, they were asked to identify the nature of the EU measure: has the measure in question been conceived as part of EU external action or external policies with intended extraterritorial effects? Or is the measure in question part of the internal policies of the EU? In that case, have these policies been conceived to produce extraterritorial effects *ab initio*? Next, authors were asked to identify the nature of the extraterritorial conduct of the EU and extraterritorial effects of EU law, that is, to frame extraterritoriality: does it occur because of conduct taking place outside the EU's 'territory' or within it but producing effects extraterritorially? What is the nature of the conduct at issue, prescriptive, judicial or executive/administrative? Is it raising an issue of protection (i.e. positive) or rather of respect (i.e. negative) of human rights? What is the jurisdictional basis/link, and more generally (factual) connection between the EU and the extraterritorial situation, that raises issues from the perspective of human rights law? Thereafter, authors proceeded to identify the impact of the measure and/or conduct concerned: what is the direct or indirect, actual or potential impact of the extraterritorial effects of EU law on: (a) the legal and regulatory system of third countries, (b) the subjects and objects of the legal and regulatory system of third countries, (c) cross-border policies, and (d) human rights, including social and labour rights and environment protection? This analysis was followed by an examination of the nature of extraterritorial human rights obligations and the limitations and problems connected with and/or posed by the extraterritoriality of EU law: what is the relationship between different types of extraterritorial obligations, particularly in relation to the extraterritorial application of EU law as well as national law, and in relation to the combined extraterritorial application of EU and national law? How far do those duties extend? What are the jurisdictional, regulatory and legal problems of the extraterritorial effects of EU law?

The contributions to this Special Issue build on these draft papers and the rich debate and discussion that took place during the workshop. In particular, they further address the way in which the extraterritoriality of EU law is shaping the relationship of EU law with international law and possibly changing our understanding of international law, principles and rules. Most importantly, some of the contributions examine whether the extraterritorial effects of EU law undermine its compliance with international law. In this context, they also examine the role of non-state actors.

The issue opens with Antal Berkes' article on the extraterritorial human rights obligations of the EU in its external trade and investment policies and, in particular, whether there is a duty to protect extraterritorially under either EU law or international law. The analysis draws examples from customary

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the EU Council Decision that approved the conclusion of the 2010 EU-Morocco Liberalisation Agreement on agricultural, processed agricultural and fisheries products, and amendments to the 2000 EU-Morocco Association Agreement (2012/496/EU). Most importantly, the GC made it clear that the EU was under an obligation to ensure respect for the fundamental rights of non-EU nationals in non-EU territory. However, the CJEU (Case C-104/16 P) found that the GC had incorrectly interpreted the territorial scope of the agreements, which the GC had used as a pivotal element in considering Front Polisario's standing and therefore quashed the decision of the GC denying legal standing for Front Polisario. In so doing, the CJEU declared Front Polisario's action to be inadmissible since the agreements could not be interpreted as applying to Western Sahara.



international law, human rights clauses of bilateral treaties and multilateral human rights conventions. In this context, Berkes takes issue with the putative due diligence obligations of the EU in relation to its trade and investment policies that have extraterritorial effects. The main argument put forward is that, while recognising that there are problems of justiciability and enforcement, the EU is bound by human rights obligations toward individuals outside the territory of its member states who are affected by its trade and investment policies. Internal rules of the EU impose such human rights obligations, namely the Founding Treaties and the EUCFR, which all apply to the EU's internal and external policies. In similar terms, various international norms bind the EU, especially customary international law, human rights clauses of bilateral treaties concluded with third states and international human rights treaties to which the EU is (or intends to be) party.

Cedric Ryngaert and Rutger Fransen examine the EU's extraterritorial obligations in relation to a highly sensitive policy area: that of trade with occupied territories, using the example of Western Sahara and the Sahrawi people. Their analysis is centred on the aforementioned judgments of the GC and the CJEU in *Front Polisario*. The central argument is that the EU courts failed to properly acknowledge the situation in Western Sahara, which remains on the United Nations list of non-self-governing territories.<sup>41</sup> In particular, both EU courts failed to fully consider that Western Sahara is under the belligerent occupation of Morocco. Consequently, in terms of the EU's extraterritorial human rights obligations, the GC and the CJEU should have applied the international law regime of occupation and the duty of non-recognition rather than EU fundamental rights law as these are tailored to the peculiar challenges confronting an occupied population. The article concludes with a critical reflection on the implications of these judgments for EU trade with all occupied territories and advocates the development of a coherent framework that legally differentiates trade that benefits the local population from trade that does not.

Focusing on human rights clauses and social norms contained in EU free trade agreements (FTAs), Clair Gammage considers the global reach of EU law and the role of the EU as a normative actor. The analysis is centred on the nexus between human rights, development and trade in the EU's external trade policy within the broader framework of international and EU human rights law. In this context, she examines the extent to which EU external action may have extraterritorial human rights effects. Gammage questions the legitimacy of the EU's conceptualisation of FTAs as vehicles for the promotion of human rights and social norms through a critique of the justiciability of the clauses contained therein. The article advances the argument that the EU's specious commitment to trade liberalisation within a human rights framework is evident in some of the 'new generation' FTAs.

With Maria Anna Corvaglia and Kevin Li's paper the focus shifts to the field of public procurement and the discussion of the extraterritoriality of human rights is undertaken in the context of global supply chains, which are part of a complex and multilayered web of regulation involving both public and private actors. The article examines the ways in which the regulation of public procurement can help to better protect human rights and labour rights extraterritorially in the cross-border behaviour of firms across the fragmented global supply chains. To this end, the article looks at the role of firms in ensuring the respect of human rights and labour rights across national borders. Using the lens of public procurement regulation is particularly important as it can serve as a key regulatory tool for effectively addressing transparency and accountability issues in global supply chains. In similar terms, it can provide a platform for the enforcement of human rights and labour standards. The authors conclude by suggesting that the EU should introduce a due diligence obligation for suppliers over their supply chain, which would strengthen the 2014 EU public procurement regulatory framework and enhance its extraterritorial reach, as well as align the former with firms' own Corporate Social Responsibility (CSR) practices and the EU's own CSR Strategy.

The final paper, by Albert Sanchez-Graells, examines another aspect of the extraterritoriality of EU public procurement law, that of good administration and access to justice by reference to the case law of the CJEU. The focus is on the EU's FTAs and Deep and Comprehensive Free Trade Agreements (DCFTAs) with third countries and, in particular, on the extraterritorial effectiveness of the EU's own procurement standards through its external trade policies. By employing a functional approach to the

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<sup>41</sup>The United Nations and Decolonisation <[www.un.org/en/decolonization/nonselfgovterritories.shtml](http://www.un.org/en/decolonization/nonselfgovterritories.shtml)> accessed 22 January 2018.

notion of territorial extension of human rights, the author uses EU public procurement law as a case study to illustrate the interplay between the EUCFR and the European Convention of Human Rights. In this context, he looks at certain aspects of the extraterritoriality of EU procedural standards and its implications for the rules on procurement remedies. The argument put forward here is that, ultimately, the territorial extension of certain EU procedural rights and standards through its external trade relations may have a significant impact on the municipal administrative and judicial systems of non-EU partner countries.

In the Conclusion to the Special Issue, Lorand Bartels provides a critical reflection on the human rights obligations of the EU in relation to its external action. In his analysis, Bartels looks, where necessary, at the justiciability within the EU order of extraterritorial human rights violations, the extraterritorial conduct of the EU and the reach of its policies and laws from the perspectives of international and EU law. Taken together, Bartels' key observations provide a solid ground for carrying out further research on the extraterritoriality of EU law and its human rights impact.

#### **4. Concluding remarks**

Extraterritoriality is a complex and multifaceted legal problem. The preceding pages showed how complexity in the conceptualisation and delimitation of extraterritoriality leads to complexity in the international human rights legal framework and in the EU legal sphere with additional challenges to the difficult relationship between international law and EU law. Against this background, the collection of papers that make up this Special Issue seeks to examine the concept of extraterritoriality in specific fields of EU law and policy, namely trade and public procurement, in order to address some of the most pressing questions concerning the extraterritorial conduct of the EU, as well as the extraterritorial effects of EU law in those specific fields, from the perspective of human rights. The overarching aim of this Special Issue is not that of providing a comprehensive analysis of extraterritoriality but rather to contribute to the debate on the extraterritorial effects produced by the laws and conduct of the EU. It is acknowledged from the outset that, given the increasing global presence of the EU and its related human rights impact, further and more systematic research in this area is required.

#### **Declarations and conflict of interests**

The authors declare no conflicts of interest associated with this publication.