

THE EUROPEAN UNION AND **INTERNATIONAL** **HUMAN RIGHTS LAW**



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

*Europe
Regional Office*



Credits

Design: Stefan Einarsson

Photographer: ©Torfi Agnarsson

Contents

Contents	1
Acknowledgements	3
Abbreviations	4
Summary	6
Chapter One: Introduction	7
Chapter Two: The European Union: Positive Aspects and Challenges for the Realisation of Human Rights within the EU	9
A. Positive Aspects of Human Rights Protection in the European Union	9
B. Challenges to the Realisation of Human Rights in the European Union	11
1. Limits of the ‘General Principles’ of EU Law ¹¹	
2. Limits of the Charter of Fundamental Rights of the European Union	13
3. Lack of Recognition of Positive Duties	14
4. Adequacy of Impact Assessments	17
5. Limitations of the FRA’s Mandate	18
6. Obligation to Denounce Incompatible Agreements with Third States	19
7. The EU’s Non-Discrimination Regime	20
C. Conclusions	21
Chapter Three: The Applicability to the European Union of Human Rights Obligations under the United Nations Charter and Human Rights Treaties	22
A. Obligations Imposed Directly on the European Union	22
1. Treaty Obligations	22
2. Customary International Law	23
3. De Facto Succession to Obligations of the Member States Recognised by EU Law	24
B. Obligations Imposed on the Member States by International Law	25
1. Continuity of Member States’ Obligations	25
1.1 Conditional or Strict Liability	26
1.2 Attributability of Acts	28
2. Specific Obligations to Accord Priority to UN Charter-Derived Obligations	29
C. A Victim-Based Approach	30
D. Conclusions	30
Chapter Four: Practical Measures for Ensuring Continuity of United Nations Human Rights Guarantees in the European Union	32
A. The Basis for Engagement of the EU with the UN Treaty Bodies or Charter Bodies	32
B. Preliminary Considerations Guaranteeing the Effectiveness of Supervision by the UN Treaty Bodies or Charter Bodies	33
1. Clear Delineation of Areas of EU Competence, Policy Measures and Legislation	33
2. Effective Mechanisms for Implementation of Treaty Body Recommendations	36
C. Direct Engagement of the EU with the UN Human Rights Infrastructure	37
1. Treaty-Based Procedures	37

1.1 Periodic Reporting	37
1.2 General Comments and Recommendations	39
1.3 Individual Petitions	41
2. Charter-based Procedures	41
D. Nature of the Legal Obligations Flowing from Decisions Issued by the UN Treaty Bodies and Charter Bodies	42
E. Conclusions	43
Chapter Five: Case study: Special Safeguards for Suspected or Accused Persons who are Vulnerable.....	45
A. Background.....	45
B. Content of the Safeguards	46
C. Considering the 2004 Proposal in the Light of the CRC and the CRPD	46
1. Children	46
2. Persons with Disabilities.....	49
D. Conclusions.....	50
Chapter Six: Conclusions and Recommendations	52
1. Recommendations Directed at the EU, its Institutions and the Member States	53
2. Recommendations Directed at the UN Human Rights Bodies	54
Notes	55

Note:

Frequent reference is made to the general comments and general recommendations of the UN treaty bodies. Those issued up until 2008 are reprinted in 'Compilation of General Comments Adopted by Human Rights Treaty Bodies', UN Doc. HRI/GEN/1/Rev.9, Vol. I and Vol. II. Later general comments are available from the Treaty Body Database accessible through the website of the OHCHR: <http://www.ohchr.org>.

Acknowledgements

The Regional Office for Europe of the UN High Commissioner for Human Rights is grateful to Dr. Israel de Jesús Butler of the Law School of Lancaster University, United Kingdom who is the primary author of this publication. The author wishes to thank Mr. Jan Jarab and Ms. Linnéa Arvidsson for their contributions and advice. The views expressed in this publication are the author's own and do not necessarily represent the views of the Regional Office for Europe of the UN High Commissioner for Human Rights.

Abbreviations

CAP	Common Agricultural Policy
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CED	International Convention for the Protection of All Persons from Enforced Disappearance
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CFR	European Union Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DG	Directorate-General of the European Commission
EAW	European Arrest Warrant
EC	European Community
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGO	Intergovernmental organization
ILA	International Law Association
ILC	International Law Commission
MoU	Memorandum of Understanding
OHCHR	Office of the United Nations High Commissioner for Human Rights
TEU	Treaty on European Union

TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	Office of the United Nations High Commissioner for Refugees
UNMIK	United Nations Interim Administration Mission in Kosovo
UPR	Universal Periodic Review (of the UN Human Rights Council)
VCLT	Vienna Convention on the Law of Treaties

Summary

The Member States of the European Union are subject to a range of human rights obligations derived from the Charter of the United Nations and the 'core' human rights treaties elaborated under the aegis of the UN. These instruments confer a range of inalienable rights on all those within the jurisdiction of the Member States.

At the same time the Member States have delegated differing degrees of competence to the EU over a range of policy areas. Certain policy areas are 'exclusive' to the EU, as a consequence of which the Member States no longer have the authority to act. A larger range of policy areas is 'shared' between the EU and Member States. In these areas, the Member States may exercise their own competence to the extent that the EU has not acted, but they must not act in a manner inconsistent with existing EU measures.

When implementing EU Law, the EU and its Member States are required to ensure that they act consistently with the EU's own internal human rights rules. However, the range of rights recognised under EU Law is narrower than that guaranteed under the UN treaties. Furthermore, the EU has accepted that it is under a duty not to actively violate rights (i.e. to 'respect' rights), but has not generally acknowledged that it has an obligation or the authority to protect or promote them. However, the duty to protect and promote rights is an integral element of the Member States' obligations under the UN treaties.

This situation strikes at the heart of the principle of the universality of human rights and gives rise to two problems. Firstly, the narrower range of human rights within EU Law risks the creation of a two-tier system of protection in the EU Member States, between those areas covered by national law and those covered by EU Law. Secondly, it creates a gap in the implementation of the duties to protect and promote those rights in those policy areas where the Member States have delegated powers to the EU.

The Member States remain bound by their obligations under UN human rights treaties and cannot release themselves from these obligations simply by delegating powers relevant to their implementation to the EU. Furthermore, under International Law the EU itself is bound by human rights obligations in so far as they are contained in Customary International Law and any treaties to which the EU is party, such as the Convention on the Protection of Human Rights and Fundamental Freedoms and the Convention on the Rights of Persons with Disabilities, which it ratified in 2010. There are also strong arguments, based in EU Law itself, to support the position that the EU is in fact bound by human rights obligations stemming from the UN Charter and the UN human rights treaties directly.

In order to prevent the existence of a two-tier system of protection in the EU, the emergence of a gap in protection and promotion of human rights, and to allow Member States to fulfil their obligations under the UN human rights treaties, it is necessary for the EU to ensure that it acts in such a way as to give effect to these obligations. Ultimately, this could be achieved through accession to or voluntary acceptance of UN standards by the EU. However, this could also be achieved at an informal level by the EU engaging with UN monitoring bodies established under the Charter or those human rights treaties to which the Member States are party. Guidance issued under these mechanisms may then be used by the EU during law and policy formulation.

UN human rights treaties, particularly those on specialised areas to which all the EU Member States are party, such as the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, provide the opportunity to enrich EU Law and policy-making – as illustrated in Chapter Five of this report.

The EU and its Member States, working in collaboration with the UN human rights protection mechanisms, have the opportunity to give full effect to the inalienable and universally recognised human rights which the Member States have accepted as legally binding. Through this process the EU may work towards realisation of its stated goal of promoting 'the well-being of its peoples'.

Chapter One - Introduction

As States intensify collective action and cooperation through intergovernmental organisations (IGOs), potential problems arise in ensuring the continuity of the human rights guarantees they have undertaken individually. In delegating powers to IGOs to perform particular functions, States may give up areas of competence to act in their own right, or coordinate on matters to the extent that decentralised action by States is either precluded under the IGOs' rules or becomes less likely. Without expressly conferring on those IGOs the obligation to guarantee human rights within their particular fields of competence, States may create a situation where either the IGO mandates practices or rules that directly conflict with those obligations, or where neither the IGO nor States have the express competence to act in fulfilment of those duties.

Whether the EU regards itself as an 'IGO' or distinguishes itself as 'supranational' is a moot point from the perspective of International Law. Any entity established by States, endowed with its own institutions to exercise particular functions, falls into the category of 'IGO' for the purposes of determining its rights and obligations in International Law.¹ Whether that entity then has particular characteristics that distinguish it from other IGOs (such as the doctrines of direct effect or supremacy in EU Law) certainly has implications for the relationship between that IGO and its Member States,² but it does not alter the relationship between that IGO and third States or other IGOs, or the relationship between the Member States and third States. This much has been explicitly recognised by the Court of Justice of the European Union (CJEU).³ Not only do these relations remain governed by International Law, but it is through rules of International Law that the EU is in fact able to create these particular 'distinguishing' characteristics to begin with.

The Member States of the EU have delegated differing degrees of competence to the EU over a range of policy areas. Certain policy areas are defined as being 'exclusive' to the EU, as a consequence of which the Member States no longer have the authority to act.⁴ A larger range of policies is described as 'shared' between the EU and Member States. In these areas, the Member States may exercise their own competence to the extent that the EU has not acted, but must not act in a manner inconsistent with existing EU measures. Thus, in policy areas of shared competence, as the EU takes measures, the competence of the Member State shrinks proportionately.⁵

The Member States of the EU are subject to a wide range of obligations derived from the UN Charter and UN human rights treaties. All Member States are party to the Charter of the United Nations, which itself (in Articles 55 and 56) places an obligation on States to 'promote... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. Over several decades of practice this reference to human rights has been interpreted by the UN General Assembly to include the Universal Declaration of Human Rights (UDHR)⁶ and any UN human rights treaties to which States are party.⁷ Thus, States are often addressed in the following terms:

[A]ll Member States have an obligation to promote and protect human rights and fundamental freedoms as stated in the Charter of the United Nations and elaborated in the Universal Declaration of Human Rights, the International Covenants on Human Rights and other applicable human rights instruments.⁸

This is reaffirmed by the fact that the Universal Periodic Review procedure of the UN Human Rights Council is based on the UN Charter, the UDHR and human rights instruments to which the State under review is party.⁹

All the Member States of the EU are party to the majority of the 'core' human rights treaties elaborated under the aegis of the UN: the International Covenant on Civil and Political Rights (ICCPR),¹⁰ the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹¹ the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),¹² the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹³ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)¹⁴ and the Convention on the Rights of the Child (CRC).¹⁵ All EU Member States have also ratified or signed the Convention on the Rights of Persons with Disabilities (CRPD).¹⁶

The EU as such has yet not ratified or acceded to a UN human rights treaty, with the notable exception of the CRPD, to which it acceded in 2010.¹⁷ It has developed its own internal mechanisms aimed at protecting human rights, but these do not reflect the range of rights, nor do they mirror the depth of the obligations undertaken by the Member States under UN instruments. Consequently, those individuals within the jurisdiction of the Member States of the EU face a two-tier system of human rights protection. Where the Member States are still competent to act individually they will be guided by their obligations under the UN human rights treaties and the UN Charter. However, in those areas falling within EU competence the Member States give effect to EU rules that do not necessarily reflect the broader and deeper standards contained in the UN instruments.

The prospect of a two-tier system of human rights protection within the EU strikes at the heart of the principle of universality on which human rights rests, both legally and conceptually. This is affirmed at the normative level by various instruments. The UDHR proclaims that its contents are ‘a common standard of achievement for all peoples and all nations’ and the 1993 Vienna Declaration affirms that ‘[t]he universal nature of these rights and freedoms is beyond question’.¹⁸ The UN human rights treaties refer to the ‘equal and inalienable rights of *all members* of the human family’, affirming that States are under an obligation ‘to promote *universal* respect for, and observance of, human rights and freedoms’.¹⁹ The EU also actively promotes ratification of UN human rights treaties by third countries in its external relations.²⁰ In this sense the ‘EU guidelines on human rights dialogues with third countries’ state:

[T]he European Union is committed to dealing with those priority issues which should be included on the agenda for every dialogue. These include the signing, ratification and implementation of international human rights instruments, cooperation with international human rights procedures and mechanisms.²¹

Thus, universality is itself a principle that the EU promotes. Therefore, it seems all the more important that the EU ensures that its own internal human rights regime conforms to UN standards, to which all its Member States have committed themselves, and which it promotes abroad. **Any disparity between internal and external approaches to human rights would only serve to undermine the role of the EU in the eyes of its international partners and other third States.** In this regard the European Parliament has underlined that “the European Union’s internal human rights record has a direct impact on its credibility and ability to implement an effective external human rights policy’.²²

This study explores how and why the EU should give effect to the human rights standards contained in the UN Charter and other UN treaties. Chapter Two examines, in a broad sense, the EU’s current approach to human rights, highlighting both its successes and remaining challenges. The shortcomings of the EU’s human rights regime underline the need for the EU to adhere to UN standards in order to ensure that those within the jurisdiction of the Member States benefit from the standards that the latter have undertaken to implement. Chapter Three explores the grounds under International Law according to which the EU is either *de jure* directly bound or *de facto* indirectly bound by UN human rights treaties and the human rights standards stemming from the UN Charter.

Chapter Four then examines the various mechanisms through which the UN treaty bodies and Charter bodies might engage with and cooperate with the EU in order to facilitate adherence to UN standards. Chapter Five contains a case study which acts as a concrete example of how UN standards may contribute to and enrich EU policies, while ensuring that they are consistent with the Member States’ pre-existing obligations under these instruments. The case study is based on the EU’s ‘Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings’.²³ In particular, it sets out the relevant standards contained in UN human rights treaties that the EU should take into account in elaborating its anticipated proposal for legislation on Special Safeguards for Suspected or Accused Persons who are Vulnerable.²⁴

Chapter Two - The European Union: Positive Aspects and Challenges for the Realisation of Human Rights within the EU

This chapter will explore, at a structural level, the means through which human rights are given effect in the EU. It is beyond the scope of this study to examine specific policy areas. However, examples of both positive developments and challenges will be presented for illustrative purposes. Section A will explore the measures that exist within the EU legal system to give effect to human rights standards. Section B will then analyse both possible shortcomings of this system as well as other challenges within EU Law and policy-making for the implementation of human rights.

As a preliminary point it should be understood that while the terminology applied by the EU has been that of **'fundamental rights', rather than 'human rights', there is in fact no real difference between the two.** Different labels, such as 'fundamental freedoms', 'civil liberties', or 'civil rights' have also been applied to the collection of values referred to as 'human rights'.²⁵ The fact that 'fundamental rights' coincides conceptually and legally with 'human rights' is clear also from the approach of the CJEU, which draws on 'human rights' treaties, as well as the Charter of Fundamental Rights of the European Union (CFR), which is made up predominantly of 'human rights' featuring in the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter "the European Convention") as well as UN human rights treaties (see below). Furthermore, the EU Agency for Fundamental Rights (FRA) is guided predominantly by UN human rights treaties, as well as the CFR, in setting out the standards against which to compare EU and Member State practices.²⁶ Neither does it appear that any attempt has been made in doctrine or case law to distinguish between fundamental rights and human rights.

A. POSITIVE ASPECTS OF HUMAN RIGHTS PROTECTION IN THE EUROPEAN UNION

In many ways the EU and its Member States can be commended for the measures taken to ensure the continued implementation of human rights obligations parallel to the process of integration. Firstly, **the CJEU has developed respect for human rights as a condition of legality of EU Law, ensuring that where the EU takes measures it may not infringe upon the body of human rights recognised as part of the 'general principles' of EU Law.** The content of the 'general principles' is developed by drawing on treaties to which the Member States are party, in particular the European Convention,²⁷ the constitutional traditions of the Member States²⁸ and, to a more limited extent, the UN human rights treaties.²⁹

Secondly, **the Lisbon Treaty has conferred legally binding status on the CFR,** obliging the institutions of the EU (and the Member States when implementing and interpreting EU Law) to respect the rights that it enumerates.³⁰ According to Article 51(1) of the CFR:

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

Thus, to the extent that national law cannot be considered to be giving effect to EU Law (i.e. certain areas where Member States retain competence to act), the CFR has no role in determining its validity.

The CFR represents a particularly important development in human rights protection by the EU, firstly because the rights enumerated therein extend beyond those hitherto recognised by the CJEU as part of the 'general principles' of law,³¹ and secondly because they go beyond the scope of the European Convention (which is the CJEU's main source of inspiration). The preamble states that the CFR 'reaffirms... the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States'.³² The influence of UN human rights treaties is made express in the explanatory document

to the CFR, for instance in Article 24 on the rights of the child, which the explanatory document states 'is based on the New York Convention on the Rights of the Child'.³³

Thirdly, the institutions of the EU have begun to be informed by human rights more expressly in their work. The European Commission (hereafter "the Commission"), responsible for initiating legislation, has stated that legislative proposals will pass through a **human rights impact assessment** to ensure compliance with the CFR.³⁴ It has also begun '**mainstreaming**' particular elements of human rights across different policy areas. For instance, the EU has also made steps towards developing a strategy on the rights of the child to facilitate their implementation across different areas of EU competence, such as asylum and immigration, development policy, health, financial services and criminal law.³⁵

The Council of the European Union (hereafter "the Council") has adopted a range of **Guidelines** to inform the institutions and Member States about how to promote human rights in relations with third States.³⁶ The Council and Commission also produce **Annual Reports** on human rights, and although these traditionally have focused on human rights outside the EU, the Commission has indicated that it will in future verify Member States' compliance with the Charter when implementing EU Law.³⁷ Within the **European Parliament** there also exist several Committees dedicated to issues relevant to human rights.³⁸ Although the European Parliament does not have authority to initiate legislation, it may formally request the Commission to do so,³⁹ and frequently calls upon the Commission, the Council and Member States to take initiatives to ensure the protection and promotion of human rights across a range of internal and external matters,⁴⁰ as well as passing resolutions directed towards third countries where human rights abuses are alleged to have occurred.⁴¹ In this sense the European Parliament tends to fulfil an active role in scrutinising and commenting upon measures taken by the Commission, the Council and the Member States.⁴²

In 2007 the EU established the **FRA** and tasked it with collecting and analysing data with a view to producing comparative reports on particular thematic human rights issues.⁴³ The FRA's studies provide in-depth analysis of law, practice and social experiences at the EU and national levels, using a comparative approach to identify strengths and weaknesses in different Member States.⁴⁴

Of particular significance is the methodology the FRA has adopted in its studies, which form the basis of its opinions issued to the EU institutions and the Member States. In this sense the FRA sets out the international standards of relevance to the matter under examination (including UN human rights treaties and documents issued by the monitoring bodies interpreting their provisions) as the background against which to analyse existing EU and Member State practices and suggest alterations.⁴⁵ For instance, the FRA's comparative report of 2009 on the housing conditions of Roma and Travellers in the EU draws on Article 11(1) of the ICESCR and in particular on general comment No. 4 of the CESCR on the right to housing in order to establish the scope and meaning of the right to housing.⁴⁶ EU and Member State policies and practices are then discussed in the light of these standards, and the opinions issued by the FRA expressly refer to the UN treaties where appropriate.⁴⁷

Fifthly, the EU has developed its own area of **substantive law relating to non-discrimination**, which is a central element of all human rights regimes.⁴⁸ The EU's non-discrimination regime emerged in order to address particular economic concerns, ensuring that competitive advantage could not be gained by Member States that offered less favourable (and therefore less costly) protection to women in the workplace.⁴⁹ Since 2000 the legislative protection in this area has evolved at a great pace, so that EU Law provides protection against discrimination in the context of employment on a range of grounds: sex, racial and ethnic origin, age, religion or belief, sexual orientation and disability.⁵⁰ Protection against discrimination outside the sphere of employment is also provided but only in relation to some of these grounds.⁵¹ Protection against discrimination on the basis of racial or ethnic origin and on the basis of sex is prohibited in the context of accessing goods and services, including housing and health care. Protection against discrimination on the basis of racial or ethnic origin is also prohibited in accessing the welfare system more generally. Furthermore, Article 10 of the Treaty on the Functioning of the European Union (TFEU) (a new provision introduced by the Lisbon Treaty) creates an obligation on the EU to 'combat discrimination' while 'defining its policies and activities', which suggests that the EU should ensure not only that its policies themselves do not discriminate, but also that they promote equality. Thus it can be seen that human rights do permeate various aspects of EU activity and inform EU policy-making in certain areas.

B. CHALLENGES TO THE REALISATION OF HUMAN RIGHTS IN THE EUROPEAN UNION

Despite these areas of success, there remains a pressing need to ensure EU compliance with human rights standards as guaranteed by the UN Charter and the UN human rights treaties, for several reasons. Broadly speaking, current methods of securing human rights within the EU do not provide the level of protection required of the Member States by virtue of their obligations under the UN Charter and UN human rights treaties. This section will outline these challenges.

1. Limits of the 'General Principles' of EU Law

The scope of human rights as recognised by the 'general principles' of EU Law has been based predominantly on the European Convention. The typical formulation of the CJEU is that:

Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. The [European Convention] has special significance in that respect.⁵²

The privileged position of the European Convention is also reflected in the wording of Article 6(3) of the Treaty on European Union, which states:

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.⁵³

It is welcome that the CJEU has recourse to the European Convention in order to develop the body of human rights that the EU must respect in a manner consistent with the obligations undertaken by the Member States under that instrument.

However, the European Convention is largely confined in scope to civil and political rights.⁵⁴ As a consequence of drawing almost exclusively from the latter, a wide range of economic, social and cultural rights, as well as rights articulated in detail in relation to particular vulnerable groups, such as women and children, are potentially excluded from protection.

The CJEU's reluctance to draw from treaties other than the European Convention in developing the 'general principles' has even extended to its dismissal of the validity of UN monitoring bodies' interpretations of human rights provisions in one case.⁵⁵ Accordingly, in the *Grant* case the CJEU refused to accept that the prohibition of discrimination on the basis of sex could include 'sexual orientation'. It was not persuaded by the argument that sexual orientation was recognised as a protected ground under International Human Rights Law through the jurisprudence of the UN Human Rights Committee (HRC). While the CJEU is entitled to conclude that 'sex' cannot include 'sexual orientation', it seemed to expressly reject the weight of HRC findings, stating that it 'is not a judicial institution' and that its findings 'have no binding force in law'.⁵⁶

At the same time, where it has referred to UN treaties, this has been somewhat inconsistent. In the case of *Parliament v Council* relating to family reunification,⁵⁷ although the CJEU referred to the CRC in positive terms it relied almost entirely on the European Convention and the case law of the European Court of Human Rights (ECtHR) in elaborating the scope of the child's right to family life under Article 8 (the right to family life).⁵⁸ In the later case of *Deiček* (concerning child abduction)⁵⁹ the CJEU relied entirely on Article 24 of the CFR on the rights of the child without any reference to the CRC or the interpretation given by the monitoring body, even though this article is in fact based on the Convention.⁶⁰

If the CJEU were to adopt a more receptive approach to UN human rights standards in its development of the 'general principles', this could mitigate the danger of a two-tier system of human rights protection in the EU, discussed in Chapter One. The UN human rights treaties clearly already satisfy the test applied in developing the 'general principles', which the CJEU has openly acknowledged:

the International Covenant on Civil and Political Rights is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law... That is also true of the Convention on the Rights of the Child.⁶¹

If the CJEU is to be a guardian of human rights within the EU, it must also surely be a guardian of human rights as a body of rules with universal application. The CJEU dedicated much effort in its early years to ensuring the uniform application of EU Law as between the Member States through developing the principles of supremacy and direct effect, in order to ensure the proper functioning of the internal market.⁶² If the economic goals of the EU justify the uniform interpretation of EU Law across the Member States, then the goal of the EU to 'promote ... the well-being of its peoples' also justifies the uniform interpretation of human rights – all the more so if the EU is promoting universality in its external relations.⁶³

The absence of regular reference to UN human rights treaties threatens to undermine universal application of human rights. The dismissive attitude expressed in the *Grant* case towards the case law of the HRC fails to take into account the nature of International Human Rights Law and, in particular, the manner through which it evolves. Human rights protection mechanisms at the regional and UN levels rely heavily on each other in order to develop the interpretation of international standards.⁶⁴ This is based on conceptual and pragmatic considerations.

Firstly, for the most part the rights contained in the principal regional and UN instruments are expressed in very similar, and often identical, terms. This in itself is based in great part upon the principle of universality which flows from the premise that what qualifies an individual to benefit from human rights is his/her existence as a human being. It therefore makes perfect sense for monitoring bodies to draw upon each others' case law and interpretative documents that elaborate on the meaning of similarly or identically worded provisions.

Secondly, unlike domestic jurisdictions, UN and regional monitoring bodies (with the exception of the ECtHR) issue relatively few decisions on contentious cases, advisory opinions, or general interpretative documents. This renders it all the more necessary for dispute settlement and monitoring bodies to draw from each other. Considering that the principle of universality is given practical effect in this way by regional and UN monitoring and dispute settlement bodies, it is all the more anomalous that the CJEU should develop a European system in isolation.

The CJEU might be encouraged to draw more extensively from the UN treaty monitoring bodies out of consideration of three other factors. Firstly, the States parties to the UN human rights treaties established monitoring bodies composed of experts and explicitly charged them with the task of interpreting their provisions.⁶⁵ Given that the treaty bodies have been mandated by the States (including all the Member States of the EU) to provide authoritative interpretations of the treaties, it seems difficult to argue with the assertion that International Human Rights Law is very much what the monitoring bodies say it is.

Secondly, it is not merely other human rights bodies that refer to the UN treaty bodies' case law, but also courts with general jurisdiction. For example, the International Court of Justice relied on interpretations issued by these bodies in its Advisory Opinion on the Wall in Occupied Palestine,⁶⁶ and they are increasingly referred to by national courts.⁶⁷ Thirdly, the ECtHR – the body to which the CJEU pays greatest deference when interpreting and applying the 'general principles' – also increasingly draws upon the decisions of the UN treaty bodies. This has proved ever more necessary in the light of the age of the European Convention, in that while UN treaties have evolved to explicitly address particular problems, such as trafficking or children's rights, the European Convention contains no express provisions on these issues. The ECtHR has therefore had greater resort to UN instruments to serve as the basis for its interpretation of more general provisions.

For instance, in a recent case relating to a complaint of trafficking, Russia raised an argument that the claim was inadmissible since trafficking is not explicitly mentioned by the European Convention. The ECtHR considered that a prohibition on trafficking nevertheless could be read into Article 4 of the European Convention, which prohibits slavery. The ECtHR referred to several UN instruments relevant to the prohibition on trafficking, including the CEDAW and the 'Palermo Protocol',⁶⁸ stating:

The Court must have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as

a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions... Account must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part.⁶⁹

In the case of *Opuz v Turkey* the ECtHR dealt with a complaint that the State had failed to take steps to adequately protect women from domestic violence, including the manner in which allegations were dealt with and pursued (or not pursued) by domestic police and courts. The ECtHR stated:

In interpreting the provisions of the Convention and the scope of the State's obligations in specific cases ... the Court will also look for any consensus and common values emerging from the practices of European States and specialised international instruments, such as the CEDAW, as well as giving heed to the evolution of norms and principles in international law through other developments such as the Belém do Pará Convention,^[70] which specifically sets out States' duties relating to the eradication of gender-based violence.⁷¹

The ECtHR then went on to set out the definition of gender discrimination set out in the CEDAW and general recommendation No. 19 of the Committee on the Elimination of Discrimination against Women (hereafter "the CEDAW Committee") and apply it to the facts of the case in order to make a finding that gender-based violence constituted a form of discrimination.⁷² The fact that the ECtHR draws to such a degree on UN human rights treaties should therefore serve to encourage the CJEU to have confidence in these instruments and the interpretations given to them by the treaty bodies. In this sense the EU has an important role in ensuring the universal application of human rights in conjunction with other regional and global jurisdictions.

Thus, while the CJEU's development of the 'general principles' marks a positive step, the latter have only drawn upon UN human rights treaties in a limited and inconsistent manner, with the potential that a wide range of obligations contained in the UN human rights treaties remain without protection in the EU's legal system. There are compelling reasons, based on existing practice among human rights dispute settlement bodies, including the ECtHR, as well as the principle of universality of human rights, for the CJEU to adopt a broader approach.

2. Limits of the Charter of Fundamental Rights of the European Union

While the CFR is an important development in the EU's human rights framework, and goes beyond the range of rights recognised in the European Convention, it does not encompass all those rights protected by the UN human rights treaties.⁷³ Furthermore, it remains unclear to what extent the CJEU will draw upon the CFR in developing the 'general principles' of EU Law.⁷⁴ The CFR has come to feature more prominently in the case law of the CJEU, though this has taken different forms. It has been used in conjunction with other international instruments to justify expansion of the 'general principles' beyond the rights contained in the European Convention. Thus, the rights of the child in the context of family reunification and trade union rights were found to constitute 'general principles' of law because they featured both in the CRC and the European Social Charter respectively,⁷⁵ as well as in the CFR.⁷⁶

Subsequently, the CJEU has begun to examine rights flowing from the CFR on their own. It has done this in two ways. Firstly, where legislation contains a reference to the CFR and asserts that it is CFR-compliant, the CJEU has used this provision to interpret legislation in conformity with the CFR itself, without any discussion of the 'general principles'.⁷⁷ Secondly, now that the Lisbon Treaty has endowed the CFR with legally binding effect, the CJEU has relied exclusively on the CFR when reviewing or interpreting legislation without making any reference to the 'general principles' or the European Convention, where previously it always did so.⁷⁸

It is too soon to predict whether this suggests that the 'general principles' will become obsolete and that the CFR will become the sole source of human rights protection within the EU. It is a welcome development that the CJEU has begun to refer to the CFR directly, because this suggests that the CJEU will protect the range of rights contained therein. Not only are these more expansive than those that have been hitherto

expressly recognised by the CJEU as ‘general principles’, but they also have the advantage of being instantly recognisable, rather than developed on a case-by-case basis. However, the disadvantage is that the ‘general principles’ by their nature were sufficiently flexible so as to continue expanding in content. Whether the CJEU may expand the list of rights recognised in the CFR is not clear. Article 53 of the CFR states:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, *by Union law and international law and by international agreements to which the Union or all the Member States are party*, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions [emphasis added].

It is possible that this provision could be interpreted by the CJEU so as to allow it to recognise human rights that were contained in UN human rights treaties but did not feature in the CFR. However, the historically ambiguous attitude of the CJEU towards the UN human rights treaties does not necessarily suggest that this is a likely outcome. Thus, while the CFR may represent an improvement in some respects over the ‘general principles’, the CFR still affords protection to a smaller range of rights than the UN human rights treaties.

3. Lack of Recognition of Positive Duties

The depth of obligations accepted by the EU is generally more restrictive than that stipulated in the UN treaties. Although the CJEU has accepted that respect for human rights is a condition for the legality of EU action, the CJEU and the institutions have consistently reiterated their lack of competence to develop a ‘human rights policy’, and this has led to the stance that the EU’s role in relation to human rights is limited merely to ensuring their respect.⁷⁹ In this sense the Commission’s Impact Assessment Guidelines and the Commission’s report on monitoring compliance of its proposals with the CFR (discussed below) lay emphasis on the role of human rights as a limit on the EU’s ability to act, and focus on the need to refrain from violating human rights when formulating policies.⁸⁰ That is, the EU acknowledges that it must not infringe human rights when it acts, but is less ready to acknowledge that human rights, of themselves, also carry a duty to protect and promote their realisation.⁸¹

This stands in contrast to the nature of human rights as interpreted both by the UN treaty monitoring bodies and the ECtHR, which state that guaranteeing the observance of human rights requires not only restraint on the part of public authorities so as to avoid interference with individuals’ rights, but also positive steps in order to prevent interference with rights from third parties, as well as creating an environment that facilitates the realisation of human rights by individuals themselves. This has been articulated as a tripartite classification, most clearly by the CESCR,⁸² which stated that “all human rights impose... three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote”.⁸³

This tripartite division has now also been expressly adopted by the Committee on the Elimination of Discrimination against Women,⁸⁴ and has been widely accepted by commentators as applicable to all human rights.⁸⁵ As noted, the obligation to ‘respect’ simply involves refraining from interfering with the enjoyment of a particular right. It has thus been described as a ‘negative’ duty, as it requires no action on the part of the duty holders,⁸⁶ except to ensure that they do not deny existing access to a particular right.⁸⁷ While the obligation to ‘respect’ rights is accepted by the EU, it has not readily accepted the obligation to ‘protect’ rights. This requires action ‘to prevent third parties from interfering in any way with the enjoyment of the right... [T]hird parties include individual groups, corporations and other entities as well as agents acting under their authority’.⁸⁸ This would include, for instance, ensuring a properly functioning system of criminal and administrative sanctions for violations of human rights by third parties as well as guaranteeing an effective remedy for victims (such as an adequate investigation and recompensing of the victim) in the event of a breach.⁸⁹ For instance, in the case of *Nachova v Bulgaria*, where it was alleged that the Bulgarian police failed adequately to investigate the murder of an individual on racial grounds, the ECtHR underlined that ‘[c]ompliance with the State’s positive obligations under Article 2 [on the right to life] of the Convention requires that the domestic legal system must demonstrate its capacity to enforce criminal law against those who unlawfully took the life of another’⁹⁰ and a further duty ‘to take all possible steps to investigate whether or not discrimination may have played a role’ in a particular crime.⁹¹

Similarly, the HRC has stated explicitly that:

[T]he positive obligations on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights insofar as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights ... would give rise to violations by States parties of those rights, as a result of States parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.⁹²

Thus, where the EU fails to prevent third parties, including the Member States themselves, from committing breaches of human rights (in so far as it has competence to do so), it will fall short of its obligations under International Human Rights Law. However, the case law of the CJEU strongly suggests that the EU's internal legal order imposes no obligation to ensure that rights are 'protected'. In the case of *Parliament v Council* it was argued that certain parts of the Family Reunification Directive failed to conform to fundamental rights standards. In examining the Directive the CJEU stated that it:

Cannot be regarded as running counter to the fundamental right to respect for family life or to the obligation to have regard to the best interests of children, either in itself or in that it expressly or impliedly authorises the Member States to act in such a way.

In the final analysis, while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights.⁹³

Consistently with past case law,⁹⁴ this confirms that EU Law must simply not mandate the Member States to breach human rights, but that it is not under a duty to protect human rights by minimising Member States' discretion for interpreting EU Law in a way that conflict with these rights by, for instance, providing more concrete definition or precision of the meaning of provisions in legislation.⁹⁵ Apart from being inconsistent with European and International Human Rights Law, this approach is damaging for human rights protection because it not only leaves to Member States the latitude to adopt an unfavourable interpretation, it also reduces accountability by leaving court proceedings against individual Member States on a case-by-case basis as the only solution (either through a Commission enforcement action, through the preliminary reference procedure or under the doctrine of State Liability).⁹⁶ By relying on aggrieved individuals or the Commission to seize the CJEU to determine whether Member States are individually interpreting legislation in conformity with human rights, the CJEU greatly reduces the effectiveness of the human rights system.⁹⁷

There is a particular danger in the nature of EU Law which multiplies the risks for human rights protection. While one approach of the EU has been to establish uniform rules across the Member States to facilitate cooperation or free movement of persons, services and goods, where such harmonisation is not politically feasible the EU has instead favoured establishing rules of mutual recognition. This obliges the authorities of one Member State to recognise the validity of decisions, such as court decisions. This poses a specific difficulty to human rights because if decisions issued by a single Member State fail in some way to conform to human rights standards, then this failure can make its effects felt in any other Member State that cooperates with it on this particular issue.

For instance, the introduction of the European Arrest Warrant (EAW) allows one Member State's judicial authority to issue a decision to be executed in another Member State, procuring the arrest or surrender of a suspect with a view to prosecution or imposing a sentence.⁹⁸ While the Decision on the EAW does not of itself mandate Member States to breach human rights standards, it does rest on the assumption that all the procedural safeguards regarding freedom from arbitrary detention, the right to a fair trial, and adequate conditions of detention are complied with by the Member States.⁹⁹ Where this is not the case, the EU effectively exposes individuals to violations because the system does not also incorporate standards of human rights protection. This has the effect of causing Member States to place individuals in a situation where their rights will be violated by another Member State – something which is prohibited under both the European Convention and UN human rights treaties.¹⁰⁰ It would appear that concerns of this nature, including the resistance of some national courts to give effect to the EAW because of interferences

with human rights,¹⁰¹ has given rise to the renewed impetus for the Commission's proposed legislative programme on the introduction of EU legislation guaranteeing certain procedural rights for defendants.¹⁰² Concerns have also been made in a similar vein in relation to draft EU legislation establishing a European Investigation Order.¹⁰³

Similar concerns have arisen in relation to EU asylum policy, and in particular the 'Dublin II' Regulation which contains rules to determine which EU Member State shall be responsible for determining an asylum-seeker's application.¹⁰⁴ Broadly speaking, this permits a Member State to send an individual applying for asylum in its territory to another Member State under certain circumstances, such as where the applicant first arrived in the EU via that Member State's territory. This can present problems where the Member State that eventually determines the claim does not observe human rights standards.

For instance, Greece has attracted attention over its processing and treatment of those seeking asylum, particularly in relation to unaccompanied or separated children.¹⁰⁵ In this sense Belgium and Greece were recently found in violation of their obligations under the European Convention due to the transferral of the applicant, who was an asylum seeker, to Greece under the Dublin II Regulation. Greece was found to have violated Article 3 (prohibiting inhuman or degrading treatment) of the Convention because of the conditions of detention and living conditions for asylum seekers, and Article 13 (the right to an effective remedy) because of the risk of the applicant's expulsion back to Afghanistan without adequate examination of the merits of his claim. In addition Belgium was found in violation of the same provisions because the decision to transfer the applicant to Greece exposed him to these violations.¹⁰⁶ Although some Member States, such as Germany and Sweden chose to suspend transferrals of asylum-seekers to Greece because of these concerns,¹⁰⁷ it was only after interim measures were issued by the ECtHR that other Member States followed suit, it is not clear whether all Member States have officially announced the suspension of transfers.¹⁰⁸ This means that relying on Member States individually to pro-actively take steps to refrain from applying EU rules that could lead to human rights violations does not provide an effective safeguard.¹⁰⁹ Again, were the EU to recognise its obligation to protect human rights by building safeguards into legislation, it would ensure safeguards that prevented such a system of cooperation from increasing the likelihood that Member States will place individuals in a situation where their rights will be violated by other Member States.

Finally, the duty to 'fulfil' a right requires the State 'to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right.'¹¹⁰ The CESCR provides clarification and guidance on how States ought to comply with this:

The obligation to *fulfil* can be disaggregated into the obligation to facilitate, promote and provide. The obligation to facilitate requires the State to take positive measures to assist individuals and communities to enjoy the right. The obligation to promote obliges the State party to take steps to ensure that there is appropriate education concerning [the right – the hygienic use of water]... States parties are also obliged to fulfil (provide) the right when individuals or groups are unable, for reasons beyond their control, to realise that right by themselves by the means at their disposal.¹¹¹

In a similar vein, the Inter-American Court of Human Rights has found that 'the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right of access to the conditions that guarantee a dignified existence. States have an obligation to guarantee the creation of the conditions required in order that violations of the basic right do not occur'.¹¹² Thus, in relation to the rights of the child the Inter-American Court has found that 'education and care for the health of children require various methods of protection and are the key pillars to ensure enjoyment of a decent life by children, who in view of their immaturity and vulnerability often lack adequate means to effectively defend their rights'.¹¹³ The obligation to fulfil therefore entails a more holistic approach to human rights implementation, requiring the State to create an environment where individuals can realise rights or, where this is not possible, to provide that right directly.¹¹⁴ For example, 'fulfilling' the right to food, which requires the ready availability of affordable and nutritious food, might require creating conditions of food production which ensure stable and adequate supplies, the introduction of subsidies or free distribution programmes for those unable to afford adequate food,¹¹⁵ as well as programmes of awareness-raising so that individuals can make informed choices about how to ensure that they receive a balanced and healthy diet.¹¹⁶

Thus, the EU currently recognises only one dimension of human rights obligations as they exist in both the European Convention and the UN human rights treaties to which all the Member States are party. The potential danger with this situation is that in those areas where the Member States no longer have competence to act individually (i.e. where it is the EU that is competent to act), if the EU continues to deny a general obligation to take positive measures, there will arise a gap in the execution of those obligations towards individuals within their jurisdiction. The implementation of positive obligations would often be possible without the extension of existing competences. Rather, it is a case of incorporating human rights considerations as to how human rights could be protected or promoted by particular policies, rather than merely enquiring how to avoid their violation. An example of this can be seen in the Communication of the Commission of the European Communities (the Commission) on the rights of the child, noted above:

The EU's obligation to respect fundamental rights, including children's rights, implies not only a general duty to abstain from acts violating these rights, but also to take them into account wherever relevant in the conduct of its own policies under the various legal bases of the Treaties (mainstreaming). Moreover, notwithstanding the ... lack of general competence [in the area of children's rights], various particular competencies under the Treaties do allow to take specific positive action to safeguard and promote children's rights. Any such action needs to respect the principles of subsidiarity and proportionality and must not encroach on the competence of the Member States. A number of different instruments and methods can be envisaged, including legislative action, soft-law, financial assistance or political dialogue.¹¹⁷

Similarly, in relation to the right to food (which is not actually recognised in the CFR), the Commission noted that its Impact Assessment accompanying a proposal for the 'Food Distribution Programme for the Most Deprived Persons of the Community' that distribution of food stocks internally by the EU for the benefit of those in difficulty constituted a measure that furthered the realisation of the right to food.¹¹⁸ There are already initiatives of the Commission in existence which could be said to promote the right to food in other respects, even if they are not considered expressly as such, for instance the 'School Fruit Scheme' and the 'School Milk Scheme', which make funds available for Member States to distribute foodstuffs that promote a healthy diet.¹¹⁹ Thus, just as providing a safeguard to ensure that the EU continues to guarantee human rights where the Member States have delegated their powers, acknowledging and incorporating this approach to human rights protection could in fact assist the EU in raising its human rights profile and help to guide the coherence of its policies towards the broader goal of the EU of 'promoting the well-being of its peoples'.¹²⁰

4. Adequacy of Impact Assessments

While reference is made to fundamental rights in the Commission's Guidelines on Impact Assessment, this does not sufficiently guarantee that human rights are systematically addressed as part of the legislative process, as will be seen below.¹²¹ Firstly, although the Commission has stated that initiatives must not violate rights as set out in the CFR, as already discussed, the CFR's range of rights is more restrictive than those contained in the UN human rights treaties.

Secondly, Impact Assessments are not carried out in relation to all initiatives of the Commission,¹²² and where they are carried out the criteria applied are expressly directed at assessing 'economic', 'social' and 'environmental' effects. The checklist on social impact does refer to certain aspects of human rights (such as non-discrimination, privacy, personal liberty and the rights of the child), but this is far from comprehensive.¹²³ Although human rights do not feature as a formal criterion with a dedicated checklist, the Guidelines do contain one paragraph specifically referring to human rights:

Impacts on fundamental rights: All Commission proposals have to be compatible with the EU Charter of Fundamental Rights, and the Commission has decided that impact assessments must take into account the impacts of initiatives on fundamental rights as laid out in the Charter. These impacts should be fully identified and assessed qualitatively. The full list of fundamental rights is provided in annex 8.1 and will help you to identify where your policy options may have an impact. As fundamental rights are horizontal in nature, they may be relevant in each of the three pillars of impact assessment – economic, social and environmental... Certain fundamental rights are absolute and cannot be limited or subject to derogation ; others can only be limited or derogated from subject to a demonstration

of necessity and, thereafter, proportionality. This analysis of impacts will be complemented by the legal verification of compliance with the Charter that takes place when the related proposal is being prepared.¹²⁴

Annex 8.1 then features a list (without elaboration) of the rights contained in the CFR. Although Impact Assessments are not carried out in relation to all proposals, the Commission did, nevertheless, commit itself from 2005 to 'check all Commission legislative proposals systematically and rigorously to ensure they respect all the fundamental rights concerned in the course of normal decision-making procedures'.¹²⁵ The Commission's 2009 Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights does feature some examples of legislative initiatives where fundamental rights considerations have played a significant role in the drafting of proposals relating to asylum, in particular through extensive cooperation with the Office of the United Nations High Commissioner for Refugees (UNHCR).¹²⁶ However, there is no suggestion that this occurs systematically across Commission Directorates-General (DGs). In this regard it is possible to refer to several Impact Assessments in policy areas with obvious human rights implications where there is either no, or merely superficial, mention of human rights considerations.

For instance, a Commission Impact Assessment explores a possible initiative on 'Solidarity in Health: Reducing Health Inequalities in the EU', which is aimed at allowing for fair and even access to health care for all across Member States.¹²⁷ Such a measure would have obvious implications for the right to health care under Article 12 of the ICESCR, in particular in fulfilment of Member States' duties to promote access to health care.¹²⁸ However, despite the relevance of such standards, these are not mentioned. Furthermore, the (more limited) right of access to health care featuring in the CFR is merely quoted with no elaboration or analysis of how the content of this right might relate to the proposed initiative.¹²⁹ As a further example, one can note the original legislative project aiming at the introduction of body scanners in airports. The European Parliament noted that a Commission proposal for legislation that would introduce body scanners was not accompanied by an evaluation of the possible impact on human rights, nor even by consultation with the FRA or the European Data Protection Supervisor.¹³⁰

As a consequence, it can be surmised that, despite statements of policy to the contrary, Commission proposals will not necessarily attract consideration of their implications for human rights, and even where they do, there is no guarantee that this will be done with sufficient rigour. In addition, it appears to be the exception (notably in relation to the rights of the child) rather than the rule that consideration of how to protect or promote human rights will be given attention.

5. Limitations of the FRA's Mandate

Although the EU has established the FRA, which is able to call upon both internal and external expertise in studying particular themes in human rights across the EU, the full potential of an institution such as the FRA remains restricted by its current mandate. Firstly, the FRA is not empowered to scrutinise Member States on an individual basis with regard to those areas that fall within EU competence. Rather, its reports adopt an EU-level comparative approach. Secondly, the FRA conducts its studies thematically and, accordingly, cannot produce a more comprehensive overview of the status of human rights implementation in the EU.¹³¹ Thirdly, the FRA is not permitted to act upon individual complaints delivered to it alleging violations of human rights, and neither does its mandate provide for a role of assisting or intervening in cases, e.g., as an *amicus curiae*.¹³² Finally, despite being the EU's only dedicated human rights body, the FRA is not given a role in screening policy or legislative proposals or assisting the Commission in its Impact Assessments. Although it may be requested to do so, the Commission, in its Communication on the methodology for ensuring compliance of its proposals with the CFR, did not express enthusiasm towards this possibility: '[I]t is to be recalled that the scrutiny of conformity of proposals with fundamental rights is not within the mandate of the Agency'.¹³³

In this sense, it should be noted that the European Parliament has both expressed to the Commission its intention to draw on the expertise of the FRA through specific requests, and has done so on occasion. Furthermore, the Stockholm Programme also calls for improved internal coordination 'in close cooperation and in coherence with' the FRA.¹³⁴ Thus, for instance, the European Parliament specifically requested the

Commission to consult with the FRA in revising its proposal on the use of body scanners in airports.¹³⁵ Similarly, the European Parliament specifically requested the FRA to conduct studies on the problem of discrimination based on sexual orientation and gender identity throughout the EU.¹³⁶

While the European Parliament has been keen to draw on the FRA, not all the institutions share its enthusiasm to make use of the FRA as a hub of expertise capable of ensuring systematic and coherent oversight of EU policies from a human rights angle.

6. Obligation to Denounce Incompatible Agreements with Third States

While Article 351(1) of the Treaty on the Functioning of the European Union (TFEU) expressly provides that accession to the EU does not impair pre-existing treaty obligations, Article 351(2) places the Member States under an accompanying duty to eliminate incompatibilities:

To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

The CJEU has underlined that where Member States are unable to revise the terms of pre-existing agreements that conflict with EU Law, they are under an obligation ultimately to denounce or withdraw from the treaty, to the extent that this is possible.¹³⁷ The ability to withdraw from a treaty is recognised by the Vienna Convention on the Law of Treaties (VCLT) of 1969 only in limited circumstances.¹³⁸ Article 54 VCLT permits this where the treaty itself so allows, or by the consent of all the parties to that treaty. According to Article 56 VCLT where no express provision is made within the treaty for withdrawal, such a provision may be implied either from the *travaux préparatoires* or by the nature of the treaty. Although the UN HRC has stated unequivocally that withdrawal from or denunciation of the ICCPR is not permissible,¹³⁹ this does not necessarily eliminate the risk that a Member State might in fact attempt to do so in the event of a conflict. In this sense, France denounced Convention No. 89 of the International Labour Organization of 9 July 1948 concerning Night Work of Women Employed in Industry. Although this was a case of an antiquated and paternalistic approach to the protection of women by prohibiting working at night (which would conflict with a modern understanding of non-discrimination law), it is **possible to envisage cases where certain provisions of human rights treaties might conflict with EU Law.**

For example, certain provisions of the **EU's legislative regime relating to non-discrimination** may in fact conflict with the right to equal treatment under the UN human rights treaties. In this sense, the monitoring bodies' acceptance of 'special measures' favouring a historically disadvantaged group by according them preferential treatment by comparison to the majority population does not coincide with the approach of the European Community (EC). The CJEU has accepted that individuals can be treated less favourably than others in a comparable situation, where the goal is to correct historic disadvantages suffered by those who are benefiting from the more favourable treatment. However, it has applied this as a strict exception to the prohibition on discrimination. While such preferential treatment may be acceptable, it must be strictly limited and applied on a case-by-case basis without creating an automatic preference for the historically disadvantaged group. In contrast the the CEDAW Committee and the Committee on the Elimination of Racial Discrimination (CERD) appear to have taken a broader approach, with the former expressly encouraging programmes of 'preferential treatment ; targeted recruitment, hiring and promotion ; numerical goals connected with time frames ; and quota systems'.¹⁴⁰ In this sense, the Court of the European Free Trade Association found that a measure introduced by Norway to earmark particular university posts specifically for women on a temporary basis conflicted with EU legislation prohibiting gender discrimination. Importantly, Norway sought to justify the measure as a 'temporary special measure' under CEDAW.¹⁴¹

In addition EU policies in the area of **immigration, Criminal Law and counter-terrorism**, including the EAW,¹⁴² asylum policy,¹⁴³ proposals for the introduction of body scanners¹⁴⁴ and the 'Passenger Name Record' agreements with third countries,¹⁴⁵ have attracted criticism over their failure to adequately observe human rights guarantees. Thus, the possibilities of Member States encountering situations where their obligations under EU Law conflict with those under UN human rights treaties are numerous and real.

Where these occur the Member States may be obliged to purport to withdraw from the latter, or simply disregard them and avoid the issue of compatibility arising.

7. The EU's Non-Discrimination Regime

While the EU's non-discrimination regime clearly assists in and promotes human dignity, several observations may be made as to the adequacy of its scope. Firstly, not all protected grounds under EU Non-discrimination Law receive an even measure of protection. That is, while the Racial Equality Directive prohibits discrimination on the basis of racial or ethnic origin in the context of employment, access to goods and services and accessing the welfare system,¹⁴⁶ the Employment Equality Directive prohibits discrimination on the basis of disability, sexual orientation, religion or belief and age only in the context of employment.¹⁴⁷ This has been described as a 'hierarchy of grounds', and sits uncomfortably with the very essence of the guarantee of equal treatment contained in International Human Rights Law.¹⁴⁸ Although a Commission proposal was put forward to allow these protected grounds to receive protection in the same spheres as racial and ethnic origin, the prospects of its adoption remain uncertain.¹⁴⁹

Secondly, while EU Law contains a fixed list of protected grounds,¹⁵⁰ both the European Convention and the UN human rights treaties provide protection on an open-ended basis, prohibiting discrimination not only on listed grounds, but also on the basis of any 'other status'.¹⁵¹ The CESCR explains this:

A flexible approach to the ground of 'other status' is thus needed to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognised grounds in article 2(2) [on non-discrimination].¹⁵²

The essence of the prohibition on discrimination in International Human Rights Law is to prevent individuals being treated less favourably than others on the basis of irrelevant or unacceptable considerations. Without the flexibility to recognise that such factors may go beyond a fixed list of grounds, EU Law does not offer the same level of protection as either the European Convention or UN standards.

Thirdly, the EU's non-discrimination regime does not cover 'any treatment which arises from the legal status of third country nationals'.¹⁵³ EU Law would not thus prevent a Member State from denying a third country national protection under this legislation as long as this was based on their legal status as a third country national. Only one particular category of third country nationals, 'long-term residents' under the Third Country Nationals Directive, enjoy equal status with citizens in virtually all regards.¹⁵⁴

EU Law does not, of course, prevent the Member States from introducing more favourable levels of human rights protection, and in this sense the EU Directives could be said to constitute 'minimum standards'. Indeed, the UN human rights treaties and the European Convention do in fact require the Member States to go beyond the standards set out in EU Law, protecting individuals across a wider range of grounds, in a wider range of contexts and irrespective of nationality. In relation to third country nationals, EU Law potentially creates a broad exclusion from protection, depending on how this is interpreted by the Member States. It is true that a Member State may consider nationals and non-nationals not to be in a comparable situation (and consider it to be permissible for them to be treated differently in certain circumstances). However, in principle all the rights in the European Convention and the UN human rights treaties must be guaranteed equally to all persons falling within their jurisdiction. Thus, any difference of treatment that is based on nationality must be justified in relation to the particular facts of the case, and cannot be based simply on one's legal status. This much has been confirmed by the ECtHR in several cases concerning differential treatment between EU and non-EU nationals.¹⁵⁵

On the one hand, it is true that EU Discrimination Law per se does not conflict with obligations imposed by UN human rights treaties, in particular because it allows the Member States the scope to continue to execute the more rigorous obligations under those agreements as well as the European Convention. However, this body of law represents a lost opportunity, in that had it reflected more accurately those obligations already incumbent on the Member States, this would have allowed it to benefit from the regime that ensures compliance with EU Law – which is more rigorous than any available to the UN treaty bodies. That is, the EU could have moved much further in ensuring the protection of human rights in creating an

effective regime for protection from discrimination in the Member States, even while respecting the limits of EU competence.¹⁵⁶

C. CONCLUSIONS

On the one hand, the EU serves as an example and an inspiration to other regional and global organisations where States pool resources and delegate powers. The CJEU has evolved a system of judicial review incorporating human rights as a condition of the legality of EU Law through the ‘general principles’. More recently, the EU has adopted a clear list of rights through the CFR that is binding on the institutions and the Member States when they are applying EU Law. The EU’s creation of the FRA now ensures the availability of human rights expertise as well as data collection and analysis that can inform the institutions and Member States on challenges to human rights protection and suggest how these may be remedied. Human rights have also begun to be integrated into policy-making and law-making through the initiatives of various of the institutions. The Commission’s commitment to verifying compliance with the CFR for legislative initiatives, and the active role of the European Parliament in engaging the other institutions and the Member States (and third States) on human rights issues, as well as Guidelines on certain human rights issues adopted by the Council, are promising practices that can contribute towards the realisation of human rights.

At the same time, there are many challenges to human rights implementation within the EU. As a result both of the narrower scope of rights protected under EU Law via the ‘general principles’ and the CFR, and the absence of any duty to ‘protect’ or ‘promote’ human rights, the populations of the Member States risk being subject to a lower level of protection where the context in which the rights are to be exercised falls under EU competence. In this sense, there is a worrying discrepancy between the level of protection that Member States have committed themselves to accord to all those within their jurisdiction via the UN human rights treaties and the level of protection that the EU itself recognises, resulting in a two-tier system that is incompatible with the universality of human rights.

To the extent that EU Law fails to recognise and reflect the greater scope and depth of Member States’ obligations as they exist in the UN human rights treaties, individuals within EU territory face a denial of their basic rights. There are numerous areas of EU Law where potential for conflict arises between the obligations incurred under UN human rights treaties and obligations deriving from EU Law. Member States may elect to give priority to their obligations under EU Law, which the EU doctrine of supremacy obliges them to do. Should the Member States attempt to give priority to their obligations under the UN treaties, EU Law obliges them to renegotiate or withdraw.

More worryingly, despite the fact that EU Law does recognise a range of human rights within its internal legal order, the mechanisms through which these are given effect face several challenges. Examples of EU legislation where human rights considerations have been overlooked or applied with a lack of rigour raise significant concerns about the adequacy of awareness or understanding of human rights internally. The limited mandate of the FRA and particularly its untapped expertise in assisting the Commission in its role of checking legislative initiatives presents a missed opportunity for strengthening human rights protection.

In the light of these considerations, **it is clear that human rights protection within the EU could greatly benefit from enhanced cooperation with existing UN human rights protection mechanisms and adherence to those standards that the Member States themselves have already expressly consented to.** Adhering to the standards embodied in those treaties would avoid a two-tier system of protection of human rights within the Member States. As will be discussed in greater detail in Chapter Four, the functions performed by the treaty monitoring bodies in cooperation with the EU could also facilitate the incorporation of human rights considerations more effectively into EU policy-making and bolster their protection.

Chapter Three: The Applicability to the European Union of Human Rights Obligations under the United Nations Charter and Human Rights Treaties

Chapter Two explored the human rights regime of the EU, highlighting a range of challenges that hamper the full realisation of the obligations undertaken individually by the Member States under the UN human rights treaties and the UN Charter. This in itself forms a cogent argument in favour of adherence by the EU to these instruments, since external monitoring by those bodies responsible for supervising the Member States is the most effective means of ensuring the complete implementation of these standards across areas of Member State and EU competence.

Chapter Three explores the various legal grounds on which the EU is in fact legally bound, either directly *de jure* or via its Member States *de facto*, to comply with existing UN human rights standards. It is well established both in scholarly writing¹⁵⁷ and case law from various jurisdictions (including the CJEU itself)¹⁵⁸ that IGOs are subjects of International Law and as such are endowed with both rights and obligations, which may derive from Customary International Law (including peremptory norms, or *jus cogens*), treaty commitments, general principles of law, and their own internal law. Put otherwise, it is not possible for States, which themselves are subject to International Law, to create new entities and endow these with particular functions, and then claim that they exist beyond the system of International Law - which facilitated and regulated their very creation, and continues to regulate their rights and duties towards third States and organisations, as well as between themselves.

A. OBLIGATIONS IMPOSED DIRECTLY ON THE EUROPEAN UNION

1. Treaty Obligations

The EU is currently party to one treaty cataloguing a range of human rights guarantees: the CRPD. Accession to other treaties is limited, in part because human rights treaties have been traditionally open only to membership by States, and in part because the EU itself has been considered to lack the competence to become party to such agreements.¹⁵⁹ The introduction of the Lisbon Treaty expressly mandates the EU to join the European Convention on Human Rights (which itself has been amended to allow this).¹⁶⁰ Participation by the EU in these agreements is the most effective means of ensuring the continued observance of the human rights obligations of the Member States in the context of integration into the EU. Such membership will allow the EU to be directly monitored and guided on the implementation of these treaties alongside the Member States, to ensure that no jurisdictional gap in the guarantee of human rights occurs.

EU *de facto* or *de jure* accession to the UN human rights treaties could occur through different means. The normal procedure would be for the EU to become party to these instruments through formal accession or signature followed by ratification.¹⁶¹ For this to occur, existing UN human rights treaties would require amendment to allow for accession by an IGO, introducing a similar provision to that contained in the CRPD.¹⁶² This could be done by way of an additional protocol, as has been the case with various Council of Europe instruments that have been opened to EU membership, such as Protocol No. 14 to the European Convention.¹⁶³ A further means for this to occur could be through unilateral declaration by the EU that it accepts that the UN Charter and human rights treaties are binding upon it. In this sense the International Court of Justice has held that a State may create obligations for itself where it makes a public declaration that is sufficiently specific and is accompanied by an intention to be legally bound.¹⁶⁴

Furthermore, there is nothing standing in the way of the EU unilaterally acting as if it were bound by these instruments, through internal measures. In this vein, one can point to the approach of the EU to the

1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol.¹⁶⁵ Accordingly, the Qualification Directive creating a Common Asylum System for the EU Member States purports to concretise and apply the standards contained in the 1951 Convention.¹⁶⁶ In this sense, the CJEU, when faced with interpreting the meaning of the Directive, has had direct resort to the 1951 Convention in ensuring that the Directive is interpreted in conformity with this treaty.¹⁶⁷ Similarly, Article 78 TFEU provides that the ‘common policy on asylum, subsidiary protection and temporary protection ... must be in accordance with the Geneva Convention’.

Another example of voluntary acceptance of the application of UN human rights standards can be seen in relation to the administration of Kosovo. UN Security Council resolution 1244 (1999) establishing the United Nations Interim Administration Mission in Kosovo (UNMIK) stipulated at paragraph 11(j) that the responsibilities of the administration would include ‘protecting and promoting human rights’.¹⁶⁸ Further to this, in 2006 UNMIK established a Human Rights Advisory Panel to receive complaints alleging violations by UNMIK of the core UN human rights treaties.¹⁶⁹ EULEX, a European Union civilian mission which has taken over some of the duties of UNMIK in Kosovo, has in turn established its own Human Rights Review Panel to receive complaints relating to alleged human rights violations committed by EULEX in Kosovo. The Panel refers to a list of ‘Relevant Human Rights Conventions, Declarations and other documents’, among which feature most of the ‘core’ UN human rights treaties.¹⁷⁰

One question that may arise from the perspective of the EU is whether an amendment to the founding treaties may be necessary in order to allow the EU to accede to the UN human rights treaties. When asked for an opinion on whether the European Communities could accede to the European Convention, the CJEU replied that this would only be possible if the EC Treaty was amended to expressly allow it,¹⁷¹ and as such the TFEU contains an express provision mandating the EU to join this instrument.¹⁷² However, no express provision in the EU treaties has been considered necessary to allow for accession to the CRPD. And yet, EU accession to the treaty poses almost similar considerations for the EU as accession to the European Convention, including subjecting the EU to the scrutiny of the Committee on the Rights of Persons with Disabilities, which may in future be authorised to receive and decide upon individual complaints against it.¹⁷³ This would suggest that no amendment would be necessary for the EU to accede to the other ‘core’ UN human rights treaties.

2. Customary International Law

While the focus of this chapter is on obligations derived from the UN Charter and UN human rights treaties, it should also be noted that **to the extent that human rights standards have become part of Customary International Law, the EU is directly bound to ensure that they are guaranteed.**¹⁷⁴

Debate surrounds the extent to which human rights have attained the status of Customary International Law, but it is agreed that it does include a substantial body of rights, and most probably the entire UDHR.¹⁷⁵ At the very least, certain human rights have been recognised on a case-by-case basis to be part of Customary International Law by the International Court of Justice: the right to self-determination;¹⁷⁶ the prohibition on genocide;¹⁷⁷ freedom from racial discrimination, including apartheid, and the prohibition on slavery;¹⁷⁸ freedom from arbitrary detention and the right to physical integrity;¹⁷⁹ and protection against denial of justice.¹⁸⁰ More broadly, the International Court of Justice found that the ‘rules concerning the basic rights of the human person’ in International Law are *erga omnes* in nature. That is, they are considered to be ‘the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection.’¹⁸¹ Thus, in addition to forming part of Customary International Law, the ‘basic rights of the human person’ constitute obligations held by each State towards every other State, and their breach gives rise to a right on any State to invoke the responsibility of the violating party.¹⁸²

The Court has also stated that ‘a very widespread and representative participation’ in a treaty can indicate that a rule has entered into Customary International Law, especially where it can be shown that the remaining States acted in such a way as to indicate that they believed these rules were generally binding.¹⁸³ Almost all States are party to the UN Charter (which, as discussed above, has been consistently interpreted by the UN General Assembly to create an obligation to abide by the UDHR), and every State in the world is party to at least one human rights treaty. In particular, only two States are not party to the

CRC, and many scholars argue that it would seem to follow from the reasoning of the International Court of Justice that this treaty has most probably passed into Customary International Law.¹⁸⁴ Accordingly, a broad range of human rights binds the EU directly via Customary International Law.

Although it is acknowledged that States are able to agree through a treaty that particular rules of Customary International Law shall not apply as between them, there are two limitations to this. Firstly, they may not agree to standards that are in violation of peremptory norms of International Law (or rules of *jus cogens* status),¹⁸⁵ such as the prohibition on torture;¹⁸⁶ the right to life;¹⁸⁷ the right to equality before the law and non-discrimination;¹⁸⁸ and the prohibition on slavery.¹⁸⁹ Secondly, while it is true that through human rights treaties States undertake obligations towards other States, the duties are primarily of an internal nature and owed towards individuals within a State's own jurisdiction.¹⁹⁰ In this sense, and considering that human rights are 'inalienable', States cannot consent as between themselves to disapply human rights guarantees.

The fact that the UN treaty bodies are authorised to monitor the implementation of human rights deriving from the UN human rights treaties does not necessarily bar the monitoring of rights derived from Customary International Law. It is true that rights in Customary International Law do not, formally speaking, stem from the UN Charter or the UN human rights treaties. However, human rights standards have been developed in great part over the last sixty years through the adoption of treaties and 'soft law' in the context of the UN in a relatively consistent manner. Almost all UN human rights instruments draw from and expand upon the rights contained in the UDHR, as well as drawing on each other to ensure consistency.¹⁹¹

For instance, the CAT reflects the interpretation given to Article 7 of the ICCPR by the HRC.¹⁹² Similarly, the CEDAW, the CRC, and the CRPD largely tailor the scope of rights established in the ICCPR and ICESCR to the particular needs of those particular groups.¹⁹³ Because International Human Rights Law has been developed in this intense written form, the State practice and *opinio juris* that has given rise to the creation of Customary International Law is based largely on these very same standards. Put otherwise, the substance of the prohibition on torture in Customary International Law will most probably have the same content as the prohibition on torture in the CAT. Accordingly, there is a strong case to be made not only that the EU is directly bound by a significant body of International Human Rights Law and that this body of law is in substance identical to the standards contained in the UN human rights treaties, but also that on this basis the UN treaty monitoring bodies are appropriately placed to address the EU on the state of implementation of these obligations.

3. De Facto Succession to Obligations of the Member States Recognised by EU Law

Article 351 TFEU preserves for EU Member States those obligations incumbent upon them before acceding to the EU.¹⁹⁴ The CJEU has found that two consequences flow from this. Firstly, EU Member States are permitted to give priority to pre-existing obligations over EU Law.¹⁹⁵ Secondly, the EU itself is bound to refrain from interfering with the implementation of such treaties by the Member States, including the invocation by individuals of their rights under these treaties.¹⁹⁶

A further consequence of Article 351 TFEU is that **where the Member States have transferred powers to the EU necessary for performing the obligations incurred under prior treaties, the CJEU has accepted that the EU may de facto succeed to their obligations**, so that the EU regards itself as bound directly.¹⁹⁷ In the *Kadi* and *Yusuf* cases, the General Court accepted that 'in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of the Charter have the effect of binding the Community'.¹⁹⁸ Although the CJEU's ruling did not explicitly reiterate this, the case was decided on the basis that the EU had succeeded to the Member States' obligations under the Charter, since the CJEU referred explicitly to Article 300 of the former EC Treaty which governed the procedure for accession by the EU to international agreements.¹⁹⁹ The CJEU then affirmed that Article 351 TFEU would only allow UN Charter obligations to take effect in the EU to the extent that these were consistent with 'primary law, in particular ... the general principles of which fundamental rights form part.'²⁰⁰ Commentators have tended to read the approach of the CJEU simply as a reaffirmation of the self-contained nature of the EU legal system, which itself determines which rules of International Law may penetrate its sphere.²⁰¹

At first sight this might seem as unfavourable for any argument that the EU is directly bound by the UN Charter or UN human rights treaties. However, this ignores the fact that although the EU's legal order has a 'gatekeeper', the role of this 'gatekeeper' is to protect human rights within the EU system. The approach of the CJEU does not undermine, but rather reinforces, the argument that human right standards derived from the UN Charter and UN treaties directly bind the EU. This is because the standards stemming from the UN Charter and the UN human rights treaties are not inconsistent with EU Law. They do go beyond the standards currently expressly recognised by EU Law, but they do not conflict with it. Indeed, despite being little referred to by the CJEU, the Court has expressly confirmed that UN human rights treaties will in fact satisfy the criteria of 'general principles' of EU Law where all the Member States are party.²⁰² In this respect, one can refer to the approach of the CJEU in the *Omega* case: 'the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law'.²⁰³

Given that the underlying objective of UN human rights treaties is precisely the furthering of human dignity, it would be difficult to find that they were in any way incompatible with the 'general principles' of EU Law. Accordingly, Article 351 TFEU not only preserves the existing obligations of Member States, but also results in the de facto succession of the EU to the obligations of the Member States under the UN Charter and UN human rights treaties to the extent of the competences of the EU.

B. OBLIGATIONS IMPOSED ON THE MEMBER STATES BY INTERNATIONAL LAW

1. Continuity of Member States' Obligations

As States continue to integrate into IGOs of a regional and/or specialised nature, they increasingly delegate powers and functions as well as a degree of autonomy in order to execute those functions. It is well established that in doing so States may not relieve themselves of obligations they have undertaken through existing treaties.²⁰⁴ In this sense the ECtHR has repeatedly reaffirmed that:

The Contracting States' responsibility continues even after they assume international obligations subsequent to the entry into force of the Convention or its Protocols. It would be incompatible with the object and purpose of the Convention if the Contracting States, by assuming such obligations, were automatically absolved from their responsibility under the Convention'.²⁰⁵

Similarly, as stated by AG Jacobs in *Bosphorus v Ireland*, 'Community law cannot release Member States from their obligations under the [European Convention]'.²⁰⁶

The HRC has also been prepared to hold States to account for breaches caused by the acts of IGOs (such as the imposition of 'smart sanctions' by the UN Security Council). Although this was not accompanied by a similar statement of principle, it does suggest implied agreement with this rule.²⁰⁷ In this sense the HRC stated that:

While the Committee could not consider alleged violations of other instruments such as the UN Charter... the Committee was competent to admit a communication alleging that a State party had violated rights set forth in the Covenant regardless of the source of the obligations implemented by the State party.²⁰⁸

The rule is also expressly recognised in Article 60 of the Draft Articles on the Responsibility of International Organizations of the International Law Commission (ILC):

A State member of an international organization incurs international responsibility if it seeks to avoid complying with one of its own international obligations by taking advantage of the fact that the organization has competence in relation to the subject matter of that obligation, thereby prompting the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.²⁰⁹

Similarly, the study by the International Law Association (ILA) study on the accountability of international organisations states that a 'transfer of powers to an [international organisation] cannot remove acts of the IO from the ambit of control mechanisms established by particular treaties nor can it exclude the responsibility of the States who transferred powers to an IO.'²¹⁰

Accordingly, the Member States of the EU remain responsible to ensure that the obligations that they have incurred under the UN Charter and human rights treaties are given effect. Although this principle is clear, two issues require clarification and discussion: firstly, whether the responsibility of the Member States for breaches by the EU is conditional or strict and secondly, the question of whether the acts resulting in the violations are to be attributed to the Member State or the EU itself.

1.1 Conditional or Strict Liability

One question that arises is **whether Member States are strictly liable for breaches of the UN human rights treaties and the UN Charter committed by the EU, or whether such liability is conditional**, that is, whether the Member States may discharge their obligations under these instruments by taking reasonable measures to reduce the risk of the EU acting in such a way by, for example, securing human rights under the EU's internal legal order. A strict liability approach has the advantage of ensuring that there is no gap in accountability for human rights violations. If Member States were able to discharge their responsibility under human rights instruments simply by taking reasonable measures, then the treaty bodies would not look into the substance of complaints. Furthermore, in a situation where the treaty bodies find that the acts are attributable to the EU itself rather than the Member State before it (and where there is no jurisdiction over the EU because it is not itself party to the instrument in question), a strict liability approach would still allow jurisdiction to be taken over the Member State by virtue of the original act of delegating powers to the EU. The strict liability approach appears to be impliedly favoured by the HRC in the case of *Sayadi* where Belgium was not exonerated of its responsibilities under the ICCPR simply because it had taken all measures available to it to have the names of the alleged victims removed from the register of the UN's Sanctions Committee.²¹¹ A strict approach is also consistent with the statement of principle by the ILC, the ILA and the ECtHR.

However, the approach of the ECtHR, on the other hand, establishes a system of conditional liability. The ECtHR has developed the 'equivalent protection' doctrine according to which the Member States may be presumed to have discharged their duty to implement the Convention rights so long as they have established a system of human rights protection within an IGO that is equivalent to that contained in the European Convention.²¹² This approach is based on deference of the ECtHR to inter-State cooperation, which it regards as a legitimate aim capable of justifying limitations on human rights:

The Court, while attentive of the need to interpret the Convention in such a manner as to allow the States Parties to comply with their international obligations, must nevertheless in each case be satisfied that the measures in issue are compatible with the Convention or its Protocols.²¹³

When the ECtHR is faced with a complaint where the measure resulting in the alleged violation is mandated by that State's obligations under an IGO, the ECtHR performs its customary analysis. Firstly, it will determine whether a right has been interfered with ; secondly, whether this interference was based on law and pursued a legitimate aim ; and thirdly, whether the level of interference was proportionate to the aim pursued. If the ECtHR finds that the State's alleged interference with human rights is rooted in obligations deriving from its membership of the EU, it considers that the Member State's decision to implement such a rule is of itself a legitimate aim: that of complying with its international obligations. In order to determine whether pursuit of this legitimate aim was proportionate, the ECtHR, as noted above, has developed a doctrine of 'equivalent' protection". According to this approach, set out in the *Bosphorus* case, an interference with human rights will be presumed to be proportionate²¹⁴ if the State has ensured that the IGO in question disposes of a system of 'equivalent' or 'comparable' protection of their human rights obligations derived from the European Convention.²¹⁵ Such a presumption may be rebutted on evidence that the protection was in fact 'manifestly deficient'.²¹⁶ Accordingly, where the ECtHR finds that a Member State has provided for a system of comparable or equivalent protection of human rights within the EU, the ECtHR will not consider the interference in question on its merits.²¹⁷

In cases of complaints against Member States for measures taken in pursuit of their obligations under EU Law, the ECtHR has consistently found that (as regards those parts of EU activity permitting review by the CJEU) human rights protection is indeed to be considered as equivalent to that required under the European Convention.²¹⁸ It bases its consideration upon the fact that the CJEU's supervision of EU Law and its application by the institutions and EU Member States includes ensuring compliance with the 'general principles' of Community law, as discussed above. Among the 'general principles' can be found substantive human rights as inspired by the European Convention.²¹⁹ The ECtHR found that while direct access for individuals to the CJEU under Article 230 of the EC Treaty (the action for annulment of Community measures, now Article 263 TFEU) was highly restricted, the existence of other remedies (the preliminary reference procedure under Article 234 (now Article 267 TFEU) and the actions for damages in tort under Articles 235 and 288 (now Articles 268 and 340 TFEU) could compensate for this.²²⁰ Some brief observations on the ECtHR's analysis, and whether it should be followed by the UN treaty bodies, should be made.

The applicability of a doctrine of conditional liability to the UN human rights treaties is questionable in at least three respects. Firstly, as discussed in Chapter Two, the EU only acknowledges a duty to 'respect' rights, while International Human Rights Law, including the European Convention, also carries positive duties. In this sense, the depth of human rights protection in the EU cannot be considered as equivalent to that in the UN human rights treaties (nor, in fact, to that in the European Convention). Secondly, as discussed in Chapter Two, the range of rights protected under the EU's internal human rights regime does not extend as far as that guaranteed in the UN human rights treaties. Thus, the range of human rights protection in the EU cannot be considered as equivalent to that in the UN human rights treaties.

Thirdly, the standing of individuals under Article 230 of the EC Treaty (now Article 263 TFEU) is such that claimants may effectively only succeed where they are specifically targeted by a measure of EU Law, which makes challenging general legislative measures virtually impossible.²²¹ Further, while a preliminary reference by a national court to the CJEU for an interpretation of EU Law allows the CJEU the opportunity to review EU legislation (under Article 241 EC, now Article 277 TFEU), the decision to make the referral and the parameters of the enquiry rest not with the individual parties to the case but with the national court itself.²²² In addition, only courts of last instance are obliged to make such a reference, and even then they may choose not to refer (with little consequence) where they believe the interpretation to be given to the rule of Community law is clear.²²³

Fourthly, the action for damages in EU Law under Articles 235 and 288 (now Articles 268 and 340 TFEU) does not allow the CJEU to annul any offending legislation and the individual will only succeed where the breach of law is manifest.²²⁴ This situation creates significant gaps in human rights protection. This much has been recognised by the EU's Court of First Instance which, having reviewed the range of remedies available, concluded 'that the procedures provided for in, on the one hand, Article 234 EC and, on the other hand, Article 235 EC and ... Article 288 EC can no longer be regarded, in the light of Articles 6 and 13 of the [European Convention] and of Article 47 of the Charter of Fundamental Rights,^[225] as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation.'²²⁶ Given that there is doubt among the judicial institutions of the EU itself, it seems difficult to understand how the ECtHR could comfortably conclude that the system of remedies within the EU can form a comparable system of protection to that of the European Convention.²²⁷ Given these considerations, it is difficult to accept that the EU's internal human rights regime can be considered as equivalent to that of the UN human rights treaties, nor as equivalent to that in the European Convention.

Fifthly, it is questionable whether international cooperation between States should ever be considered a legitimate aim capable of justifying interference with human rights. The accepted legitimate aims as expressed in the European Convention share in common that they represent societal interests which cannot be readily equated to the interests of the State (or a group of States). This is apparent upon examination of the express list of legitimate aims justifying interference with human rights given in Article 8(2) of the European Convention:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention

of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.²²⁸

A broader expression of this idea can be found in Article 29(2) UDHR:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Broadly speaking then, while it is acceptable to limit human rights, these limitations must be based on consideration of the rights of other individuals or society as a whole. It is quite a leap to assume that obligations entered into between governments based on considerations of mutual gain and reciprocity will necessarily pursue such aims. International Human Rights Law is fundamentally different from other areas of International Law in focusing on the promotion and protection of human dignity. Any justification for limiting human rights on the basis of States' other international commitments is fundamentally different in nature from the already accepted 'legitimate aims' that the ECtHR takes into account. Thus, it is questionable whether the proportionality test applied in the context of conditional liability is itself adequate, and doubtful whether it is consistent with UN human rights standards, as well as those contained in the European Convention.

As noted above, the presumption that the interference with rights is proportionate may be rebutted where the protection is found to be 'manifestly deficient'.²²⁹ Thus, in the earlier case of *Matthews v UK* the ECtHR did choose to examine the substance of a rule of EU Law concerning elections to the European Parliament in Gibraltar. The rules being challenged by the claimant in *Matthews* were contained in a treaty agreed between the foreign ministers of the EU Member States outside the regular law-making process of the EU (the so-called '1976 Act') and the Maastricht Treaty itself amending the EC Treaty.²³⁰ The acts complained of in *Matthews* were beyond the review of the CJEU and therefore not subject to an equivalent level of protection as that afforded by the European Convention.²³¹

While the presumption of proportionality where a system of 'equivalent protection' exists may be rebutted, this will only occur in marginal circumstances, such as where the CJEU has no jurisdiction over the acts complained of. It is doubtful that, even if adopted by the UN treaty bodies, the 'equivalent protection' doctrine could be satisfied by the EU's internal human rights regime given that the depth and range of obligations imposed under UN instruments is greater than that featuring in EU Law. Conditional liability is also inconsistent with the statement of principle by the ILC, the ILA and the ECtHR itself (which maintains the ongoing responsibility of the Member States for acts of the EU), which can only be made effective through strict liability. Further, the approach of the HRC also seems to support the application of strict liability.

1.2 Attributability of Acts

A further problem that arises in the context of holding States to account for breaches committed by IGOs is that where the ECtHR and HRC have been prepared to take jurisdiction, this has always been based on the fact that the breach can be attributed to the State. Where the act is attributed directly to the IGO itself, these monitoring bodies have made findings of inadmissibility. In the *Behrami* and *Saramati* cases the Grand Chamber of the ECtHR found it was unable to take jurisdiction in an application alleging violations committed by UN peacekeeping forces created under Chapter VII of the UN Charter. Guided by the Draft Articles on the Responsibility of International Organizations of the International Law Commission,²³² the ECtHR found that because States had donated troops to serve in forces operating under the command and control of a subsidiary of the UN (the Kosovo Force (KFOR) and UNMIK),²³³ individual donating States would not remain responsible for their illegal actions.²³⁴ That is, the conduct in question became attributable to the UN itself rather than the individual States.

The Court's decision to turn down jurisdiction was based heavily on the policy consideration that operations authorised under Chapter VII of the UN Charter are central to the UN's task of maintaining international peace and security, and holding States to account for the acts of their forces under peacekeeping actions

would frustrate this aim by potentially interfering with actions mandated by the Security Council.²³⁵ This ignores the fact that alongside the UN's goal of maintaining international peace and security (Article 1(1) UN Charter) is also the goal of promoting respect for human rights (Article 1(3) UN Charter). The UN Charter does not create a hierarchy between its purposes and principles in this manner. According to the Charter's preamble, the very reason for charging the UN with the maintenance of international peace and security is that war brings 'untold sorrow to mankind' in the form of human rights violations.

A similar approach was adopted in an older case by the HRC which decided that it was unable to take jurisdiction to examine a complaint against the Netherlands which in substance related to the alleged discriminatory employment practices of the European Patent Office, since these practices fell outside 'the jurisdiction of the Netherlands or of any other State party to the' ICCPR.²³⁶

Two remarks should be made in relation to the requirement of attributability of breaches to the State. Firstly, the ECtHR and the HRC have been prepared to attribute responsibility to the State in a generous manner. In the *Sayadi* case it was clear that the detriment suffered by the petitioner had resulted from measures mandated by the UN Security Council and given effect by an EU Regulation,²³⁷ and the responsibility of Belgium was based loosely on the fact that it had transmitted information about the petitioners which resulted in their being subject to sanctions.²³⁸ Similarly, in the *Bosphorus* case, the interference with property resulting from impounding the applicant's aircraft was carried out by Ireland in execution of its obligations under EU Law. The ECtHR did not consider the fact that Ireland had no choice under EU Law to be of relevance.²³⁹

Secondly, although it is understandable that such a monitoring body should decline to take jurisdiction over the EU itself, to hold that neither does it have jurisdiction over the Member States runs contrary to the clear statements of principle outlined above, which have been confirmed expressly by the ILC, the ILA and the ECtHR itself and impliedly by the HRC and the CJEU, i.e., that a Member State cannot escape responsibility for human rights violations simply by reasoning that it has delegated the relevant powers to another entity. It would seem to follow that attribution of particular acts to an IGO is not determinative of the responsibility of its Member States.²⁴⁰ The delegation of powers to the EU to begin with is more relevant than the role the Member State plays in the immediate acts leading to the breach of human rights. Thus, until the EU becomes party to the full range of human rights instruments to which its Member States are party, it is necessary to guarantee accountability for failure to observe the relevant obligations by continuing to hold the Member States accountable. This is best done where a system of strict liability is in operation.

From the above, it is clear that EU Member States remain responsible for the implementation of their obligations under the UN Charter and UN human rights treaties, even after the transfer of powers to the EU. Where the Member States fail to give effect to these obligations, they will incur international responsibility if a breach has occurred as a result of an act of the EU. Furthermore, Member States will also remain accountable for failing to give effect to their obligations to protect and promote or fulfil human rights where they are unable to act because the matter in question falls within the competence of the EU. In order to avoid a situation where the Member States become unable to discharge these obligations, it is imperative that the Member States ensure that express recognition exists within the EU legal framework of the full range of obligations of the Member States. This means that the EU should recognise its role in guaranteeing respect for, protection and promotion or fulfilment of human rights as contained in the UN instruments, to the extent of its competences. Such a measure also reduces the risk of a lacuna in protection resulting from the attribution of particular breaches to IGOs themselves.

In order to further the effectiveness of human rights protection, it is imperative that monitoring bodies maintain a system of strict liability with regard to the Member States, giving full effect to the principle that a State's responsibility to ensure execution of its obligations subsists even following transfer of powers to an IGO. This effectiveness is hampered by adopting an approach whereby a State may discharge its responsibilities simply by establishing a system of equivalent protection within the IGO, since it precludes examination of the merits of the claim and may not actually represent an accurate assessment. Effectiveness is also hampered by refusing to exercise jurisdiction through attribution of particular acts to the IGO itself.

2. Specific Obligations to Accord Priority to UN Charter-Derived Obligations

According to Article 103 of the UN Charter, obligations stemming from the UN take precedence over conflicting obligations under other treaties. As noted in the Introduction, the range of human rights obligations incumbent on Member States under the UN Charter (which includes the UDHR and UN human rights treaties themselves) is significant. In the *Kadi* case, the General Court and the CJEU found that Article 103, while it imposed an obligation on EU Member States to accord priority to obligations stemming from the UN, did not of itself bind the EU and did not oblige the EU to grant primacy to rules derived from the UN.²⁴¹ However, even if Article 103 does not directly bind the EU, nor oblige the EU to implement UN Charter-derived obligations inside the EU's legal order, the CJEU did not deny the fact that by virtue of Article 103 the Member States were obliged to give the UN Charter priority. In this respect, it was impliedly accepted by the CJEU – and explicitly accepted by the Advocate General – that Member States may [be responsible to] engage their international responsibility towards [vis-à-vis] other UN members by failing to implement their UN Charter-derived obligations because of their obligations under EU Law.²⁴²

Taking this into consideration, it is arguable that by virtue of the UN Charter the human rights obligations deriving from the Charter and the UN human rights treaties take precedence over any conflicting obligations stemming from the EU. Although this does not of itself mean that the EU is bound by the UN Charter or UN human rights treaties, it does mean that EU Law should be rendered compatible with the UN Charter by Member States in order to avoid a conflict of obligations. Article 103, for instance, would legitimate (or oblige) an EU Member State to take measures in an area of exclusive EU competence where the EU was not exercising its powers to give full effect to that Member State's human rights obligations. By the same token, Article 103 prevents a Member State from relying on its obligations under EU Law to justify a failure to take measures to implement human rights guarantees before the UN treaty bodies.

C. A VICTIM-BASED APPROACH

As part of the debate regarding the continuity of human rights obligations, some authors have advocated adopting a victim-centred approach. That is, **rather than focusing on the extent to which non-State actors may hold obligations under International Human Rights Law, an alternative approach is to focus on the rights-bearers.**²⁴³ **Under this view, whichever entity exercises authority in relation to a particular territory has a responsibility to give effect to these rights.** This opinion appears to be shared by the HRC, which has underlined that once a State has undertaken commitments under the ICCPR, these devolve permanently onto the population and territory:

[T]he rights guaranteed under the Covenant belong to the people living in the territory of a State party, and ... once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding changes in the administration of that territory.²⁴⁴

Accordingly, the HRC, in its concluding observations on the periodic report of the United Kingdom, reminded the government that when handing over administration of Hong Kong to the Chinese government in 1997, the rights accorded to the people of Hong Kong by virtue of the UK's membership of the ICCPR remained in force.²⁴⁵ The UK concluded an agreement with China to this effect, and China made its first report to the HRC in 1999 despite not being party to the ICCPR.²⁴⁶ By the same token, the HRC requested UNMIK, which administered Kosovo from 1999, to assume the reporting obligations previously held by Serbia, which was no longer in a position to report on that territory.²⁴⁷

Although the EU does not directly administer the territory of the Member States, it does share responsibility with the Member States across a range of policy areas and has exclusive competence in others. Of course, the implementation of EU Law and the administration of the Member States rest almost entirely with national authorities, but this does not alter the fact that the origin of the legislation that these authorities are obliged to implement finds itself with the EU.²⁴⁸ Under a victim-based approach the EU is responsible for giving effect to the human rights conferred on the population and territory by the Member States when they became party to human rights treaties, to the extent that it has competence to act.

D. CONCLUSIONS

To ensure the continuing guarantee of human rights derived from the UN Charter and UN human rights treaties, both the Member States and the EU must exercise their respective competences to give them effect. The most effective way of ensuring this is through the accession of the EU to those human rights instruments, and the precedents of the European Convention and the CRPD should be extended to the 'core' UN human rights treaties. Until this occurs, it is crucial to ensure that the EU gives effect, within its competences, to those 'core' human rights treaties in order to avoid a two-tier system of protection where the populations of the Member States are unable to benefit from the full extent of their rights within areas of EU competence.

The grounds on which the UN Charter and UN human rights treaties bind the EU directly can be summarised as follows. Firstly, the EU is bound to implement human rights guarantees deriving from the UN Charter and UN human rights treaties in so far as these have become part of Customary International Law. Secondly, the EU itself is now bound by the CRPD will become directly bound by the European Convention once it accedes to this instrument. Thirdly, the CJEU has accepted that under EU Law (in particular, Article 351 TFEU) the EU may de facto succeed to the obligations of its Member States under pre-existing treaties to the extent that it has been delegated powers necessary for their implementation by the Member States.

There are also several grounds on which the Member States will engage their international responsibility for acts of the EU that conflict with their obligations under the UN Charter and UN human rights treaties. While these obligations do not directly bind the EU, if the Member States fail to give them effect in the EU's internal legal order, they will remain responsible for breaches committed by the EU.

Firstly, according to the case law of the ECtHR and the HRC as well as the Draft Articles on the Responsibility of International Organizations of the International Law Commission and the study on the accountability of IGOs of the International Law Association, the Member States remain responsible for the implementation of their human rights obligations under the UN Charter and UN human rights treaties in respect of those powers delegated to the EU. Thus, the EU will engage the responsibility of the Member States where the former fails to give effect to these obligations.

Secondly, Article 103 of the UN Charter further imposes a duty on the Member States to accord priority to obligations derived from the UN Charter where these conflict with other treaty obligations. Thirdly, under EU Law (Article 351 TFEU) agreements entered into by the Member States prior to accession to the EU shall not be affected (which includes the UN Charter for all, and the 'core' UN human rights treaties for many, of the Member States).

Finally, if one adopts a 'victim-centred' approach to International Human Rights Law, it is apparent that the EU and its Member States are jointly bound by UN human rights standards. According to the HRC, once the Member States have undertaken human rights guarantees with respect to those within their jurisdiction, these cannot be revoked, even where changes in administration occur. Consequently, such rights belong to the people and are incumbent upon any entity that exercises authority over those territories.

Accordingly, it is extremely difficult to dispute that the EU is bound by UN human rights standards, and that the Member States remain bound by their obligations under these treaties. Chapter Four will now explore the modalities of cooperation between the EU and the UN's human rights infrastructure in order to give effect to these obligations, and in particular the nature of the monitoring functions and the procedural duties that flow there from.

Chapter Four: Practical Measures for Ensuring Continuity of United Nations Human Rights Guarantees in the European Union

Chapters Two and Three presented the case for why EU adherence to UN human rights instruments is both necessary from the perspective of ensuring effective human right protection and obligatory under International Law. Chapter Four will continue the discussion by exploring the mechanisms through which, in practical terms, the UN Charter and treaty bodies could engage with the EU. The most effective means of ensuring the continued guarantee of the Member States' obligations under UN instruments, as well as consistency in interpretation of these instruments as between the EU and its Member States, is to engage the EU in the same system of supervision and monitoring in which the Member States are currently involved. There are a variety of ways through which this could occur, which will be discussed in turn.

A. THE BASIS FOR ENGAGEMENT OF THE EU WITH THE UN TREATY BODIES OR CHARTER BODIES

This chapter is based on the assumption that the EU would agree to supervision by the treaty bodies ; however, the discussions are also directly relevant for the EU's relationship with the Committee on the Rights of Persons with Disabilities (Hereafter "the CRPD Committee"), since it is now party to the CRPD. In relation to other UN human rights treaties, or the UN Charter itself, the EU could, as discussed in Chapter Three, become party to these instruments if they are amended to allow adherence by a regional organisation, as has occurred in relation to the European Convention. Alternatively, as discussed in Chapter Three, the EU could, by unilateral declaration, declare itself bound by these instruments.

It is also **possible for the EU to cooperate with the treaty bodies at an informal level**, which could include submitting to the same supervisory mechanisms as the Member States. As noted above, the HRC has had occasion to engage directly with UNMIK over the implementation of human rights obligations during its administration of Kosovo.²⁴⁹ This could serve as a precedent to engaging the EU directly, even in the absence of accession to UN human rights treaties, on the basis that the EU shares authority with the Member States over their populations and territories. Similarly, the UN Charter bodies have dealt with complaints from individuals relating to territories that have not been recognised as States as well as other non-State actors and entities. For instance, the Special Rapporteur on extrajudicial, summary or arbitrary executions engages the government of the Occupied Palestinian Territories over allegations falling within his mandate to obtain clarification of cases and secure compliance with UN standards.²⁵⁰

The EU has already indicated a willingness to cooperate with external bodies in the field of human rights in ensuring compliance of its policies with international standards. In 2007 the EU concluded a Memorandum of Understanding (MoU) with the Council of Europe in order to coordinate and enhance cooperation. In particular, the MoU stipulates that:

[R]elevant Council of Europe norms will be cited as a reference in European Union documents. The decisions and conclusions of its monitoring structures will be taken into account by the European Union institutions where relevant. The European Union will develop co-operation and consultations with the Commissioner for Human Rights with regard to human rights.

While preparing new initiatives in this field, the Council of Europe and the European Union institutions will draw on their respective expertise as appropriate through consultations.²⁵¹

Paragraph 22 of the MoU also provides for cooperation between the Council of Europe and the FRA. The EU has also indicated a willingness to submit its policies to scrutiny by bodies within the UN Human Rights Council. For instance, the EU recently submitted its largest development treaty (the Cotonou Convention)²⁵² for evaluation by the Human Rights Council's High-Level Task Force on the Implementation of the Right to Development.²⁵³ It has also entered into an informal agreement with the UNHCR in order to facilitate compliance by the EU with the Refugee Convention.²⁵⁴ This agreement provides for, among other things,

'[r]egular and systematic exchanges of information and analysis on particular issues arising from Member States' national law and practice in relation to the Common European Asylum System and how that affects the situation of refugees, asylum-seekers and other persons of concern to UNHCR'.²⁵⁵

These practices could serve as precedents to informal agreements with both the UN treaty bodies and Charter bodies. As such, the EU could agree with the treaty bodies to submit to the supervision and monitoring processes already in place. The EU could also, for instance, cooperate with the 'special procedures' in place in the UN Human Rights Council, as well as participating in the Universal Periodic Review (UPR) procedure, discussed further below.

B. PRELIMINARY CONSIDERATIONS GUARANTEEING THE EFFECTIVENESS OF SUPERVISION BY THE UN TREATY BODIES OR CHARTER BODIES

In order to allow the treaty bodies to properly target their analysis and comments during any process of engagement, the EU must clearly delineate the extent to which, and over which areas, the EU has competence to act. Further, if guidance from the treaty bodies is to have an influence on EU policy, effective mechanisms must be in place to allow for the translation of general comments and concluding observations into practical and useful guidelines for the institutions, and particularly the Commission in its role as initiator of legislation and policy.

1. Clear Delineation of Areas of EU Competence, Policy Measures and Legislation

Firstly, monitoring bodies must benefit from a clear **understanding of which policy areas fall within EU competence and whether this is exclusive of, shared with, or complementary to that of the Member States**. In addition, the monitoring bodies must have a clear picture of what legislation and policies are in place under these areas of competence. This would allow the committees sufficient knowledge to direct their comments effectively.

For instance, if a monitoring body raises concerns relating to asylum policy with a Member State and recommends changes, it must be aware that much of asylum policy is regulated by EU legislation. Accordingly, the relevant committee would then have the option to either raise the issue with the EU directly, or develop an approach to the Member States where it underlines in express terms that the latter are under a continuing obligation to ensure that policies elaborated in the context of the EU are adjusted to comply with UN standards. In this regard, for instance, it can be noted that there are numerous cases relating to non-refoulement brought before the Committee against Torture (hereafter "the CAT Committee") where recommendations are currently directed to the defendant State, which may have deeper consequences for EU asylum policy.²⁵⁶ However, EU legislation is rarely discussed in these cases, which means that the impact of the Committee's decisions may be limited to the case before it without resolving the underlying problem that may result from EU policies.

The EU appears to have taken some steps in this direction with regard to the CRPD. The Council Decision authorising the Commission to deposit the EU's instrument of ratification is accompanied by a declaration which provides a list of areas of competence that are exclusive to the EU and shared with Member States, as well as a list of legislation that is considered to have implications for the rights of persons with disabilities.²⁵⁷ However, the explanation given is vague, by no means comprehensive, and could form a potential source of confusion for the treaty bodies.

Paragraph 1 of the Declaration states that the EU 'has exclusive competence as regards the compatibility of State aid with the common market and the Common Custom Tariff'. It also states that it has exclusive competence with regard to the employment conditions of its own staff. Presumably, these areas have been included because they are considered by the EU to be capable of having an impact on the rights of disabled persons, such as the allocation of State aid in respect of services for the benefit of persons with disabilities, or the setting of customs tariffs that may make equipment designed for persons with disabilities more affordable.

It is unclear, however, why other areas of exclusive competence have been omitted from this list, such as the Common Agricultural Policy (CAP) or the Common Commercial Policy. It would appear to be too

sweeping to suggest that no powers exercised under these areas could possibly be relevant to the CRPD. For instance, Article 4 of the CRPD does not limit the scope of obligations to the territory of the parties, which implies that it imposes duties not only to promote and protect the rights of persons with disabilities at home, but also abroad. In this regard Article 4(2) specifically mandates parties to ‘take measures to the maximum of its available resources and, where needed, within the framework of international cooperation’ to realise the rights contained in the treaty. If the CRPD carries with it these obligations towards promoting the rights of disabled persons in third States, it is difficult to understand how the Common Commercial Policy could be excluded from consideration. It is well established that international trade policies have a significant impact on human rights in third countries, particularly through trade liberalisation. This must be impliedly accepted by the EU because the Declaration refers to the Common Custom Tariff. Accordingly, to the extent that the Common Commercial Policy would be capable of affecting the rights of persons with disabilities in third countries, such as rules regarding the liberalisation of trade in certain products (e.g., products to assist mobility), or rules regarding intellectual property (e.g., facilitating the development or distribution of speech recognition software in third countries for those who have difficulty writing or typing), this policy area should not be excluded.²⁵⁸

In principle, therefore, any declaration or other form of expression explaining the division of competence between the EU and Member States should be comprehensive and not based on an assumption that particular policy areas do not give the EU powers relevant to the execution of obligations under the UN human rights treaties.

As noted above, in areas of shared competence the Member States retain the competence to act in so far as the EU has not acted and to the extent that such measures are not incompatible with EU Law. Paragraph 2 of the Declaration appears to attempt to exclude the responsibility of the EU in areas of shared competence, where EU legislation exists, but only establishes ‘minimum standards’ rather than harmonisation (that is, the establishment of a common European standard), stating that in the case of the former, the Member States retain competence.²⁵⁹ While legislation establishing ‘minimum standards’ does allow Member States the right to act to introduce higher standards of their own,²⁶⁰ this cannot be a reason for regarding areas regulated by ‘minimum standards’ as within Member State competence, and not EU competence. This is because the Member States nevertheless remain under a duty to implement these minimum standards. The assertion in the Declaration accompanying the EU’s ratification of the CRPD reflects the position of the CJEU in the case of *Parliament v Council* (discussed in Chapter Two), which establishes that while the EU is obliged not to mandate breaches of human rights in its legislation, it is not under an obligation to protect human rights by wording legislation in such a way as to minimise the possibility that Member States might interpret it in a manner contrary to human rights standards. In other words, as long as legislation is worded in such a way that Member States can interpret it consistently with human rights, the EU has discharged its duty. Under this approach the EU may establish minimum standards for Member States to adhere to, while authorising them to adopt higher standards. Even if these minimum standards are below the level required by human rights guarantees, because the legislation allows the Member States to introduce their own higher standards, it is capable of being interpreted in line with human rights standards.

However, this approach is unlikely to be accepted by the CRPD Committee in light of the fact that parties are under an obligation not merely to respect rights, but also to protect them. This would imply, as discussed above, that the EU will be obliged to take measures to minimise the risk that its legislation could be interpreted by Member States inconsistently with the CRPD. It would also follow that where the EU establishes minimum standards, such an area falls jointly within the competence of the EU and the Member States. Accordingly, the EU would remain responsible for establishing minimum standards that were excessively weak, and the Member States would remain responsible for implementing minimum standards in a way that violated the CRPD. Thus, any declaration or other form of expression explaining the division of competences between the EU and the Member States cannot legitimately purport to place responsibility solely on the Member States for legislation implementing ‘minimum standards’.

It is understandable that the Declaration should be lacking in detail, since it merely accompanies the instrument of ratification. However, in order to maximise the opportunity for future fruitful dialogue between the CRPD Committee, and other treaty bodies, and the EU it will be necessary to set out in far greater detail not merely the general headings of policy, but precisely what issues these cover.

For example, while the EU has exclusive competence over the CAP, this does not of itself explain what the boundaries of the CAP actually are. Put otherwise, not every matter relating to agriculture (e.g., the rules relating to the buying and selling of farmland) falls within the scope of the CAP. Without an understanding of the scope and content of particular areas of competence, the treaty monitoring bodies will be unable to direct the EU and its Member States concerning which promotional measures they may respectively adopt to give effect to the obligations in the treaties. In this sense, it should be noted that the HRC has underlined the need for sufficiently detailed reports under the periodic reporting procedure to enable it to ascertain with precision what measures have been taken in implementation of the parties' obligations.²⁶¹

One question that arises is whether this Declaration is interpretive or whether it in fact purports to alter the scope of the EU's obligations (in which case it is in substance a reservation). Where a party to a treaty enters a declaration, this is deemed to be merely a statement of opinion by the party relating to the meaning or scope of its obligations. As such, it does not of itself alter the legal obligations of that party. Where parties wish to alter the scope of their obligations under a treaty they may enter a reservation.²⁶² Reservations are expressly permitted under the CRPD (Article 46), but only to the extent that they are compatible with the object and purpose of the treaty. It is true that reservations may take the form of a 'declaration'. According to the VCLT, it falls to the other parties to a treaty to determine whether a reservation or a declaration has been made and whether the reservation is valid. However, the HRC has underlined that this decentralised approach should not apply in relation to human rights treaties:

[Human rights] treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place... And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant... In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effect objections have between States inter se... It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant.²⁶³

According to this view, it would fall to the CRPD Committee to examine the substance of the EU's declaration to determine whether it was in fact (even if not in form) a reservation. If the CRPD Committee found that the Declaration amounted to a reservation, it could then consider its validity. It is highly doubtful whether a reservation to the CRPD that purported to limit the obligations of the EU to those areas of competence specifically mentioned in the Declaration would be considered compatible with the object and purpose of the treaty. Such a reservation would have the effect of limiting the application of all the rights of the CRPD in so far as they fell within the scope of a particular area of competence not mentioned in the Declaration. Such 'general' reservations which do not relate to specific provisions of the treaty in question are not accepted in International Law.²⁶⁴ In sum, then, the Declaration of the EU should not be read as a limitation on the scope of the EU's obligations, since as a declaration it is merely an interpretation offered by the party, and if it was a reservation it would most probably be considered invalid.

Thus, in order for the treaty bodies to benefit from a clear understanding of which areas fall within EU competence, the EU should provide an outline of all policy areas (and not only those which it deems may be of relevance), including information on the precise limits of EU powers in those areas and the principal legislative and policy instruments currently in existence in those areas. It then falls to the treaty bodies to determine the extent to which particular policies may be of relevance to the execution of obligations under the treaty. Given the level of detail that this may involve, such information could best be transmitted to the treaty bodies in the first report of the EU as part of the periodic reporting procedure. In addition, the treaty bodies could be given access to the information in electronic format that could be updated periodically by the EU in order to reflect new developments. Currently, such overviews of policy areas do exist with public access in the form of a series of 'Fact Sheets' hosted on the web pages of the European Parliament,²⁶⁵ as well as 'Summaries of legislation' hosted on the main EU web pages,²⁶⁶ which appear to be regularly updated in line with major developments.

2. Effective Mechanisms for Implementation of Treaty Body Recommendations

In order to allow monitoring to have an impact on policy- and law-making, effective mechanisms within the EU's institutional framework need to be in place to ensure that observations and recommendations made by the monitoring bodies penetrate the relevant structures. As a matter internal to the EU's workings, the development of the technicalities of such a system falls to the institutions and the Member States. However, any such mechanism could be facilitated by sensitising EU personnel, particularly those working within the Commission, given its responsibilities as formulator and proposer of EU policies and its central role in the development of delegated or secondary legislation under the 'comitology' procedure.²⁶⁷ It is especially important not to confine awareness-raising on human rights to those DGs that appear superficially to be human rights oriented, such as DG Justice (which has a specific brief for human rights in the EU) or DG Employment and Social Affairs (which deals with Non-discrimination Law and policy).

As noted above, all policy areas may have an impact on rights protection. The dangers of ignoring this fact can be illustrated by reference to the legislative course of the so-called 'Service' Directive.²⁶⁸ This legislation was drafted with the aim of facilitating the free movement of services between Member States and, as part of this goal, contained a 'State of origin' clause.²⁶⁹ According to this provision, a service provider operating legally under the laws of one Member State would be free to offer services in any other Member State without needing to conform to additional, more rigorous, requirements in place in the destination State. The clause was drafted in general terms and in the original proposal as applicable to all services, including those of a social nature, such as care for the elderly, disabled or infirm. While the aim of the Directive was to increase competition among service providers and therefore benefit consumers, the impact on social services, where the ultimate recipients cannot be considered as consumers with purchasing power to exercise an effective choice (since such services would be purchased by national or local authorities), appears not to have received consideration.²⁷⁰

This is arguably in part due to the consultation habits of different Commission DGs. Thus, DG Internal Market at the time consulted predominantly with commercial enterprises since these were probably perceived as its primary stakeholders, but it seems to have had little contact with social NGOs.²⁷¹ Thus, it was not until the proposal was transmitted to the European Parliament that, after a considerable amount of lobbying by NGOs and MEPs, the Commission modified its proposal to exempt many areas of social services.²⁷² This example illustrates that without some awareness of human rights, the EU institutions may either simply not consider possible human rights dimensions of policies, and may also be unreceptive to efforts to mainstream human rights across policy areas. It may be that the Commission's approach in its disability strategy, to give effect to the EU's obligations under the CRPD, could provide a useful model for a coordinated approach across all DGs for human rights protection and promotion in general.²⁷³

In addition to measures to sensitise the institutions to human rights issues, **effective integration of human rights considerations into policy-making could also be facilitated by the creation of a human rights reference document or database.** This would require adaptation of the principles extracted from case law, concluding observations, and general comments or recommendations to the policy areas covered by each DG. Thus, in relation to the CAP, for instance, such a database could explain the relevance and content of the right to food and relate them to matters on which DG Agriculture is competent to take action. These considerations could then guide the policy choices made in developing particular initiatives so as to best achieve these goals.

Such a reference guide would, of course, constitute a living instrument as policy areas develop. Were it comprehensive and systematic, it could ensure that human rights input into policy- and law-making results as a matter of course, rather than in a haphazard fashion where particular DGs recognise the relevance and utility of using existing standards as guidance, while others do not. In addition to constructing such a reference point, it may also be helpful to designate staff within particular DGs to undertake human rights training to identify where human rights may become relevant to particular policy proposals so that further advice may be sought early on in the policy formulation process. Such expert advice could be drawn from expert groups internal to the Commission,²⁷⁴ or could be sought from the FRA.

C. DIRECT ENGAGEMENT OF THE EU WITH THE UN HUMAN RIGHTS INFRASTRUCTURE

The remainder of this chapter will examine **the procedures under which the treaty bodies and the Charter bodies might engage with the EU**, and explain the procedural obligations that the EU would have as part of these mechanisms.

1. Treaty-Based Procedures

The implementation of each of the ‘core’ UN human rights treaties is monitored by a committee (referred to collectively as the ‘treaty bodies’). The **treaty bodies** consist of:

Eighteen experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as of the principal legal systems.²⁷⁵

Members are often drawn from among high-ranking legal academics. The treaty bodies exercise various monitoring functions. Their principal monitoring function is carried out through the periodic reporting procedure through which they gain an overview of human rights implementation by the party as a whole and give general directions on how to improve realisation of the party’s obligations. The treaty bodies are also able to receive and issue decisions on individual complaints, where the relevant party has given its consent.

A further important function is the issuing of general comments or recommendations, which are similar in form to advisory opinions. These are issued *proprio motu* by the treaty bodies and offer interpretations of procedural and substantive obligations of the parties. These will be discussed in turn below. Several of the treaties also provide for inter-State complaints as well as the ability to conduct a confidential enquiry into particular situations.²⁷⁶ However, these two procedures will not be discussed here. Illustrative examples have been taken from the various treaty bodies, and these should be regarded as applicable to each of the human rights treaties since they contain similarly worded procedural obligations. Even if the EU chooses not to engage with all of the treaty bodies, the discussion has particular pertinence for the EU as regards the implementation of the CRPD.

1.1 Periodic Reporting

Under the periodic reporting procedure a party is invited to a ‘report on the legislative, judicial, administrative or other measures which they have adopted to give effect’ to the particular treaty.²⁷⁷ The opportunity of a fresh engagement with the EU might open the possibility for a single report to be considered by each of the committees simultaneously in order to reduce the administrative burden and allow for complementarity in monitoring, and coordination between the way that recommendations for changes are delivered to, and perhaps also the way that they are received and processed by the EU itself.²⁷⁸ However, the normal procedure is for a party to report separately to each committee.

Depending on the treaty body, reports are expected to be submitted and considered between every two to five years. Initial reports are expected to deal with the situation in the State as a whole and subsequent reports may focus on particular issues as requested by the relevant treaty body. After States submit their reports, the treaty bodies may request further information pending consideration of the reports. They will then engage in an oral dialogue with representatives of the State. In order to enhance the effectiveness of the process, the treaty bodies will also make use of information from ‘shadow’ reports submitted by NGOs.²⁷⁹

The treaty bodies have offered a great deal of guidance over what substantive information the reports should include. In addition, they have elaborated on the range of procedural obligations that flow from the reporting process, which are not apparent from the text of the treaties. In particular, the process should go beyond simply presenting a ‘snapshot’ of the status of human rights in the party at the time. At a general level, the HRC has underlined that parties are under a duty not merely to report on legislation giving effect to their obligations, but also ‘the practices and decisions of courts and other organs of the State party as well as further relevant facts which are likely to show the degree of actual implementation and enjoyment of the rights recognized in the Covenant, the progress achieved and factors and difficulties in implementing the obligations under the Covenant.’²⁸⁰

Firstly, in drawing up its initial report the party should 'ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and procedures, and practices in an effort to ensure the fullest possible conformity with the Covenant.'²⁸¹ The CRPD Committee has also specified that information should be included on the mechanisms 'in place to ensure that a State Party's obligations under the Convention are fully integrated in its actions as a member of international organizations'.²⁸² In order for the review to realise its proper potential, it should not be limited to one division of government, but rather involve all departments. In this sense, the CESCR has stated that the review of national implementation should 'be undertaken in conjunction with each of the relevant national ministries or other authorities responsible for policy-making and implementation in the different fields covered by the Covenant.'²⁸³ Similarly, the CRC Committee has stated that coordination between government departments, both centrally and locally, is essential in order to ensure respect for all of the Convention's principles and standards for all children within the State jurisdiction ; to ensure that the obligations inherent in ratification of or accession to the Convention are not only recognized by those large departments which have a substantial impact on children - education, health or welfare and so on - but right across Government, including for example departments concerned with finance, planning, employment and defence, and at all levels.²⁸⁴

Thus, as noted above, it is particularly important to sensitise officials from different DGs that may not typically realise the impact of their policy areas on respecting, protecting and promoting rights. Furthermore, the CRC Committee has emphasised that an assessment of the status of rights implementation 'needs to consider the Convention not only article by article, but also holistically, recognizing the interdependence and indivisibility of human rights' and that it should be an ongoing process.²⁸⁵ Accordingly, the Commission, which has been designated as the institution responsible for reporting to the CRPD Committee, should ensure that all DGs, and not merely DG External Relations (currently responsible for human rights in multilateral forums), are involved in drawing up the EU's reports under the CRDP.²⁸⁶ This would apply similarly in relation to the other treaty bodies, should the EU choose to engage with them.

Secondly, in order to provide meaningful information, the parties must ensure the adequacy of available data. The CESCR has noted that parties must collect and analyse statistical data, and that this should be done in such a way as to allow monitoring of particular vulnerable groups.²⁸⁷ This includes an obligation to disaggregate data according to race,²⁸⁸ gender,²⁸⁹ age,²⁹⁰ disability,²⁹¹ and on other grounds in so far as they ensure the protection of vulnerable groups.²⁹²

Thirdly, the collection of data should be accompanied by the use of benchmarks by the party in order to allow progress to be tracked.²⁹³ As a related obligation, the parties must also then make use of this information in order to elaborate policies and plans of action that will lead to the better realisation of rights in the future.²⁹⁴ Put more explicitly by the CRC Committee:

If Government as a whole and at all levels is to promote and respect the rights of the child, it needs to work on the basis of a unifying, comprehensive and rights-based national strategy, rooted in the Convention...

The strategy must not be simply a list of good intentions ; it must include a description of a sustainable process for realizing the rights of children throughout the State ; it must go beyond statements of policy and principle, to set real and achievable targets in relation to the full range of economic, social and cultural and civil and political rights for all children. The comprehensive national strategy may be elaborated in sectoral national plans of action - for example for education and health - setting out specific goals, targeted implementation measures and allocation of financial and human resources. The strategy will inevitably set priorities, but it must not neglect or dilute in any way the detailed obligations which States parties have accepted under the Convention. The strategy needs to be adequately resourced, in human and financial terms.²⁹⁵

In this sense, the Commission's Strategy on the Rights of the Child, discussed in Chapter Two, is to be commended and should be applied more generally to all human rights.

Fourthly, the CESCR and CRC Committee have underlined the need for sufficient publicity and engagement of stakeholders such as NGOs in drawing up the report and disseminating the findings of the treaty bodies, in order to allow a constructive dialogue to develop at a national level.²⁹⁶

Finally, the HRC has emphasised that in order to maximise the potential benefit of the reporting procedure, it is 'desirable that the States representatives should have such status and experience (and preferably be in such number) as to respond to questions put, and the comments made, in the Committee over the whole range of matters covered by the Covenant.'²⁹⁷ This coincides with the first requirement that all relevant departments of central and local government be involved in drawing up the report. Accordingly, representatives from all DGs with sufficient knowledge of the policies and initiatives originating with their departments should be present during the oral stage of the reporting process in order to respond adequately to requests for clarifications from the treaty bodies.

It would appear that the Commission and the Member States are embarking upon an approach that broadly follows some of these requirements in relation to the CRPD.²⁹⁸ Thus, a 'Disability High Level Group' has been established gathering representatives of national authorities and the Commission to facilitate the development of national and EU strategies on disability and allow for coordination between the national and EU levels.²⁹⁹ This is to be commended. The potential weakness of the process lies in its voluntary nature, which relies on the cooperation and good will of Member States. However, as the EU has no authority to legally bind the Member States in areas outside its competence it is limited to a role of facilitating coordination in areas where Member States retain the authority to act.

1.2 General Comments and Recommendations

The UN treaty bodies also regularly issue general comments (or recommendations) elaborating on the meaning of States' obligations under the treaties.³⁰⁰ Each of the UN human rights treaties contains a set of procedural obligations in relation to implementation, as well as substantive rights,³⁰¹ and several of the monitoring bodies have delivered general comments explaining what these entail.³⁰² This section will not go into discussion of the general comments relating to the substantive obligations flowing from the treaties given the range and depth of rights they contain. Rather, it will focus on general comments elaborating on the range of procedural obligations that parties are subject to. In this sense, a useful first step in engaging with the EU could be the elaboration of a general comment adapting earlier documents to the EU's particular nature, where competences are divided between the EU and its Member States. Drawing from existing general comments, the following observations can be made.

Firstly, it is clear that the UN human rights treaties, including the CRPD, require the EU to implement new legislation, in so far as existing legislation falls short of the requirements of the treaty.³⁰³ Clearly, decisions over the extent of legislation required will need to be taken in conjunction with the Member States, in accordance with the principle of subsidiarity, to ensure that the EU remains within its competence. However, once it is determined that legislative gaps exist, the EU and the Member States must then coordinate to establish which of them is best placed to give effect to the obligations under the human rights treaties so as to avoid a situation where neither party takes any action. This would appear to be part of the role of the Disability High Level Group, noted above. The treaty bodies have stated that actual incorporation of the rights under the UN human rights treaties, while not strictly necessary, would be highly desirable.³⁰⁴ If the EU were to give effect to the UN human rights treaties in this manner, it would require substantial reform of the CFR since it does not contain the range of rights guaranteed by the former.

Secondly, even though incorporation of the rights contained in the human rights treaties into domestic law is not obligatory, an obligation does exist to ensure that individuals have access to an effective remedy. Article 8 of the UDHR, which binds all members of the UN, expressly requires that an effective remedy be available through national judicial bodies. The treaties also impose an obligation on parties to provide an effective remedy, though not necessarily through judicial bodies.³⁰⁵ Although the ICESCR does not contain an explicit right to a remedy, the CESCR has stated that an onus on parties exists to justify why effective judicial remedies have not been put in place as part of the general obligation to implement the treaty.³⁰⁶ Similarly, the CRC Committee has stated that '[f]or rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties.'³⁰⁷ The right to an effective remedy does not automatically equate to the right of access to a court. At a very minimum, however, some kind of mechanism must exist in order to allow aggrieved individuals to obtain reparation:

Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy ... is not discharged... [T]he Committee considers that the Covenant

generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.³⁰⁸

Furthermore the right to an effective remedy also requires the parties to ‘investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies’, for instance through a National Human Rights Institute.³⁰⁹ In view of this the treaty bodies have strongly urged parties to give effect to the right to an effective remedy via judicial institutions, though it has also recognised that it may be given effect through administrative or other official mechanisms.³¹⁰

Considering Article 8 of the UDHR together with the relevant provisions and interpretations given to the UN human rights treaties there is a strong argument in favour of the EU ensuring access to a judicial body, or some other mechanism at the very least, in order to complain of rights violations. This body should be capable of awarding compensation as well as other forms of reparation, in addition to a broader duty on the EU to investigate allegations of breaches in a prompt and impartial manner. To a limited extent the prompt and impartial investigation of alleged violations could be fulfilled by the European Parliament’s Ombudsman. However, this is unsatisfactory since the Ombudsman’s mandate is limited to investigating maladministration by the EU’s institutions, while potential conflict with human rights obligations could stem from EU legislation itself and/or its implementation, from its policies and the application of its financial instruments, without involving maladministration.

In order to give full effect to the obligations stemming from the UN human rights treaties it would be necessary to widen access to the CJEU, since (as discussed in Chapter Three) this is extremely restrictive – to the extent that the General Court stated that the EU does not comply with Articles 6 and 13 of the European Convention guaranteeing the right to a fair trial and an effective remedy.³¹¹ In this sense it should be noted that the right of access to an effective remedy is also recognised by the CJEU as a general principle of EU Law, obliging the Member States to ensure that individuals have access to civil or administrative procedures in order to enforce their rights under EU Law.³¹² This right is also expressly recognised by Article 47 of the CFR, which binds the EU itself.

Thirdly, the treaty bodies have also made clear that aside from enacting legislation to give effect to individuals’ rights, States are under an obligation to undertake other activities to make those rights effective. In particular the parties are under duties to engage in training of their own personnel to ensure that human rights are taken into consideration by government officials:

‘All administrative and judicial authorities should be aware of the obligations which the State party has assumed under the Covenant. To this end the Covenant should be publicized in all official languages of the State and steps should be taken to familiarize the authorities concerned with its contents as part of their training.’³¹³

The committees have also stressed the importance of awareness-raising for members of the public. For example, the HRC has stated that ‘individuals should know what their rights under the Covenant ... are’.³¹⁴ Similarly, the CEDAW Committee has stated that parties should ‘adopt education and public information programmes, which will help eliminate prejudices and current practices that hinder the full operation of the principle of the social equality of women’.³¹⁵ Indeed, research at the EU level has shown that many individuals do not avail themselves of existing rights and protection mechanisms because they are unaware of their existence.³¹⁶ In addition, Article 7 of ICERD specifically obliges parties to take measures ‘in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups’. The CERD and CEDAW and CRC Committees have also recommended that parties should create adequately resourced and mandated national human rights institutions as part of their general duty to give full effect to the rights in the treaties, in order to monitor rights implementation, assist in the formulation and analysis of policies, and provide assistance to victims.³¹⁷ These awareness-raising obligations are also set out in detail within the text of the Article 8 of the CRPD.

1.3 Individual Petitions

The EU has expressed its intention to become party to the Optional Protocol to the CRPD,³¹⁸ which would allow individuals to make complaints alleging breaches of the treaty.³¹⁹ Each of the treaty bodies (apart from the CRC Committee) has a similar procedure which parties may choose to consent to.³²⁰ This procedure can be described as 'quasi-judicial', as opposed to 'judicial'. A quasi-judicial dispute procedure can be distinguished from a 'judicial' procedure in that settlement of a dispute is undertaken by a body of independent experts (rather than 'judges') who consider the evidence and arguments of the parties by reference to law (though, unlike judicial proceedings, quasi-judicial proceedings do not tend to hold oral hearings) and delivers findings which, unlike judicial proceedings, States have not expressly accepted as binding.³²¹

While some of the treaty bodies have made provision for oral hearings, the individual complaints procedure is generally written.³²² Nevertheless, the procedure retains an adversarial character as the individual and the State are permitted to reply to and contest each other's submissions. The treaty bodies will also make use of presumptive or circumstantial evidence in favour of the petitioner where the credible evidence is produced and the State fails to contest this or produce a persuasive explanation.³²³ This is very similar in nature to the 'shared' or 'reversed' burden of proof operating in the ECtHR³²⁴ and by the CJEU in the context of Non-discrimination Law.³²⁵

After considering the evidence, and where the admissibility criteria for complaints are satisfied, the treaty body will then issue a decision on the merits of the claim. Where a breach has been found, the treaty body may do no more than merely declare a violation, without a recommendation for further action.³²⁶ However, it will usually invite the State to take some form of action to: provide a particular judicial remedy at the domestic level (such as opening an investigation, prosecution and punishment of those responsible for violations, the creation of a civil remedy);³²⁷ reform its legislation;³²⁸ prevent similar violations in the future;³²⁹ disseminate the committee's views in an appropriate language;³³⁰ refrain from taking particular action (such as deportation);³³¹ release victims;³³² guarantee the security of a victim;³³³ reinstate the victim in a particular post.³³⁴ Occasionally, compensation³³⁵ or payment of legal costs is directed.³³⁶ The party is then invited to inform the treaty body (usually within a period of three months) of any action taken to remedy the breach.³³⁷

Thus, the three main mechanisms operated by the treaty bodies work in a complementary manner. The reporting process would allow the treaty bodies to review and advise the EU on its policies in the round and address systemic problems in human rights protection. At the other end of the scale, the individual petition procedure allows the treaty bodies the opportunity to address specific violations which may occur even in the absence of broader difficulties in the human rights structure. Nevertheless, individual petitions also serve a useful role in identifying particular laws or practices that may result in more widespread violations. Finally, the function of general comments or recommendations will allow the treaty bodies to offer interpretations on the meaning of substantive and procedural obligations which can inform law and policy-making.

2. Charter-based Procedures

The principal UN Charter-based human rights protection mechanisms operate within the context of the **Human Rights Council**. Although the EU is not a member of the UN (nor of the Human Rights Council), all Member States are members of the former and several are members of the latter, and they do coordinate in order to give effect to EU policies, often making statements 'on behalf of' the EU, usually via the Member State holding the presidency at the time.³³⁸ Of relevance to the EU are the '**special procedures**' and the **UPR process**.

The 'special procedures' in place at the Human Rights Council consist of independent experts holding mandates that are either country-specific or thematic.³³⁹ Those holding country mandates investigate and report on human rights implementation in the targeted State, while thematic mandates may be established to investigate a particular practice or problems relating to the implementation of a particular right, as well as undertaking the development of new norms. Most thematic mandate holders also receive and act upon individual complaints, and the prior consent of States is not needed to authorise this process.³⁴⁰

The special procedures provide several opportunities for collaboration with the EU. Firstly, the reach of the thematic mandate holders appears to be universal and has included entities not recognised as States,

such as the Occupied Palestinian Territories, or commercial enterprises.³⁴¹ Thus, mandate holders may engage the EU in relation to individual complaints, as well as conducting studies on the EU as a whole on the same basis as the ‘country visits’ of the special procedures. For the most part, the mandate holders do not deliver in-depth analysis of complaints on the merits, but rather transmit allegations, request a reply, and make reference to international standards that may be of relevance to the complaint.³⁴² The conduct of ‘country visits’ by the special procedures could, however, allow for the broader analysis of EU policy on relevant areas of competence. For instance, the Special Rapporteur on the right to food could examine the EU’s CAP, and the Special Rapporteur on the human rights of migrants could examine EU policy in relation to the conditions of entry, residence, and the legal and social position of third country nationals. There is also scope for collaboration between these procedures and the EU’s FRA as part of its mandate in conducting research and formulating evidence-based policy recommendations.

Secondly, given the increasing prevalence of integration by States into both regional and international organisations, there is a compelling argument for establishing a mandate to specifically establish a clear framework for ensuring the accountability of such organisations under International Human Rights Law. Thus, alongside the existing Special Representative of the Secretary General on human rights and transnational corporations and other business enterprises,³⁴³ who is tasked, among other things, with articulating international legal standards on this issue, there could be established a mandate on human rights and regional and international organisations.

Under the UPR procedure the Human Rights Council will review the implementation of human rights in each of the Member States of the UN.³⁴⁴ This involves the submission by the State of a national report, which would include responses to specific questions posed by other States, as well as information submitted by other stakeholders such as NGOs. The State is then reviewed on the basis of the standards in the UDHR and any human rights instruments to which it is party, as well as any voluntary undertakings made by the State. Other States may then comment upon the human rights situation in that State and then make recommendations for future improvements. The process is thus one of peer review, rather than assessment by experts. Although the EU is not itself a member of the UN, it does have observer status at the General Assembly, of which the Human Rights Council is a subsidiary body. The voluntary submission of the EU to a review procedure of the High-Level Task Force on the Implementation of the Right to Development of the Human Rights Council (discussed above) could serve as a precedent for the voluntary submission by the EU to the UPR. In the alternative, EU Member States could be specifically requested to introduce information in their own national reports indicating relevant areas of EU Law that have an impact on the implementation of their human rights obligations.³⁴⁵

D. NATURE OF THE LEGAL OBLIGATIONS FLOWING FROM DECISIONS ISSUED BY THE UN TREATY BODIES AND CHARTER BODIES

Neither the UN human rights treaties nor the UN Charter (nor more specific instruments relating to the operation of the Human Rights Council) specifically stipulate that the decisions, opinions, views, observations or recommendations issued via the treaty bodies, UPR process, or special procedures are legally binding. This does not mean, however, these are devoid of legal significance.

Both commentators and the HRC have expressed the view that committee recommendations on individual cases carry some legal weight. Tomuschat states that “[l]egally, the views formulated by the Human Rights Committee are not binding on the State party concerned which remains free to criticize them. Nonetheless, any State party will find it hard to reject such findings in so far as they are based on orderly proceedings during which the defendant party had ample opportunity to present its submissions.”³⁴⁶ Steiner believes that the HRC “has taken the position that absence of a provision in the Protocol [to the ICCPR] describing views as ‘binding’ cannot mean that a State may freely choose whether or not to comply with them. Views carry a normative obligation for States to provide the stated remedies, an obligation that stems from the provisions of the Covenant and Protocol.”³⁴⁷ The reasoning of the HRC and CERD is as follows:

Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the

rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party ... information about the measures taken to give effect to the Committee's Views.³⁴⁸

Accordingly, since the parties have delegated to the treaty bodies the function of determining whether there has been a violation, it is the view of the treaty bodies and not that of the parties that indicates, as a matter of fact, whether there has been a violation. Furthermore, because the parties have undertaken to provide a remedy at the national level where breaches occur - even if they are not obliged to follow the remedies put forward by the treaty bodies to the letter - there is an uncontested obligation to provide an adequate remedy of some kind. A similar argument can be made in relation to Concluding Observations issued by the treaty bodies under the reporting procedure and the General Comments and Recommendations, in the sense that parties have delegated to the treaty bodies the function of interpreting the meaning of their obligations.

Furthermore, in relation both to the treaty bodies' decisions and those of the UN Charter bodies, it must be recalled that Article 2(2) of the UN Charter imposes a general duty on parties 'to fulfil in good faith' their obligations under the Charter. As discussed above, the UN Charter imposes an obligation on all States to promote respect for human rights, as well as guaranteeing the rights contained in the UDHR. Thus, even if the parties are not under a concrete obligation to execute any opinions or recommendations issued by these bodies in meticulous detail, they are at the very least under a duty to consider them in good faith.³⁴⁹ The International Court of Justice has stated that membership of an IGO entails for parties a 'clear obligation to cooperate in good faith to promote the objectives and purposes of the Organization as expressed in its Constitution'³⁵⁰

The obligation to give due weight to the opinions issued by the human rights bodies is thus further strengthened considering that Article 1(3) of the UN Charter stipulates that the promotion of human rights is one of the goals of the organisation. It would seem that repeated failure to act in furtherance of the objectives of the organisation by giving some kind of effect to the views of the UN human rights bodies would amount to 'abuse of right', which limits the ability of a party to consistently disregard repeated calls to take particular action in order to comply.³⁵¹

Thus, the decisions issued to the EU by the CRPD Committee (or other treaty bodies should the EU agree to participate) under its various procedures, while not expressly binding, will entail a legal obligation to take some action in order to fulfil the obligation to provide an effective remedy for a breach of the treaty. This is reinforced by the obligation on parties to give act in good faith in execution of their obligations under the UN Charter and the UN human rights treaties.

E. CONCLUSIONS

A range of mechanisms exist across the UN treaty bodies and UN Charter bodies. Now that the EU is party to the CRPD, and if it becomes party to the Optional Protocol, it will participate in the procedures described above in relation to the treaty bodies. Should the EU elect to engage with the other treaty bodies in relation to the remaining UN human rights treaties, it may also be engaged by their respective committee. These procedures present an opportunity for the EU to engage in a constructive exchange with external expert bodies that can contribute to developing a rich, coherent and comprehensive approach to human rights implementation in the EU. In particular, such a process could ensure consistency between the guidance that Member States receive and the EU's internal human rights policy, which would consequently ensure that Member States' obligations were being met in relation to those powers delegated to the EU. There are some precedents in relation to the EU's engaging in cooperation with the Council of Europe and the UNHCR, as well as examples of the treaty bodies and Charter bodies engaging with entities that are neither States, nor party to the human rights treaties. Even if the EU does not wish to formally accede to these instruments, the preceding chapters present cogent reasons for the EU's engaging voluntarily with the UN human rights infrastructure. Clearly, there are complexities involved in coordinating action between the EU and the Member States, but the approach of the EU to the CRPD is promising in this respect and should serve as evidence that such an operation can be accomplished in relation to the other UN human rights treaties.

Chapter Five - Case study: Special Safeguards for Suspected or Accused Persons who are Vulnerable

While a commitment from the EU to follow UN standards would mark an important progression, this of itself would have limited practical significance unless the EU is then able to allow these standards to penetrate its decision-making processes. As noted in Chapter Two, the quality and coherence of EU policy can be greatly enhanced by efforts to implement UN standards, such as the Commission's Strategy and Agenda on the Rights of the Child, which ensures that measures to further the rights of the child as guaranteed by the CRC are given effect across different policy areas. As discussed in Chapters Two and Four, it is important that awareness is raised of human rights among Commission DGs in a general sense and to UN standards in particular. Furthermore, it would also be helpful if particular DGs could have a reference point, such as a 'living' database that draws links between particular policy areas and their potential to breach, but also to promote and protect rights.

As such, this chapter presents a **case study as an example of how UN instruments may prove useful in formulating legislative proposals**. Its focus is on a future proposal of the Commission which is planned under the 'Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings', specifically relating to the rights of vulnerable persons.³⁵² This future proposal is examined from the perspective of the CRC and the CRPD. Although previous consultation documents from 2003-2004 discussed the CFR and European Convention in some detail, little more but mention was made of relevant UN instruments.³⁵³ However, it is clear that unlike the European Convention, among the 'core' UN human rights treaties are specialised instruments relating to vulnerable persons to which all Member States are party. In addition, these two instruments are of particular pertinence given the Commission's Strategy and Agenda on the Rights of the Child (discussed in Chapter Two) and its ratification of the CRPD.

Apart from the ability to improve the quality of EU legislation, another persuasive argument for taking UN standards into consideration can be advanced. The EU itself is under an obligation not to discriminate through its legislation, on a range of grounds including age and disability. This obligation flows from the CFR and the 'general principles' of EU Law, as well as International Law (through the means discussed in Chapter Two) via the European Convention, and the UN human rights treaties and the UN Charter. However, the rights of the child or the rights of persons with disabilities are not articulated in any detail in EU Law comparable to the CRC and CRPD.

Further, it is well established that the obligation not to discriminate includes the duty to take action to ensure that measures are tailored so as not to have a disproportionately negative impact on individuals by virtue of certain characteristics (or protected grounds) that they possess.³⁵⁴ In addition to the general prohibition on discrimination, both Article 20 CFR and Article 14(1) ICCPR impose a right of equality before the law that prohibits differential treatment and differential enjoyment of the right to a fair trial caused by failure to take measures to ensure substantial equality by those disadvantaged on certain grounds, such as disability or age.³⁵⁵ Thus, to the extent that EU Law regulates criminal proceedings, it must itself ensure that legislation contains adequate provisions to guarantee substantive equality. Failing the inclusion of express provisions to give this effect, the CJEU and the Member States remain under a duty to interpret the legislation in such a way as to guarantee substantive equality. Being guided by relevant UN standards would ensure compliance by the EU and Member States with their obligations under EU Law and UN human rights instruments.

A. BACKGROUND

In 2004 the Commission put forward a proposal for a Council Framework Decision on procedural rights for suspects and defendants in criminal proceedings. The aim of establishing common minimum standards of treatment was to ensure that Member States could enjoy mutual trust and confidence in each others' criminal justice systems as part of the operation of the EAW. As discussed in Chapter Two, where the Member States

are to cooperate in transnational matters that bring with them obligations of mutual recognition (such as the obligation to execute a judgement or arrest warrant issued in another Member State, or hand over custody of a national for trial in another Member State)³⁵⁶ there arises a risk firstly that the rights of the individual become diminished where lower standards exist in other Member States, and secondly (and as a consequence of this), a Member State may refuse cooperation.³⁵⁷ The proposal originally related to a range of issues: access to legal advice ; access to free interpretation and translation ; giving ‘appropriate attention’ to those who are ‘not capable of understanding or following’ proceedings ; the right to communicate with consular authorities ; and the right of suspects to be notified of their rights.³⁵⁸ However, the proposal was subsequently abandoned until 2009, when it was placed back on the agenda by the Council as a range of separate measures in the **‘Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings’**.³⁵⁹ As such, the Commission is in the process of reintroducing initiatives under various of these headings as individual, self-contained proposals.

To date, the Commission has launched a Proposal for a Directive on the right to interpretation and translation in criminal proceedings³⁶⁰ and a Proposal for a Directive on the right to information in criminal proceedings (otherwise known as a ‘Letter of Rights’).³⁶¹ The Roadmap also specifically provides for a **proposal on ‘special safeguards for suspected or accused persons who are vulnerable’**, which is intended to ensure that ‘special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, [or] mental or physical condition’.³⁶²

B. CONTENT OF THE SAFEGUARDS

Although no text is yet available for the proposal, the text of the initial proposal relating to vulnerable persons can serve as a starting point. The Commission’s initial Green Paper cast the net widely over the category of persons who could be classed as ‘vulnerable’, and included those who did not speak the national language, children, persons with mental or emotional impairments or disabilities and physical disabilities, persons with dependents, the illiterate, asylum-seekers, and those with a dependency on drugs or alcohol. Those considered ‘vulnerable’ would then be offered ‘procedural safeguards ... to offset their disadvantages’.³⁶³

In the subsequent proposal of 2004, the focus shifted away from identifying ‘vulnerable persons’ as a class of beneficiaries. Rather, Article 10 of the proposal centred on the fact of whether the individual in question is able to ‘understand or follow the content or the meaning of the proceedings owing to his age, [or] mental, physical or emotional condition’.³⁶⁴ Where they were unable to do so, Article 10 would oblige the Member State to offer ‘specific attention’ to that person ‘in order to safeguard the fairness of proceedings’.³⁶⁵ As a matter of procedure, the same provision obliged the Member States to consider and record in writing whether specific attention was considered necessary and whether any steps were taken in that regard. Article 11 gave a suspect or defendant who was ‘entitled to specific attention’ three substantive rights: firstly, to ensure that a recording is made of any questioning, as well as a transcript in the event of a dispute ; secondly, that medical assistance is provided wherever necessary ; and thirdly, that ‘[w]here appropriate... specific attention may include the right to have a third person present during any questioning by police or judicial authorities’.

C. CONSIDERING THE 2004 PROPOSAL IN THE LIGHT OF THE CRC AND THE CRPD³⁶⁶

1. Children

The CRC Committee has dealt specifically with the rights of the child in the context of juvenile justice in its General Comment No. 10 (2007), which contains illuminating interpretations and explanations both of the relevance of the CRC in general to juvenile justice, but also more specifically the meaning of Article 40 CRC, which deals with the penal system.³⁶⁷ The CRC Committee also draws on the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (‘The Beijing Rules’),³⁶⁸ the United Nations Rules for the Protection of Juveniles Deprived of their Liberty,³⁶⁹ and the United Nations Guidelines for the Prevention of Juvenile Delinquency (‘The Riyadh Guidelines’)³⁷⁰ in interpreting the provisions of the CRC, which could also act as reference points for the Commission. Further guidance is included in the Guidelines for Action on Children in the Criminal Justice System.³⁷¹

At a general level, Article 3(1) CRC provides that the **principle of the 'best interests of the child'** shall constitute the primary consideration in decisions taken in relation to minors.³⁷² In the context of juvenile justice, the CRC Committee has underlined that children are 'different from adults in their physical and psychological development, and their emotional and educational needs.'

As a consequence, parties must ensure 'a **separate juvenile justice system**'.³⁷³ Juvenile courts may be established 'either as separate units or as part of existing regional/district courts. Where that is not immediately feasible for practical reasons, the States parties should ensure the appointment of specialized judges or magistrates for dealing with cases of juvenile justice'.³⁷⁴ This should include the establishment of 'specialised units within the police, the judiciary, the court system, the prosecutor's office, as well as specialised defenders or other representatives who provide legal or other appropriate assistance to the child.'³⁷⁵ This in itself marks an important distinction between the requirements of the CRC and the content of the Commission's original proposal. While the establishment of a separate system of juvenile justice could be implied from the requirement to give 'special attention' to vulnerable persons in the criminal justice process, the future proposal should make this express in order to ensure consistency with CRC standards that the Member States themselves are bound to implement.

A second general divergence between the Commission's original proposal and the CRC is the fact that the receipt of 'special attention' is contingent on whether an individual is considered to be capable of 'understanding' the proceedings that they are involved in. However, the safeguards in the CRC are not dependent on the child's ability to understand procedures. Although this is a factor in relation to certain of the rights, such as having charges explained in terms the child can understand (discussed below), the basis for differential treatment of children is, as stated above, due to the fact that their 'physical development, and their emotional and educational needs' differ from those of adults. Accordingly, the future proposal of the Commission should be widened in this respect to take into account that **an individual's vulnerability in the criminal process is not synonymous with their ability to understand proceedings**.

Considering more specific provisions of the CRC together with the original proposal, it is possible to identify other issues that could guide the Commission in its elaboration of the future proposal.

Firstly, Article 10 of the original proposal does not identify who is responsible for taking the decision of whether an individual is capable of understanding proceedings. In this sense, the CRC Committee has specified that the child's right to be treated with dignity, contained in Article 40 CRC, requires that 'all professionals involved in the administration of juvenile justice be knowledgeable about child development, the dynamic and continuing growth of children, what is appropriate to their well-being, and the pervasive forms of violence against children'.³⁷⁶ This would support the position that, within a separate system of juvenile justice, it should be for professionals with specialist knowledge of children who make the determination of whether a child (which Article 1 CRC presumes to be someone below eighteen years of age) should be entitled to 'specific attention' under the legislation. While this might not preclude the law enforcement authorities from taking this decision, at the very least it is apparent that it should fall to officers trained to deal specifically with children.

The CRC Committee has further stated that Article 40(2) on fair trial guarantees requires the **adequate training of those involved in juvenile justice**, namely 'police officers, prosecutors, legal and other representatives of the child, judges, probation officers, social workers', which means that they should be dealt with by specialists throughout the entirety of proceedings.³⁷⁷ In particular, free legal assistance should be available from lawyers or paralegals who are adequately trained in working with children in the criminal justice system.³⁷⁸ The CRC Committee also stressed that the guarantees embodied in Article 14(3)(b) ICCPR, providing for adequate time and facilities to prepare a defence, including privacy of communications between client and lawyer, should also be observed in relation to children.³⁷⁹

Secondly, although the CRC does not fix a **minimum age of criminal responsibility**, it has stated that an individual who has attained that age will nevertheless require protection if they are under 18 years of age.³⁸⁰ Thus, the Commission's future proposal would benefit from specifying not merely that 'age' should be a factor that may render an individual 'vulnerable', but rather that 'special attention' should be accorded to anyone under the age of 18, even if they have achieved the minimum age of criminal responsibility.³⁸¹

Thirdly, parties are under an obligation to **prevent violence against children** ‘in all phases of the juvenile justice process, from the first contact with the police [and] during pretrial detention’.³⁸² In addition special attention should be paid to the girl child, particularly her special health needs and in relation to prior abuse.³⁸³ Related to this, safeguards should exist to ensure not only that children are not coerced to give testimony, but also that they are not subject to inducements or otherwise pushed towards self-incrimination due to the length of questioning or fear of imprisonment. In considering any admission of guilt, the courts should take such factors into account.³⁸⁴ Thus, ‘special attention’ should therefore expressly include safeguards of this nature.

Fourthly, measures must be taken to ensure the adequate participation of the child throughout the process. The CRC Committee has determined that the **right to be heard** under Article 12 CRC,³⁸⁵ either directly or via a representative, has application to all stages of the criminal justice process, ‘starting with [the] pretrial stage when the child has the right to remain silent, as well as the right to be heard by the police, the prosecutor and the investigating judge’, as well as ‘the stages of adjudication and of implementation of the imposed measures’.³⁸⁶ The child’s views should be given due weight according to his/her maturity.³⁸⁷ This has particular pertinence to Article 11 of the original proposal, which allows a third party to be present during questioning ‘where appropriate’. In line with the approach of the CRC Committee, the future proposal should expressly extend this to all stages of proceedings.

This is tied in with the **right of the child to effective participation in court proceedings** under Article 40(2)(b)(iv) CRC. This may ‘require modified courtroom procedures and practices’, depending on the child’s maturity.³⁸⁸ Children must also have the charges against them and possible consequences explained in simplified language so that they are in a position to direct their ‘legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed’.³⁸⁹ Furthermore, the child has a right to the free assistance of an interpreter under Article 40(2)(vi). This is already provided for in the Commission’s Proposal for a Directive on the right to interpretation and translation in criminal proceedings.³⁹⁰ However, the future proposal on vulnerable persons could benefit from an express provision along the terms of the CRC Committee’s statement that the interpreter should be ‘trained to work with children, because the use and understanding of their mother tongue might be different from that of adults’.³⁹¹ Furthermore, children with speech impairments or other disabilities should be provided with assistance by professionals, for instance in sign language.³⁹²

The parties should also ensure that the child’s **right to privacy** is ensured during the course of proceedings, including the initial stages. This should include a presumption in favour of hearings being closed to the public and non-identification of the child once a final decision is reached, as well as the ability for children to obtain removal of offences from their records on attaining the age of 18.³⁹³ Finally, parties should also facilitate, to the greatest extent possible, the **participation of parents and legal guardians** in legal proceedings in order to provide support for the child.³⁹⁴

Fifthly, Article 40(2)(b)(iii) CRC provides that charges against a child should be disposed of ‘**without delay**’. The CRC Committee has stated that this should be read in the light of Article 37(d) CRC which states that a child deprived of his/her liberty ‘shall have the right to ... a prompt decision’ to determine the legality of detention. The CRC Committee went on to state that ‘prompt’ is a stronger term than ‘without delay’, which in turn is stronger than ‘without undue delay’ contained in Article 14(3)(c) ICCPR, and that parties should specify a time limit for periods between commission of the offence and final adjudication. Accordingly, a future proposal should specify in express terms that time limits and delays in proceedings should be set as ‘much shorter than those for adults’, while not sacrificing fair trial rights.³⁹⁵

In the light of the above, it is clear that in so far as children are concerned, the future proposal of the Commission in relation to vulnerable persons should contain more specific and express provisions relating to the measures to be taken in relation to children. In addition, ‘special attention’ for the benefit of children should not be contingent simply on their level of understanding, but rather derive from their status as a child of itself. Further, there should be more general provision for a system of juvenile justice that is distinct from the mainstream criminal justice system, including adequately trained professionals participating in all stages of proceedings.

2. Persons with Disabilities

The CRPD Committee has not yet had the opportunity to formulate General Comments on the scope and meaning of the rights contained in the CRPD. Nevertheless, several observations on what the CRPD may require in relation to persons with disabilities in the criminal process can be made.

Firstly, Article 14(1) ICCPR accords a **general right to equality before the law**. This is given greater specificity under Article 12 CRPD which obliges the parties to ‘provide access by persons with disabilities to the support they may require in exercising their legal capacity’, and Article 13(1) which requires parties to ‘ensure effective access to justice for persons with disabilities on an equal basis with others’. This would include a general duty to provide assistance to suspects and defendants with disabilities in order to ensure that they are not placed at a disadvantage. In this sense the OHCHR has clarified that ‘[p]rocedural accommodations both during the pretrial and trial phase of the proceedings might be required in accordance with article 13 of the Convention, and implementing norms must be adopted’³⁹⁶

Secondly, Article 14(3)(d),(e) and (f) ICCPR provides for the right for individuals to be tried in their presence, to defend themselves or be defended through free legal assistance, the right to examine witnesses and the right to an interpreter. More specifically, the CRPD contains particular provisions to **facilitate effective participation in proceedings** by persons with disabilities. Article 13 CRPD requires the provision of ‘procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants ... in legal proceedings, including at investigative and other preliminary stages.’ The CRPD Committee Guidelines specify that this includes ‘procedural accommodations that are made in the legal process to ensure effective participation of all types of persons with disabilities in the justice system’.³⁹⁷ This provision can be read together with Article 12(3) which requires States to ‘take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity’. Although the CRPD Committee has not yet had the opportunity to specify what this entails, guidance can be sought from Article 9 relating to accessibility, which sets out a range of measures that States should adopt in ensuring independent living for persons with disabilities, in particular in relation to accessing ‘facilities and services open or provided to the public’.

These include provision of public signs ‘in Braille and easy to read and understand forms’, ‘live assistance and intermediaries, including guides, readers and professional sign language interpreters’ ; ‘appropriate forms of assistance and support to persons with disabilities to ensure their access to information’ ; and access to ‘new information and communications technologies and systems’. Interpreting Articles 12(3) and 13 (in so far as the court system is a service open to the public) it is reasonable to conclude that, in the context of criminal proceedings, a person with disabilities would be entitled, for instance, to: assistance from sign-language specialists or provision of technical equipment for those with difficulty hearing ; the provision of documents in Braille or a reader for those with visual impairments ; the provision of speech recognition software or a scribe for those unable to write ; support from a professional able to assist an individual with disabilities in expressing themselves during proceedings ; making information about the charges or evidence against an individual understandable for those with mental impairments, so that they may instruct their legal representatives effectively. This should be available not only during court hearings but also the initial stages of proceedings.

Thirdly, Article 13(2) CRPD also requires parties to ‘promote **appropriate training** for those working in the field of administration of justice, including police and prison staff’. As is the case in relation to children involved in legal proceedings, this will include the provision of appropriately trained police officers, judges, social workers, translators and legal counsel available for proceedings involving persons with disabilities. It should also fall to properly trained individuals to make the determination of whether an individual should benefit from ‘specific attention’. Of particular importance will be the provision of legal counsel who has experience with working with persons with disabilities. However, other measures or assistance may well be needed in order to facilitate communication between the legal counsel and the client where, for instance, the suspect or defendant has a hearing impairment or cannot communicate orally. Article 14(3)(b) ICCPR guaranteeing ‘adequate time and facilities for the preparation of ... defence and to communicate with counsel’, read in conjunction with the prohibition on discrimination and the right to equality before the law (Article 14(1) ICCPR, Article 20 CFR), would seem to require such extra facilities.

Finally, Article 12(1) and (2) requires that States accord persons with disabilities equal recognition before the law, including equal legal capacity. Article 12(4) also requires parties to ‘take appropriate measures

to provide for appropriate and effective safeguards to **prevent abuse** in accordance with international human rights law'. As noted above in relation to children, this should include safeguards against self-incrimination which may result from fear or a lack of understanding. For instance, depending on the situation of the accused, it may require courts to consider the value of 'confessions' with caution. It may also require safeguards to ensure that the methods and duration of questioning and other elements of criminal proceedings do not prejudice individuals with mental or physical disabilities by, for instance, imposing levels of stress that may not be experienced by a person without such disabilities. In particular, given the subjective nature of the definition of inhuman or degrading treatment, parties should ensure that proceedings do not impose excessive strain or distress on an individual whose disabilities may result in a lower level of tolerance.³⁹⁸ In this regard, the ECtHR has found that failure to provide adequate accommodation for a person with physical disabilities while in detention, resulting in significant hardship, could amount to degrading treatment.³⁹⁹

As in relation to the rights of the child, persons with disabilities are entitled under the CRPD and ICCPR to have criminal proceedings adapted in order to allow them to participate on an equal footing with other members of society. This entitlement to 'specific attention' flows, according to the UN treaties, not merely from individuals' inability to adequately understand the proceedings in which they are involved, but rather from the fact that their physical or mental condition may make them inherently vulnerable and liable to suffer distress. The fact that their ability to understand or participate in proceedings may be impaired is thus an important consideration, but it is not the sole or central reason for affording such persons specific measures of protection. The terms of the Commission's future proposal should accordingly be widened to reflect this. Furthermore, it is clear that the CRPD and the ICCPR (by virtue of Article 14 taken together with the prohibition on discrimination) will require specific measures to be taken in order to guarantee substantive equality for persons with disabilities, and these should feature expressly in the future proposal.

D. CONCLUSIONS

The above consideration of the Commission's original proposal in the light of the CRC and the CRPD illustrates that reference to these two instruments and the interpretations of the treaty bodies in formulating a future proposal may contribute significantly to the full realisation of the rights of the child and of persons with disabilities. Given its ratification of the CRPD, the EU now falls under a legal duty to ensure that these standards are observed. Drawing on the CRC will also ensure that the procedural rights of children are not omitted from the EU's Strategy on the Rights of the Child.

The first difficulty with the existing text is that 'specific attention' is contingent on an individual's ability to understand proceedings. However, this conflicts with both the CRC and CRPD, which require measures to be taken to ensure substantive equality based on the broader criteria of the vulnerability of persons falling within these categories. While part of an individual's vulnerability in criminal proceedings is related to his or her ability to understand proceedings, it also relates more widely to the right to participate effectively and the need to prevent unnecessary distress.

The second difficulty is that under the existing text of Articles 10 and 11, it falls to the 'competent authority' to make the determination of which individuals are entitled to 'specific attention', but this authority is not identified. Clearly, there may be great disparity in levels of protection depending on whether this determination is made by the police, a prosecutor, a court, a medical professional, or a specialised agency (e.g., social services). The CRC and the CRPD require that those dealing with persons with disabilities and children in the criminal justice process should be adequately trained. Therefore, the future proposal should specify that a determination of what 'specific attention' is needed should be made by specialised professionals.

Other divergences between the existing text and the requirements of the CRPD and the CRC include a range of measures which could be classed as measures of 'specific attention'. Currently, the text gives a limited range of rights to those considered to be vulnerable, namely, the right to have proceedings recorded, the right to medical attention and the right to the presence of a third party. **The CRC and the CRPD clearly impose a far wider range of duties.** In relation to the CRC, this includes a significant structural duty to operate a separate system of juvenile justice. Other duties in relation both to children and persons with disabilities include, among others, assistance in order to participate effectively in proceedings and assistance in order to facilitate communication with legal counsel, as well as safeguards to ensure that vulnerabilities do not play a part in obtaining testimonies.

Chapter Six: Conclusions and Recommendations

The EU is not a ‘human rights organisation’ in the sense that this term is commonly applied, in that it was not created with the principle aim of monitoring the implementation of or promoting the protection of human rights. Nonetheless, the EU’s stated aim is to ‘promote ... its values and the well-being of its peoples’, and its values include ‘respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’.⁴⁰⁰ These overall aims and values coincide and reflect the standards embodied in those UN human rights treaties to which all the Member States are party (and which the EU promotes in its relations with third States).

Furthermore, the EU disposes of a large range of powers placing it in a position to give these standards effect. In certain policy areas the EU is competent to take action to the exclusion of the Member States ; in other areas where the EU shares competence, the Member States incrementally cede the ability to act independently as the EU legislates. The EU disposes of a human rights regime that allows human rights to be taken into consideration during the legislative process, and also allows the CJEU to verify compliance after legislation has been adopted. The creation of the FRA and adoption of the CFR are important and commendable achievements in this system. The EU is to become party to the European Convention and has become party to the CRPD, which will allow the ECtHR and CRPD Committee to monitor its activities. At the same time, all the Member States of the EU are party to most of the ‘core’ UN human rights treaties as well as to the UN Charter.

There remain many challenges, however. There exists a disparity between the range of human rights standards recognised in EU Law and those guaranteed in UN human rights instruments to which the Member States are party. There is also a divergence between the depth of the obligation to guarantee human rights under UN instruments (as well as the European Convention), which includes positive measures, and the EU’s traditional approach, which merely guarantees restraint from interference. Furthermore, the mechanisms in place to inject human rights into the legislative and policy-making process could be made far more effective and coherent.

As a result, there is a risk of a two-tier system of protection emerging in the EU. In policy areas falling within EU competence, individuals in Europe risk a lower level of protection than in policy areas falling under Member State competence. The lack of consistency between the EU’s policy of promoting adherence to UN instruments in relations with third countries, while not according them prominence internally, also risks undermining its credibility on the world stage.

The UN human rights treaties confer rights on individuals which are inalienable and universal in nature. As such, individuals cannot be deprived of these rights, including the right to a remedy. This means that the Member States cannot be released from their obligations under these treaties simply by transferring powers to the EU. Similarly, it means that those bodies responsible for monitoring Member States cannot accept obligations deriving from EU Law as a bar to overseeing individuals’ rights.

It is difficult to argue that the EU is not already under an obligation, both by virtue of its own internal legal system and by virtue of International Law, to give effect to UN human rights standards. At the very least, the Member States remain bound by these obligations and will incur international responsibility to the extent that the EU does not fulfil those duties. The most effective means of ensuring that the EU and the Member States can give full effect to their obligations under UN instruments is for the EU to engage with the UN’s human rights infrastructure, and particularly the treaty bodies. Applying the same system of supervision and guidance to the EU and the Member States can help to enrich EU policies and facilitate coordination between the EU and its Member States, ensuring consistency across EU and national policies in relation to human rights and a division of labour that reflects their respective areas of competence. This needs to be accompanied by the development of measures to ensure that human rights considerations permeate the work of the institutions, and particularly the Commission as initiator of legislation and policy. This should include the participation of officials from all DGs in the reporting process before the treaty bodies, as well as human rights training and the creation of reference documents highlighting how particular policy areas can have both a positive and negative impact on human right implementation. What follows is a series of recommendations, based on the foregoing analysis that may help to give full realisation to human rights across the EU.

1. RECOMMENDATIONS DIRECTED AT THE EU, ITS INSTITUTIONS AND THE MEMBER STATES

- The Commission should consider revising the existing Impact Assessment Guidelines to give greater prominence to human rights considerations. The human rights standards considered by the Commission should be widened to include UN human rights instruments. This should be accompanied by more rigorous implementation of the Commission's commitment to ensure the compliance of proposals with the provisions of the CFR and UN human rights instruments.
- The Commission should consider providing training in human rights awareness for staff involved in formulating policies.
- The Commission should consider the development of a 'living' reference document, giving guidance on the implications of human rights standards tailored to specific policy areas covered by each DG. This would highlight the potential positive contribution or negative consequences of policies at an early stage of development. Assistance could be sought from the FRA.
- The Council, the Commission and the European Parliament could consider revising the founding Regulation of the FRA to increase the scope of its mandate. This could include providing assistance to the Commission through systematic verification of legislative proposals for compliance with human rights standards, including international human rights standards.
- The CJEU should consider making more extensive reference to UN human rights instruments in reflection of the fact that all Member States are party to most of the 'core' instruments, and that these standards are universal.
- The Council should consider requesting the Commission to develop an overarching human rights strategy that acknowledges and gives effect to the positive obligations of the EU under UN human rights instruments.
- The CJEU should develop the 'protection' and 'promotion' (in so far as the latter may be justiciable) of human rights as a condition of legality for EU Law. The Council, the Commission, and the European Parliament could jointly and formally recognise the existence of positive obligations to protect and promote human rights as part of EU Law.
- The Council, the Commission and/or the European Parliament could consider inviting experts operating under the special procedures of the Human Rights Council to conduct visits or draft reports specifically analysing relevant aspects of EU policy.
- The Council could consider requesting the Commission to initiate cooperation with the UN treaty bodies and Charter bodies either as a result of accession to human rights treaties or through a Memorandum of Understanding. This could include participation in the reporting procedure (in accordance with the guidance given by the treaty bodies) and could include consenting to individual petitions.
- The Commission could consider designating staff from each relevant DG to participate in the reporting process, where either the Member States or the EU's reports are under consideration before the treaty bodies, and for ensuring the transmission of relevant documents issued by the treaty bodies to their DG.
- The Council could, in the longer term, consider initiating an amendment to the CFR to ensure consistency with UN human rights treaties. This should be accompanied by formal recognition by the institutions of the significance of UN human rights instruments as a source of the 'general principles' of EU Law.
- The Council should consider requesting the European Commission to explore the possibility of adherence by the EU to UN human rights treaties, either through formal accession to existing treaties (subject to amendment of those instruments) or a declaration of voluntary acceptance.

2. RECOMMENDATIONS DIRECTED AT THE UN HUMAN RIGHTS BODIES

- The treaty bodies could pay greater attention to the extent to which national practices and law may be contingent on EU legislation and policies when reviewing States Parties.
- The treaty bodies could consider inviting the EU to conclude a Memorandum of Understanding to facilitate cooperation, including the application of the periodic reporting procedure to the EU.
- The treaty bodies could consider developing, as a joint document, a General Comment or Recommendation adapting existing General Comments relating to the implementation obligations of the States Parties to the particular situation of the EU, in view of the fact that it shares competence in policy areas with the Member States.
- The treaty bodies could consider developing the responsibility of States on the basis of strict liability for the actions of international organisations to which those States are party, as the most effective means of ensuring the continuity of human rights obligations.
- The Human Rights Council could consider examining the issue of the human rights accountability of international organisations through the creation of a thematic mandate under the special procedures, with a view to developing a normative framework. The Human Rights Council could also consider inviting the EU to participate in the UPR process.

Notes

- ¹ The EU falls within the internationally accepted definition of an IGO: [an] 'inter-state body created by multilateral treaty... [with] what may be called a constitution... [and] organs separate from its members'. Amerasinghe, *Principles of Institutional Law of International Organizations* (2nd ed., 2005), 9-10.
- ² e.g., Case 6/64, *Costa v ENEL* [1964] ECR 585 ; Case 26/62, *Van Gend en Loos* [1963] ECR 1.
- ³ CJEU, Case C-286/90, *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.* [1992] ECR I-6019, para. 9 ; Case C-162/96, *Racke* [1998] ECR I-3655, para. 45 ; Joined Cases C-402/05 P and C-415/05, *Kadi* [2008] ECR I-6351, para. 291.
- ⁴ See Treaty on the Functioning of the European Union (TFEU) (OJ C 83, 30.3.2010, p. 47), Article 2(1). Article 3 TFEU states: '1. The Union shall have exclusive competence in the following areas: (a) customs union ; (b) the establishing of the competition rules necessary for the functioning of the internal market ; (c) monetary policy for the Member States whose currency is the euro ; (d) the conservation of marine biological resources under the common fisheries policy ; (e) common commercial policy. 2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.'
- ⁵ See Article 2(2) TFEU and Case 22/70, *AETR* [1971] ECR 263. In this sense, although the policy area as a whole is 'shared', it becomes progressively exclusive for the EU because to the extent that it takes measures the Member States lose their ability to act individually. Article 4(3) and 4(4) TFEU set out two specific exceptions to this. Article 4 TFEU states: '2. Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market ; (b) social policy, for the aspects defined in this Treaty ; (c) economic, social and territorial cohesion ; (d) agriculture and fisheries, excluding the conservation of marine biological resources ; (e) environment ; (f) consumer protection ; (g) transport ; (h) trans-European networks ; (i) energy ; (j) area of freedom, security and justice ; (k) common safety concerns in public health matters, for the aspects defined in this Treaty. 3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes ; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs. 4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy ; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.'
- ⁶ UN General Assembly resolution 217 A (III), 10 December 1948.
- ⁷ See analysis of General Assembly resolutions from 1945-2005 in Butler, *Unravelling Sovereignty: Human Rights Actors and the Structure of International Law* (2007), chap. 3.
- ⁸ Interestingly, the General Assembly used this language in relation to Myanmar and Cuba, neither of which were party to one of the 'core' UN human rights treaties. On Myanmar, see resolutions: 16/132, 17/12/91 ; 47/144, 18/12/92 ; 48/150, 20/12/93 ; 49/197, 23/12/94 ; 50/194, 22/12/95 ; 51/117, 12/12/96 ; 52/137, 3/3/98 ; 53/162, 25/2/99 ; 54/186, 29/2/00 ; 55/112, 1/3/01 ; 56/231, 28/2/02 ; 57/237, 28/2/03 ; 58/247, 11/3/04 ; 59/263, 23/12/04 ; 60/233, 23/12/05. On Cuba: resolutions: 47/139, 18/12/92 ; 48/142, 20/12/93 ; 49/200, 23/12/94 ; 50/198, 22/12/95 ; 51/113, 12/12/96 ; 52/143, 6/3/98. This language has also been used in respect of other UN Member States which are party to relevant 'core' UN human rights treaties. See Butler (above, footnote 7), chap. 3.
- ⁹ Human Rights Council resolution 5/1, *Institution-building of the United Nations Human Rights Council*, 18 June 2007, annex, para. 1.
- ¹⁰ 999 UNTS 171.
- ¹¹ 993 UNTS 3.
- ¹² 660 UNTS 195.
- ¹³ 1249 UNTS 13.
- ¹⁴ 1465 UNTS 85.
- ¹⁵ 1577 UNTS 3.
- ¹⁶ General Assembly resolution 61/106, 13 December 2006. In addition, some Member States are also party to the International Convention for the Protection of All Persons from Enforced Disappearance (General Assembly resolution 61/177, 20 December 2006), though none are yet party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (General Assembly resolution 45/158, 18 December 1990).
- ¹⁷ See: Council Decision 2010/48 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ L 23, 27.1.2010, p. 35.
- ¹⁸ World Conference on Human Rights, Vienna Declaration and Programme of Action, 12 July 1993, section I, para 1. UN Doc. A/CONF.157/23.
- ¹⁹ ICCPR and ICESCR, fourth preambular paragraph. Emphasis added.
- ²⁰ See e.g., Commission, *European Instrument for Democracy and Human Rights (EIDHR) Strategy Paper 2007-2010*, DG RELEX/B/1 JVK 70618, available at: http://ec.europa.eu/europeaid/what/human-rights/documents/eidhr_strategy_paper_2007-2010_en.pdf ; Commission, 'The European Union's Role in Promoting Human Rights and Democratisation in Third Countries', COM(2001) 252 final, 8.5.2001.
- ²¹ Council of the EU 16526/08, 22 December 2008.
- ²² European Parliament resolution of 7 May 2009 on the Annual Report on Human Rights in the World 2008 and the European Union's policy on the matter, P6_TA(2009)0385, para. E.
- ²³ Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings 2009/C 295/01, OJ C 295, 4.12.2009, p. 1.
- ²⁴ See Council Roadmap, and Commission Green Paper, 'Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union', COM(2003) 75, 19.2.2003.

²⁵ These terms are often understood to refer more specifically to a subset of ‘civil and political’ rights, which guarantee freedom from interference by the State within areas of individual autonomy (such as freedom from arbitrary detention or the right to privacy), as well as rights guaranteeing participation in the ‘public’ life of the State (such as the right to free speech or the right to vote). See further the collection of essays in McCorquodale (ed.), *Human Rights (International Library of Essays in Law and Legal Theory: Second Series)* (2003).

²⁶ See e.g., FRA, ‘Housing conditions of Roma and Travellers in the European Union: Comparative Report’ (2009); FRA, ‘Child Trafficking in the European Union: Challenges, Perspectives and Good Practices’ (2009); FRA, ‘Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis’ (2009) available at: <http://www.fra.europa.eu>.

²⁷ See further: De Schutter, ‘L’influence de la Cour européenne des droits de l’homme sur la Cour de justice des Communautés européennes’, in Cohen-Jonathan & Flauss (dir.), *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l’homme* (2005), 189; Guild and Lesieur, *The European Court of Justice on the European Convention on Human Rights: Who Said What, When?* (1998); Trimidas, *The General Principles of EC Law* (2007); Usher, *General Principles of EC Law* (1998).

²⁸ C-29/69, *Stauder v Ulm* [1969] ECR 4119; C-11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1971] ECR 1125; C-4/73, *Nold v Commission* [1974] ECR 491; Case 36/75, *Rutili v Minister for the Interior* [1975] ECR 1219; Case 44/79, *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727; Case 5/88, *Wachauf v Germany* [1989] ECR 2609; Case C-13/94, *P v S and Cornwall CC* [1996] ECR I-2143; Case C-36/02, *Omega* [2004] ECR I-9609.

²⁹ Case C-540/03, *European Parliament v Council* [2006] ECR I-5769.

³⁰ Article 6(1) TFEU.

³¹ For a review of the general principles relating to human rights see Tridimas (above, note 27), chap. 7.

³² OJ C 83, 30.3.2010, p. 389.

³³ Council of the European Union, Note from the Praesidium, ‘Explanations Relating to the Charter of Fundamental Rights of the European Union as set out in CHARTE 4487/00 CONVENT 50’, Convent 49, CHARTER 4473/00, 11 October 2008, available at http://www.europarl.europa.eu/charter/pdf/04473_en.pdf.

³⁴ European Commission, ‘Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights’. COM(2009) 205, 29.4.2009; Commission Communication, ‘Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union’, COM(2010) 573 final, 19/10/2010.

³⁵ European Commission, ‘Towards an EU Strategy on the Rights of the Child’, COM(2006) 367, 4.7.2006; European Commission, ‘Implementation of the European Union’s Strategy on the Rights of the Child: State of Play – November 2009’, available at: http://ec.europa.eu/justice_home/fsj/children/docs/children_state_of_play_en.pdf; Commission Communication, ‘An EU Agenda for the Rights of the Child’, COM(2011) 60 final, 15/2/2011.

³⁶ See the following documents of the EU Council: ‘EU Guidelines on Human Rights Dialogues’, 14469/01, 3 December 2001; ‘Mainstreaming of Human Rights into ESPD’, 11936/4/06, 14 September 2006; ‘EU Guidelines on Human Rights Dialogues with Third Countries – Update’, 16526/08, 22 December 2008; ‘EU Guidelines for the Promotion and Protection of the Rights of the Child’, 16031/07, 3 December 2007; ‘Update of the EU Guidelines on Children and Armed Conflict’, 10019/08, 5 June 2008.

³⁷ See speech of Commissioner Viviane Reding, ‘How to make the Charter of Fundamental Rights the compass for all EU policies?’, SPEECH/10/324, 22 June 2010, available at:

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/324&format=PDF&aged=0&language=EN&guiLanguage=en>. For access to the Annual Reports see <http://www.consilium.europa.eu/showPage.aspx?id=970&lang=en>.

³⁸ Committees dealing with human rights issues include: the Committee on Human Rights (a subcommittee of the Committee on Foreign Affairs); the Committee on Employment and Social Affairs; the Committee on Civil Liberties, Justice and Home Affairs; the Committee on Women’s Rights and Gender Equality.

³⁹ Article 225 TFEU.

⁴⁰ See e.g., European Parliament resolution of 17 June 2010 on EU policies in favour of human rights defenders (P7_TA(2010)0226); European Parliament resolution of 7 May 2009 on the Annual Report on Human Rights in the World 2008 and the European Union’s policy on the matter (P6_TA(2009)0385); European Parliament resolution of 23 October 2008 on the impact of aviation security measures and body scanners on human rights, privacy, personal dignity and data protection (P6_TA(2008)0521); European Parliament recommendation to the Council of 24 April 2009 on the problem of profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control (P6_TA(2009)0314).

⁴¹ E.g., European Parliament resolution of 21 January 2010 on human rights violations in China, notably the case of Liu Xiaobo (P7_TA(2010)0006); European Parliament resolution of 18 December 2008 on attacks on human rights defenders in Russia and the Anna Politkovskaya murder trial (P6_TA(2008)0642).

⁴² See e.g., the resolution adopted annually by the European Parliament in reaction to the annual human rights report produced by the Commission and Council. See e.g., European Parliament resolution of 7 May 2009 on the Annual Report on Human Rights in the World 2008 and the European Union’s policy on the matter (P6_TA(2009)0385).

⁴³ Regulation 168/2007, OJ L 53, 22.2.2007, 1.

⁴⁴ See website of the EU Agency for Fundamental Rights to access publications: <http://www.fra.europa.eu>.

⁴⁵ Under Article 4(1)(d) of Regulation 168/2007 (OJ L 53, 22.2.2007, 1), the FRA is mandated to ‘formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law’.

⁴⁶ European Union Agency for Fundamental Rights, ‘Housing conditions of Roma and Travellers in the European Union: Comparative Report’ (2009), 12-14. Available at: <http://www.fra.europa.eu>.

⁴⁷ See e.g., European Union Agency for Fundamental Rights, ‘Detention of third-country nationals in return procedures’, Conference edition (2010), 11.

⁴⁸ Every treaty that catalogues a list of human rights includes a provision requiring States parties to prohibit discrimination. See e.g., Article 14 European Convention, and Protocol No. 12 (CETS No. 177, 4.11.2000); Article 2(1) ICCPR; Article 2(1) ICESCR; Article 1(1) CAT; Article 2 African Charter on Human and Peoples’ Rights (27/6/81, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (1982)); Article 1(1) American Convention on Human Rights (22/11/69, OASTS 36, 9 ILM 673 (1970)); Article 3(1) Arab Charter on Human Rights (reprinted 12 IHRR 893 (2005)). Other human rights instruments are specifically dedicated to eliminating

discrimination and creating equality of opportunity: ICERD, CEDAW, CRC and CMW.

⁴⁹ This was contained in Article 119 of the original 'Treaty of Rome' which created the European Economic Community. It is now in Article 157 TFEU. For an account of the development of EU Non-discrimination Law see Barnard, *EC Employment Law* (2006), chap. 1 ; Ellis, *EU Anti-Discrimination Law* (2005), chap. 1.

⁵⁰ The EU is empowered to take measures to combat discrimination on these grounds in Article 19, TFEU (formerly Article 13 of the European Community Treaty). This provision is implemented by several directives: Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26.07.2006, p. 23 ; Directive 2004/113 implementing the principle of equal treatment between women and men in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37 ; Directive 2000/78 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.07.2000, p. 22 ; Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16.

⁵¹ A proposal of the Commission to extend the reach of protection from discrimination is currently under negotiation in the Council, although progress has been slow. See European Commission, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation', COM(2008) 426 final, 2 July 2008.

⁵² Case C-540/03, *Parliament v Council* [2006] ECR I-5769, para. 35. For cases reiterating the privileged place of the European Convention see Case C-260/89, *ERT* [1991] ECR I-2925, para. 41 ; Opinion 2/94, Accession of the European Community to the European Convention for the Safeguard of Human Rights and Fundamental Freedoms [1996] ECR I-1759, para. 33 ; Case C-274/99 P, *Connolly v Commission* [2001] ECR I-1611, para. 37 ; Case C-94/00, *Roquette Frères* [2002] ECR I-9011, para. 25 ; Case C-112/00, *Schmidberger* [2003] ECR I-5659, para. 71 ; Case C-36/02 *Omega* [2004] ECR I-9609, para. 33.

⁵³ Consolidated Version of the Treaty on European Union, OJ C 83, 20.3.2010, p. 13.

⁵⁴ There are of course notable exceptions, such as the right to property and the right to education, guaranteed under Protocol No. 1 to the European Convention, 1952, CETS No. 9.

⁵⁵ Case C-249/96, *Grant v South West Trains Ltd* [1998] ECR I-621, para. 46.

⁵⁶ *Ibid.*, para. 47.

⁵⁷ Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, OJ L 251, 3.10.2003, p.12.

⁵⁸ Case C-540/03, *Parliament v Council* [2006] ECR I-5769, paras. 52-66.

⁵⁹ Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, OJ L 338, 23.12.2003, p. 1.

⁶⁰ Case C-403/09 PPU, *Detiček*, 9 December 2009, paras. 6, 53-58.

⁶¹ Case C-540/03, *Parliament v Council* [2006] ECR I-5769, para. 37.

⁶² The rule that EU Law takes supremacy over all national law and the rule permitting individuals to invoke EU Law directly before national courts were intended to facilitate the uniform interpretation of EU Law across the Member States, in order to minimise interference with the free movement of goods, persons and services that might arise from differing national interpretations.

⁶³ Article 3 TEU.

⁶⁴ For illustrative purposes see e.g., Inter-American Court of Human Rights: *Case of the 'Juvenile Re-education Institute' v Paraguay*, 02.09.04, Inter-American Court of Human Rights, Series C 112, para 161 ; Inter-American Commission on Human Rights, *Pinder v The Bahamas*, 15.10.07 ; Inter-American Commission on Human Rights, Case 12.513, Report 79/07, paras 28-30 ; African Commission on Human and Peoples' Rights, *Legal Resources Foundation v Zambia*, Communication No. 211/98 (2001), paras. 59, 63, 70.

⁶⁵ See further, Chapter Four.

⁶⁶ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136, at paras. 109 and 112.

⁶⁷ On the influence of the case law, including views adopted on individual communications, general comments and concluding observations of the UN human rights treaty bodies, see International Law Association, 'Final Report on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals' (2004). See also collection of related papers at: http://web.abo.fi/institut/imr/research/seminars/ILA/ILA_papers.htm ; Heyns and Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (2002).

⁶⁸ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000, General Assembly resolution 55/25, 15 November 2000.

⁶⁹ *Rantsev v Cyprus and Russia*, No. 25965/04, 7 January 2010, paras. 274, 282.

⁷⁰ A treaty of the Organisation of American States, operating in the Inter-American human rights system. Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 1991. Reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, 30 June 2010, OAS/Ser.L/V/1.4 rev. 13.

⁷¹ *Opuz v Turkey*, No. 33401/02, 9 June 2009, para. 164.

⁷² *Ibid.*, paras. 74, 184-191, 199-202.

⁷³ Such as the rights of minorities guaranteed under Article 27 ICCPR, or the right to adequate housing or food under Article 11 ICESCR. For an explanation of the provisions of the CFR, see Council of the European Union, Note from the Praesidium, 'Explanations Relating to the Charter of Fundamental Rights of the European Union as set out in CHARTE 4487/00 CONVENT 50', Convent 49, CHARTER 4473/00, 11 October 2008, available at: http://www.europarl.europa.eu/charter/pdf/04473_en.pdf ; Goldsmith, 'The Charter of Rights—A Brake Not an Accelerator' (2005), *European Human Rights Law Review* 473.

⁷⁴ See Butler and De Schutter, 'Binding the EU to International Human Rights Law' (2009), *Yearbook of European Law* 277, 280-284.

⁷⁵ European Social Charter, 1965, CETS No. 35.

⁷⁶ Case C-540/03 *Parliament v Council* [2006] ECR I-5769 ; Case C-438/05 *Viking* ECR [2007] I-10779 ; C-341/05 *Laval* [2007] ECR I-11767.

⁷⁷ Case C-403/09 PPU, *Detiček*, 23 December 2009, paras. 6, 53-58 ; Joined Cases C-175 – 179/08, *Salahadin Abdulla*, 2 March 2010 ; Case C-578/08, *Chakroun*, 4 March 2010.

⁷⁸ C-407/08 P, *Knauf Gips v Commission*, 1 July 2010, para. 91.

⁷⁹ Opinion 2/94, *Accession of the European Community to the European Convention for the Safeguard of Human Rights and Fundamental Freedoms* [1996] ECR I-1759, para. 27: 'N^oTreaty provision confers on the Community institutions any general power to enact rules on human rights'. Article 51(2) CFR: 'The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.' Declaration concerning the Charter of Fundamental Rights of the European Union appended to the Lisbon Treaty. See Council of the European Union, 'Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union', Brussels, 30 April 2008, 6655/1/08, Rev. 1, p. 427. See also discussion in Butler and De Schutter, 'Binding the EU to International Human Rights Law' (2009), *Yearbook of European Law* 277, 293-298.

⁸⁰ Commission, 'Impact Assessment Guidelines', 15 January 2009, SEC(2009) 92 ; Commission, 'Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights', COM(2009) 205 final, 29/4/2009. Similarly, Commission Communication, 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union', COM(2010) 573, 19/10/2010.

⁸¹ CESCR, General Comment No. 14 (2000), The right to the highest attainable standard of health (Article 12), para. 33. See also CESCR, General Comment No. 13 (1999), The right to education (Article 13), para. 46 ; CESCR, General Comment No. 12 (1999), The right to adequate food (Article 11), para. 15.

⁸² Although not all human rights monitoring bodies have expressly used the typology 'respect, protect, fulfil', the case law and other interpretative documents issued by these bodies recognise the existence of positive obligations which can be understood within this typology. See e.g., ECtHR, *Nachova and Others v Bulgaria* [GC], Nos. 43577/98 and 43579/98, ECHR 2005-VII ; ECtHR, *Turan Cakir v Belgium*, No. 44256/06, 10 March 2009 ; ECtHR, *Šečić v Croatia*, No. 40116/02, ECHR 2007-VI ; ECtHR, *97 Members of the Gldani Congregation of Jehovah's Witnesses v Georgia*, No. 71156/01, 3 May 2007 ; HRC, General Comment No. 23 (1994), para. 7 ; Inter-American Court of Human Rights, *Bulacio v Argentina*, Series C No. 100, para. 142 ; Inter-American Court of Human Rights, *Villagrán Morales et al.* (the 'Street Children' case), Series C No. 63, para. 144 ; Inter-American Court of Human Rights, *Juridical Condition and Human Rights of the Child*, Advisory Opinion 17, OC-17/2002, para. 86.

⁸³ CESCR, General Comment No. 14 (2000), The right to the highest attainable standard of health (Article 12), para. 33. See also CESCR, General Comment No. 13 (1999), The right to education (Article 13), para. 46 ; CESCR, General Comment No. 12 (1999), The right to adequate food (Article 11), para. 15.

⁸⁴ CEDAW Committee, General Recommendation No. 24 (1999), Article 12 of the Convention (women and health) ; CEDAW Committee, General Recommendation No. 25 ((2004), Article 4, paragraph 1, of the Convention (temporary special measures).

⁸⁵ For example, Scott and Macklem state that '[o]ver the decades, the United Nations has invested considerable energy in developing the idea of a multilayered obligations structure that may potentially be generated for any right whether it be a civil liberty or a social right'. Scott and Mecklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution', 141(1) *University of Pennsylvania Law Review* (1992) 1, 73. See also Steiner and Alston, *International Human Rights in Context: Law, Politics, Morals* (2000), 182-184 ; Amnesty International, *Respect, Protect, Fulfil – Women's Human Rights, State Responsibility for Abuses by 'Non-State actors'* September 2000, AI Index: IOR 50/01/00 ; McCrudden, 'Mainstreaming Human Rights', in Harvey (ed.), *Human Rights in the Community, Rights as Agents for Change* (2005), 9, 12, 14 ; Craven, *The International Covenant on Economic, Social and Cultural Rights, A Perspective on its Development* (1995), 110 ; Tomasevski, *Women and Human Rights* (1993), 107.

⁸⁶ CESCR, General Comment No. 15 (2002), The right to water, para. 21. See also the same views expressed in CESCR, General Comment No. 12 (1999), The right to adequate food, para. 15 ; CESCR, General Comment No. 14 (2000), The right to the highest attainable standard of health, paras. 33 and 34.

⁸⁷ Nevertheless, it may require the existence of legal provisions in the first place obliging non-interference. See e.g., ECtHR, *X & Y v Netherlands*, No. 8978/80, Series A No. 91, para. 23 and Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995), 112.

⁸⁸ See e.g., CESCR, General Comment No. 15 (2002), The right to water, para. 23. 'There is a clear responsibility on states under international law, which extends beyond violations by those acting on behalf of the state and its organs, such as police officers, military personnel and security forces.' Amnesty International, *Respect, Protect, Fulfil – Women's Human Rights, State Responsibility for Abuses by 'Non-State actors'*, September 2000, AI Index: IOR 50/01/00, 2.

⁸⁹ See e.g., HRC, General Comment No. 31(2004), The nature of the general legal obligation imposed on States parties to the Covenant, para. 8.

⁹⁰ ECtHR, *Nachova and Others v Bulgaria* [GC], Nos. 43577/98 and 43579/98, ECHR 2005-VII, para. 160.

⁹¹ *Ibid.*, para. 168.

⁹² HRC, General Comment No. 31 (2004), The nature of the general legal obligation imposed on States parties to the Covenant, para. 8. Similarly, the HRC has explained that Article 27 ICCPR, which states that 'persons belonging to ... minorities shall not be denied the right ... to enjoy their own culture', also carries positive obligations: '[C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.' HRC, General Comment No. 23 (1994), Article 27 (Rights of minorities), para. 7.

⁹³ Case C-540/03, *Parliament v Council* [2006] ECR I-5769, paras. 103-104.

⁹⁴ Case C-101/01, *Lindqvist* [2003] ECR I-12971, paras. 84-88.

⁹⁵ For instance, the Family Reunification Directive provided an exception to the right of a minor to join their parent sponsor in the host country where the child was over 12 and did not meet the 'integration' requirements specified in national legislation. The European Parliament argued that as such 'integration' requirements were not defined or limited by the Directive, it was open to Member States to adopt an interpretation that conflicted with human rights standards. Case C-540/03, *Parliament v Council* [2006] ECR I-5769, paras. 40-62.

⁹⁶ E.g., Case C-578/08, *Chakroun*, 4 March 2010.

⁹⁷ One possibly emerging practice is the use of a 'non-regression' clause that expressly mentions UN standards, such as that

featuring in Article 10 of the Commission's proposal on the 'Letter of Rights' (see Chapter Five): 'Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that may be ensured under the [European Convention], under the ICCPR and under other relevant provisions of international law or under the laws of any Member States which provide a higher level of protection.' (See Commission Proposal for a Directive on the right to information in criminal proceedings COM(2010) 392/3 (available at : http://ec.europa.eu/justice_home/news/intro/doc/com_2010_392_3_en.pdf)). Such a provision prevents a Member State from advancing the argument that EU Law obliged or authorised it to implement standards that contravened its obligations under UN human rights treaties. However, in practice it simply prevents a Member State from arguing that the breach can be attributed to the EU. It does little to actually 'protect' the rights in the aforementioned international treaties, which would rather require the articulation of specific standards within the substance of the legislation that are themselves in conformity with UN standards.

⁹⁸ Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, Article 1(1). OJ L 190, 18.7.2002, p. 4.

⁹⁹ A recent survey of procedural rights across EU Member States reveals varying levels of conformity with human rights standards. See Cape, Namoradz, Smith and Spronken, *Effective Criminal Defence in Europe* (2010).

¹⁰⁰ ECtHR, *Soering v U.K.*, Application No. 14038, Series A No. 161 ; HRC, *Judge v Canada*, Communication No. 829/1998, 5 August 2002.

¹⁰¹ See Fichera, 'The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?' 15 *European Law Journal* (2009), 70, 81-84 ; Komárek, 'European Constitutionalism and the European Arrest Warrant: in Search of the Limits of "Contrapunctual Principles"', 44 *Common Market Law Review* (2007), 16-30.

¹⁰² Commission, Green Paper, 'Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union', COM(2003) 75 final, 19.2.2003, 9 ; European Criminal Law Academic Network, 'Analysis of the future of mutual recognition in criminal matters in the European Union' (2008), 11. Commission, 'Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union', COM(2004) 328 final, 28.4.2004, 2-8.

¹⁰³ See FRA, 'Opinion of the European Union Agency for Fundamental Rights on the draft Directive regarding the European Investigation Order', 14 February 2011, available on: <http://fra.europa.eu/fraWebsite/attachments/FRA-Opinion-EIO-Directive-15022011.pdf>.

¹⁰⁴ Regulation 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003, 1.

¹⁰⁵ UNHCR, 'Observations on Greece as country of asylum' (2009), available at: <http://www.unhcr.org/refworld/docid/4b4b3fc82.html>.

¹⁰⁶ ECtHR [GC], *M.S.S. v Belgium and Greece*, Application No. 30696/09, 21 January 2011.

¹⁰⁷ The European Voice, 'Greece to defend its asylum procedures', 17.4.2008, available at: <http://www.europeVOICE.com/article/imported/greece-to-defend-its-asylum-procedures/60332.aspx>. See also Decision of the Swedish Migration Board of 6 May 2008.

¹⁰⁸ For further information on the situation in Greece, see FRA, 'Coping with a fundamental rights emergency: The situation of persons crossing the Greek land border in an irregular manner', 2011.

¹⁰⁹ The CJEU, for instance, has typically been unsympathetic to Member States attempting to derogate from the principle of mutual trust and solidarity. See e.g., Case C-5/94, *Hedley Lomas* [1996] ECR I-2553, where the UK suspended exports of livestock to Spain over reports that animals were not being slaughtered according to EU standards.

¹¹⁰ CESCR, General Comment No. 14 (2000), The right to the highest attainable standard of health (Article 12), para. 33.

¹¹¹ CESCR, General Comment No. 15 (2002), The right to water (Articles 11 and 12), para. 25.

¹¹² *Villagran Morales et al.* (the 'Street Children' case), Series C No. 63, para. 144.

¹¹³ Juridical Condition and Human Rights of the Child, Advisory Opinion 17, OC-17/2002, para. 86.

¹¹⁴ See, for instance, in relation to food, article 11(2) of the ICESCR, which reads: 'The States Parties to the present Covenant... shall take... the measures... which are needed... to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources...'

¹¹⁵ CESCR, General Comment No. 12 (1999), The right to adequate food (Article 11).

¹¹⁶ Budlender, 'Justiciability of Socio-Economic Rights: Some South African Experiences', in Ghai and Cottrell, *Economic, Social and Cultural Rights in Practice* (2004), 33, 37 ; Steiner and Alston, *International Human Rights in Context: Law, Politics, Morals* (2000), 184. To an extent, the EU already engages in some of these activities, even if not doing so 'in the name of' human rights. See further below.

¹¹⁷ Commission Communication, 'Towards an EU Strategy on the Rights of the Child', COM(2006) 367 final, 4/7/06, 3. This approach was confirmed in Commission Communication, 'An EU Agenda for the Rights of the Child', COM(2011) 60 final, 15/2/2011.

¹¹⁸ See Commission staff working document accompanying the Proposal for a Council Regulation amending Regulations (EC) N°. 1290/2005 on the financing of the common agricultural policy and (EC) No. 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) as regard food distribution to the most deprived persons in the Community: Impact Assessment, SEC(2008) 2436/2.

¹¹⁹ See Regulation 288/2009 (School Fruit Scheme), OJ L 94, 8.4.2009, p. 38 ; Regulation 657/2008 (School Milk Scheme), OJ L 183, 11.7.2008, p. 17.

¹²⁰ Article 3 TEU.

¹²¹ Commission, 'Impact Assessment Guidelines', 15 January 2009, SEC(2009) 92 ; Commission, 'Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights', COM(2009) 205 final, 29.4.2009.

¹²² Seventy-nine Impact Assessments were conducted in 2009. See Commission Staff Working Document, Impact Assessment Board Report for 2009, SEC(2009) 1728 final, 29.1.2010, 6. It is instructive to compare this to the list of adopted initiatives for the same year, which spans ninety pages. See European Commission, Adopted Commission Initiatives 2009, at: <http://ec.europa.eu/>

atwork/programmes/docs/execution_report_2009.pdf.

¹²³ European Commission, Impact Assessment Guidelines, 15 January 2009, SEC(2009) 92, 32-38.

¹²⁴ *Ibid.*, 39.

¹²⁵ See Commission, 'Compliance with the Charter of Fundamental Rights in Commission legislative proposals: Methodology for systematic and rigorous monitoring', COM(2005) 172 final, 27.4.2005, para. 6.

¹²⁶ European Commission, 'Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights', COM(2009) 205, 29.4.2009, 3-5.

¹²⁷ Commission staff working document, Impact assessment accompanying the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Solidarity in health: Reducing health inequalities in the EU, SEC(2009) 1396 final, 20.10.2009.

¹²⁸ See also CESCR, General Comment No. 14 (2000), The right to the highest attainable standard of health.

¹²⁹ Commission staff working document, Impact Assessment accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Solidarity in health: Reducing health inequalities in the EU, SEC(2009) 1396 final, 20.10.2009, 6.

¹³⁰ European Parliament Resolution of 23 October 2008 on the impact of aviation security measures and body scanners on human rights, privacy, personal dignity and data protection (P6_TA(2008)0521), para. E. See Communication from the Commission to the European Parliament and the Council on the Use of Security Scanners at EU Airports, COM(2010) 311, 15.6.2010, paras. 28-31, for an explanation of the chronology of the legislative proposal on body scanners. This Commission document also indicates that both the FRA and the Electronic Data Protection Supervisor have now been consulted.

¹³¹ Article 4 of the FRA's founding Regulation. There are some limited exceptions to this: FRA, 'Incident report on violent attacks against Roma in Italy' (2008) ; FRA, 'The impact of 7 July 2005 London bomb attacks on Muslim communities in the EU', (2005). Available via: <http://www.fra.europa.eu>.

¹³² Preamble, para. 15, to the FRA's founding Regulation.

¹³³ European Commission, 'Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights'. COM(2009) 205, 29.4.2009, 8.

¹³⁴ Council of the European Union, Presidency Note, Multiannual programme for an area of Freedom, Security and Justice serving the citizen, 16 October 2009, 14449/09, 32.

¹³⁵ See Communication from the Commission to the European Parliament and the Council on the Use of Security Scanners at EU Airports, COM(2010) 311, 15.6.2010.

¹³⁶ E.g., the European Parliament's request that the FRA carry out research into homophobia and related intolerance across the Member States. See FRA, 'Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis' (2009) ; FRA, 'Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation' (2009). Available via: <http://www.fra.europa.eu>.

¹³⁷ Case C-62/98, *Commission v Portugal* [2000] ECR I-5171, paras. 32-52.

¹³⁸ 1155 UNTS 331.

¹³⁹ HRC, General Comment No. 26 (1997), Continuity of obligations (1997), paras. 1-2:

1. The International Covenant on Civil and Political Rights does not contain any provision regarding its termination and does not provide for denunciation or withdrawal. Consequently, the possibility of termination, denunciation or withdrawal must be considered in the light of applicable rules of customary international law which are reflected in the Vienna Convention on the Law of Treaties. On this basis, the Covenant is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right to do so is implied from the nature of the treaty.

2. That the parties to the Covenant did not admit the possibility of denunciation and that it was not a mere oversight on their part to omit reference to denunciation is demonstrated by the fact that article 41 (2) of the Covenant does permit a State party to withdraw its acceptance of the competence of the Committee to examine inter-State communications by filing an appropriate notice to that effect while there is no such provision for denunciation or withdrawal from the Covenant itself. Moreover, the Optional Protocol to the Covenant, negotiated and adopted contemporaneously with it, permits States parties to denounce it. Additionally, by way of comparison, the International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted one year prior to the Covenant, expressly permits denunciation. It can therefore be concluded that the drafters of the Covenant deliberately intended to exclude the possibility of denunciation. The same conclusion applies to the Second Optional Protocol in the drafting of which a denunciation clause was deliberately omitted.'

¹⁴⁰ CEDAW Committee, General Recommendation No. 25 (2004), Article 4, paragraph 1, of the Convention (temporary special measures), para. 22. Although CERD does not use these express examples, its approach is rather broader than that of the CJEU. See CERD, General Comment No. 32 (2009), The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination.

¹⁴¹ Case E-1/02, *EFTA Surveillance Authority v Norway*, 24 January 2003. See para. 27.

¹⁴² Fichera, 'The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?' 15 *European Law Journal* (2009), 70, 81-84 ; Keijzer and Sliedregt (eds.), *The European Arrest Warrant in Practice* (2009) ; Komárek, 'European Constitutionalism and the European Arrest Warrant: in Search of the Limits of "Contrapunctual Principles"', 44 *Common Market Law Review* (2007), 16-30.

¹⁴³ Battjes, *European Asylum Law and International Law* (2006) ; Gammeltoft-Hansen and Gammeltoft-Hansen, 'The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU', 10 *European Journal of Migration and Law* (2008) 439 ; Kalverboer, 'The Developmental Consequences for Asylum-seeking Children Living with the Prospect for Five Years or More of Enforced Return to their Home Country', 11 *European Journal of Migration and Law* (2009) 41 ; Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees', 10 *European Journal of Migration and Law* (2008) 315.

¹⁴⁴ European Data Protection Supervisor, 'Speaking notes on body scanners delivered by Giocanni Buttarelli at the meeting of the LIBE Committee on recent developments in Counter-terrorism policies (body scanners, "Detroit flight"...)', 27 January 2010.

Available at: <http://www.edps.europa.eu/EDPSWEB/edps/EDPS/Publications/SpeechArticle/SA2010>.

¹⁴⁵ Papakonstantinou and de Hert 'The PNR Agreement and Transatlantic Anti-Terrorism Cooperation: N° Firm Human Rights Framework on Either Side of the Atlantic' 46 *Common Market Law Review* (2009) 885. European Data Protection Supervisor, 'Comments of the EDPS on different international agreements, notably the EU-US and EU-AUS PNR agreements, the EU-US TFTP agreement, and the need of a comprehensive approach to international data exchange agreements', 25 January 2010. Available at: <http://www.edps.europa.eu/EDPSWEB/edps/site/mySite/Comments>.

¹⁴⁶ This provision is implemented by several directives: Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26.07.2006, p. 23 ; Directive 2004/113 implementing the principle of equal treatment between women and men in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37 ; Directive 2000/78 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.07.2000, p. 22 ; Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16.

¹⁴⁷ Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16.

¹⁴⁸ See FRA, 'Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis' (2009), 35-37. Available via: <http://www.fra.europa.eu>.

¹⁴⁹ Commission, 'Proposal for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation', COM(2008) 426 final, 2.7.2008.

¹⁵⁰ These grounds are listed exhaustively in Article 19 TFEU (formerly Article 13 of the European Community Treaty).

¹⁵¹ European Convention, Article 14 and Protocol No. 12 (CETS No. 177, 4.11.2000) ; ICCPR, Article 2(1) ; ICESCR, Article 2(2).

¹⁵² CESCR, General Comment No. 20 (2009), Non-discrimination in economic, social and cultural rights, para. 27.

¹⁵³ Article 3(2), Employment Equality Directive.

¹⁵⁴ Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.01.2004, p. 44.

¹⁵⁵ ECtHR, *Anakomba Yula v Belgium*, Application No. 45413/07, 10 March 2009 ; ECtHR, *Andrejeva v Latvia* [GC], Application N° 55707/00, 18 February 2009 ; ECtHR, *Kova Poirrez v France*, Application No. 40892/98, 30 September 2003 ; ECtHR, *Gaygusuz v Austria*, Application No. 17371/90, 16 September 1996 ; ECtHR, *C v Belgium*, Application No. 21794/93, 7 August 1996 ; ECtHR, *Moustaquim v Belgium*, Application No. 12313/86, 18 February 1991.

¹⁵⁶ hat is, it would not be necessary to introduce a general rule of non-discrimination that applies to all areas including those outside EU competence. It would suffice to firstly, introduce an open-ended list of protected grounds and secondly, to abolish the current 'hierarchy' of protection.

¹⁵⁷ International Law Association, 'Accountability of International Organisations: Final Report' Berlin Conference (2004), 22. Amerasinghe, *Principles of Institutional Law of International Organizations* (2005), 399–406 ; Hirsch, *The Responsibility of International Organizations Toward Third Parties, Some Basic Principles* (1995), 17 ; Sands and Klein, *Bowett's Law of International Institutions* (2009), 461-462 ; Schermers and Blokker, *International Institutional Law, Unity Within Diversity* (2003), paras. 1572–1591 ; Wellens, *Remedies against International Organisations* (2002), 1 ; White, *The Law of International Organisations* (2005), 216 ff ; Clapham, *Human Rights Obligations of Non State Actors* (2006).

¹⁵⁸ International Court of Justice, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 ICJ Reports, 73, 89–90. CJEU, Case C–286/90, *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.* [1992] ECR I–6019, para. 9 ; Case C–162/96, *Racke* [1998] ECR I–3655, para. 45 ; Joined Cases C-402/05 P and C-415/05, *Kadi* [2008] ECR I-6351, para. 291. International Criminal Tribunal for the Former Yugoslavia, Prosecutor v Simic et al., Case No. IT-95-9-PT, 'Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness', 27 July 1999, Trial Chamber III.

¹⁵⁹ Opinion 2/94, Accession of the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECR I-1759.

¹⁶⁰ Article 44 CRPD ; Protocol 14bis to the European Convention and Article 6(2) of the Treaty on European Union (as amended by the Lisbon Treaty, OJ C 83, 30.3.2010, p 13). Additionally, several Council of Europe treaties relating to particular aspects of human rights protection also permit adherence by the EU, e.g., the Council of Europe Convention on Action against Trafficking in Human Beings, CETS 197 and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS 201.

¹⁶¹ Article 11 VCLT.

¹⁶² Article 42 CRPD.

¹⁶³ At Article 17. 13.5.2004, ETS No. 194. See also e.g., Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows, 8.11.2001, ETS No. 181, allowing the EU to become party to the original treaty (15.12.1958, ETS No. 26).

¹⁶⁴ *Nuclear Tests (Australia v France)* 1974 ICJ Reports 253, para. 43: 'It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the state was made.'

¹⁶⁵ 189 UNTS 137 ; Protocol relating to the Status of Refugees, 1967, 606 UNTS 267.

¹⁶⁶ Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304 30.09.2004, p. 12.

¹⁶⁷ See e.g., Joined Cases C-175 – 179/08 *Salahadin Abdulla*, 2 March 2010 ; Case C-31/09 *Bolbol*, 17 June 2010.

¹⁶⁸ Security Council resolution 1244 (1999), 10 June 1999.

- ¹⁶⁹ UNMIK Regulation 2006/12 on the establishment of the Human Rights Advisory Panel, 23 March 2006.
- ¹⁷⁰ For the Panel's Rule of Procedure see: For the list of applicable instruments see: <http://www.hrrp.eu/relevant-rights.php>.
- ¹⁷¹ Opinion 2/94, Accession of the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECR I-1759.
- ¹⁷² Article 6(2) TEU.
- ¹⁷³ Proposal for a Council Decision concerning conclusion, by the European Community, of the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities, COM(2008) 530 final, 28.8.2008,.
- ¹⁷⁴ E.g., CJEU, Case C-308/06, *Intertanko* [2008] ECR I-4057, para. 51.
- ¹⁷⁵ See Hurst, 'The Status of the Universal Declaration of Human Rights in National and International Law', 25 *Georgia Journal of International and Comparative Law* (1996) 287 ; Henkin, 'Human Rights and State "Sovereignty"', 25 *Georgia Journal of International and Comparative Law* (1996) 31 ; Kartashkin, 'Working paper on the observance of human rights by States which are not parties to United Nations human rights conventions', Subcommission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/1999/29 ; Kartashkin, 'Observance of human rights by States which are not parties to United Nations human rights conventions', Subcommission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2000/2 ; Ramcharan, *The Concept and Present Status of the International Protection of Human Rights, Forty Years after the Universal Declaration* (1989) ; Schachter, *International Law in Theory and Practice* (1991), 335-345 ; Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States', 32 *American University Law Review* (1982) 1.
- ¹⁷⁶ East Timor case (Portugal v Australia) 1995 ICJ Reports 90, 101.
- ¹⁷⁷ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 ICJ Reports 15, 23.
- ¹⁷⁸ Barcelona Traction Light and Power Co. Ltd (Belgium v Spain), 1970 ICJ Reports 3, 32, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 ICJ Reports 16, 57.
- ¹⁷⁹ Diplomatic and Consular Staff in Tehran, 1980 ICJ Reports 3, 42.
- ¹⁸⁰ Barcelona Traction case, 47.
- ¹⁸¹ *Ibid.*, 32.
- ¹⁸² See Article 48(1)(b) and accompanying commentary: ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), [2001] *Yearbook of the International Law Commission*, Vol. II, Part Two, 126-128.
- ¹⁸³ *North Sea Continental Shelf Cases* 1969 ICJ Reports 3, 42-44, paras. 73 and 76.
- ¹⁸⁴ The only States not party are the United States and Somalia (though both have signed the treaty), and these States are party to at least one other human rights treaty.
- ¹⁸⁵ According to Article 64 VCLT, 1969 (reprinted in 63 *American Journal of International Law* (1969) 875), a norm of *jus cogens* will invalidate conflicting treaty provisions. Article 53 VCLT I defines a rule of *jus cogens* as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'. See also Jennings and Watts (eds.), *Oppenheim's International Law*, Vol. I 'Peace', Parts 2 to 4, 9th ed. 1992, 4 ff ; White and Klaasen, 'An Emerging Legal Regime', in White and Klaasen (eds), *The UN, Human Rights and Post Conflict Situations* (2005), 1, 7.
- ¹⁸⁶ ECHR, *Al-Adsani v UK* [GC], No. 35763/97, ECHR 2001-XI, para. 61. International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v Furundzija*, IT-95-17/I-T, 38 ILM (1999) 317, para. 144.
- ¹⁸⁷ Inter-American Commission on Human Rights, *Victims of the Tugboat '13 de Marzo' v Cuba*, Report No. 47/96, Case 11.436, para. 79.
- ¹⁸⁸ Inter-American Court of Human Rights, Advisory Opinion OC-18/03, 17 September 2003, Series A 18 (2003), para. 101.
- ¹⁸⁹ Inter-American Court of Human Rights, *Aloeboetoe v Suriname*, Series C N°15, 1.2 IHRR 208 (1994), para. 57.
- ¹⁹⁰ See e.g., HRC, General Comment No. 24 (1994), Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, para. 17.
- ¹⁹¹ General Assembly resolution 217 A (III), 10 December 1948.
- ¹⁹² International Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, 1465 UNTS 85 ; International Convention on Civil and Political Rights, 1966, 999 UNTS 171 ; International Covenant on Economic, Social and Cultural Rights, 1966, 993 UNTS 3 ; HRC, General Comment No. 7 (1982), Article 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment).
- ¹⁹³ Convention on the Elimination of All Forms of Discrimination against Women, 1979, 1249 UNTS 13 ; Convention on the Rights of the Child, 1989, 1577 UNTS 3. For instance, the NGOs December 18 and the European Platform for Migrant Workers' Rights expressly argue, as part of their campaign to promote ratification of the CMW by EU Member States, that accession to this instrument will not actually entail obligations differing from those already imposed by the other UN human rights treaties to which they are party. See European Platform for Migrant Workers' Rights, 'The UN Migrant Workers Convention: Steps Towards Ratification in Europe', (2010), 7-8. Available at: http://www.december18.net/sites/default/files/Steps_Towards_Ratification_in_Europe.pdf.
- ¹⁹⁴ Formerly Article 307 (and prior to that, Article 234) of the EC Treaty.
- ¹⁹⁵ Case C-158/91, *Levy* [1993] ECR I-4287, para. 17.
- ¹⁹⁶ Case 812/79, *Burgoa* [1980] ECR 2787, paras. 9-11. At the same time, as noted above, the CJEU has found that under Article 351 Member States remain under a duty either to renegotiate these treaties so as to eliminate the conflict, or to withdraw from or denounce them, where this is possible. The CJEU has stated that this is possible only to the extent permitted by International Law (Case C-62/98, *Commission v Portugal* [2000] ECR I-5171, paras. 32-52). Since the HRC has stated that this is not possible, at least in respect of the ICCPR (HRC, General Comment No. 26 (1997), Continuity of obligations), any conflict would need to be resolved through amendment of EU Law, rather than withdrawal from UN treaties. Nevertheless, the risk that a Member State might purport to withdraw remains a real one.
- ¹⁹⁷ Joined cases 21-24/72, *International Fruit Company* [1972] ECR 1219, para. 18. Besson, 'European Legal Pluralism after *Kadi*', 5 *European Constitutional Law Review* (2009), 237, 245 ; Pescatore, 'External Relations in the Case-Law of the Court of Justice of the European Communities', 16 *Common Market Law Review* (1979) 615, 637-638 ; Reinisch, 'Securing the Accountability of

International Organizations', 7 *Global Governance* (2001) 131, 137-138.

¹⁹⁸ General Court Case T-315/01, *Kadi* [2005] ECR II-3649, para.203. Case T-306/01, *Yusuf* [2005] ECR II-3533, para. 253.

¹⁹⁹ CJEU Joined Cases C-402/05 P and C-415/05 P, *Kadi* [2008] ECR I-6351, paras. 306-309. This interpretation is confirmed by the General Court in Case T-85/09, *Kadi v Commission*, 30 September 2010, para. 120.

²⁰⁰ CJEU Joined Cases C-402/05 P and C-415/05 P, *Kadi* [2008] ECR I-6351, para. 308.

²⁰¹ Besson, 'European Legal Pluralism after *Kadi*', 5 *European Constitutional Law Review* (2009) 237 ; De Wet, 'The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalisation?' 5 *European Constitutional Law Review* (2009), 284 ; Recker, 'European Court of Justice Secures Fundamental Rights from UN Security Council Resolutions', 1 *Göttingen Journal of International Law* (2009), 159.

²⁰² Case C-540/03, *Parliament v Council* [2006] ECR I-5769, para. 37: '[T]he International Covenant on Civil and Political Rights is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law... That is also true of the Convention on the Rights of the Child ... which, like the Covenant, binds each of the Member States.'

²⁰³ Case C-36/02, *Omega* [2004] ECR I-9609, para. 34.

²⁰⁴ Brownlie, 'State responsibility: the problem of delegation', in Ginther et al. (eds.), *Völkerrecht zwischen normativen Anspruch und politischer Realität* (1994), 300-301 ; White, 'Towards a Strategy for Human Rights Protection in Post-Conflict Situations', in White and Klaasen (eds), *The UN, Human Rights and Post Conflict Situations* (2005), 463, 464.

²⁰⁵ ECtHR, Case of Capital Bank Ad v Bulgaria, Application No. 49429/99, 24/11/05, para. 111 ; ECtHR, Case of Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland, No. 45036/98, 30/6/05, para. 154.

²⁰⁶ CJEU Opinion of Advocate General (AG) Jacobs delivered on 30 April 1996, Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others* ECR [1996] 3953. Similarly, AG Maduro in the *Kadi* judgement before the CJEU stated that while the EU was prevented from implementing international obligations that conflicted with internal EU laws on human rights, this would not of itself release the Member States of these international obligations towards third States: 'While it is true that the restrictions which the general principles of Community law impose on the actions of the institutions may inconvenience the Community and its Member States in their dealings on the international stage, the application of these principles by the Court of Justice is without prejudice to the application of international rules on State responsibility or to the rule enunciated in Article 103 of the UN Charter.' Opinion of Advocate General Maduro, 23 January 2008, Case C-415/05 P, *Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, para. 39. See also Case C-62/98, *Commission v Portugal* [2000] ECR I-5171, para. 44: '[I]n accordance with the principles of international law (see, in that connection, Article 30(4)(b) of the 1969 Vienna Convention on the Law of Treaties) that application of the EC Treaty does not affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations thereunder.'

²⁰⁷ *Sayadi v Belgium*, Communication No. 1472/2006, 22 October 2008.

²⁰⁸ *Ibid.*, para. 7.2.

²⁰⁹ International Law Commission, Report on the work of its sixty-first session (4 May - 5 June and 6 July-7 August 2009), *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10 (A/64/10)*, chap. IV.

²¹⁰ International Law Association, 'Accountability of International Organisations: Final Report', Berlin Conference (2004), 19.

²¹¹ *Sayadi*, paras. 2.5, 10.13. Belgium's request that the alleged victims be de-listed does not appear to have been met.

²¹² *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, No. 45036/98, 30/6/06, para. 155 ; Costello, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe', 6.1 *Human Rights Law Review* (2006), 87, 115 ff. It should be noted that in the *M.S.S.* case the ECtHR did not consider that Belgium was under an obligation in EU law to actually make the transfer to Greece, and so the doctrine of 'equivalent protection' did not apply. ECtHR [GC], *M.S.S. v Belgium and Greece* Application No. 30696/09, 21 January 2011, para. 340.

²¹³ ECtHR, *Case of Capital Bank Ad v Bulgaria*, No. 49429/99, 24/11/05, para. 111.

²¹⁴ *Bosphorus*, para. 156.

²¹⁵ *Ibid.*, para. 155.

²¹⁶ *Ibid.*, para. 156.

²¹⁷ *Ibid.*, para. 150.

²¹⁸ *Ibid.*, para. 165.

²¹⁹ See para. 30 of AG Van Gerven's Opinion, Case C-159/90, *SPUC v Grogan* [1991] ECR I-4685: 'A feature of [the]... case-law [of the CJEU] is that it does not confer direct effect in the Community legal order on the provisions of ... international treaties but regards those treaties, together with the constitutional traditions common to the Member States, as helping to determine the content of the general principles of Community law.' Similarly, AG Slynn has noted that 'the Convention provides guidelines for the Court in laying down those fundamental rules of law which are part of Community law, though the Convention does not bind, and is not part of the law of, the Community as such'. See Cases 60-61/84, *Cinéthèque SA and others v Fédération Nationale des Cinémas Français* [1986] 1 CMLR 365, 379. The General Court made this express in Case T-347/94, *Maye-Melnhof Kartongesellschaft mbH v Commission* [1998] ECR II-1751, para. 311 ; Case T-112/98, *Mannesmannrohren-Werke v Commission* [2001] ECR II-729, para. 59.

²²⁰ The CJEU refers to this as the 'complete system of legal remedies' (see e.g., Case 50/00 P, *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para. 40). Article 230 of the EC Treaty is now Article 263 TFEU. Article 234 EC is now Article 267 TFEU. Article 235 EC and 288 EC are now Article 268 TFEU and Article 340 TFEU.

²²¹ The basic rules were established in Case 25/62, *Plaumann v Commission* [1963] ECR 95.

²²² C-283/81, *CILFIT* [1982] ECR 3415, para. 7: 'Article 177 [later Article 234 and now Article 267 TFEU] does not constitute a means of redress available to the parties to a case pending before a national court or tribunal. Therefore the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article 177.'

²²³ See C-224/01, *Köbler* [2003] ECR I-10239. Compare Case C-173/03, *Traghetti del Mediterraneo* [2006] ECR I-5177, paras. 24-46.

²²⁴ See Case 175/84, *Krohn v Commission* [1986] ECR 753 and Case T-47/02, *Danzer v Council* [2006] ECR II-1779.

²²⁵ These provisions set out the right to a fair trial and to an effective remedy.

²²⁶ Case T-177/01, *Jégo-Quéré v Commission* [2002] ECR II-2365, para. 47. The General Court's attempt to widen the rules relating to standing under Article 230 of the EC Treaty was reversed by the CJEU which pointed out that such an alteration would require an amendment to the treaty. Case C-263/02 P, *Commission v Jégo-Quéré* [2004] I-3425, para. 31. See also the Opinion of Advocate General Jacobs (when the case was appealed) 10/7/03 in Case C-263/02 P, *Jégo-Quéré*, para. 43: 'I find highly problematic the strict test of standing currently applicable under the fourth paragraph of Article 230. In my view, that test gives rise to a real risk that individuals will be denied any satisfactory means of challenging before a court of competent jurisdiction the validity of a generally applicable and self-implementing Community measure. It may prove impossible for such individuals to gain access to a national court (which in any event has no competence to rule on validity) ... otherwise than by infringing the law in the expectation that criminal (or other enforcement) proceedings will then be brought against them when the national court may be persuaded to refer to the Court of Justice the issue of the validity of the measure. Besides the various practical disadvantages which may attend the making of a reference in the context of criminal proceedings, such a procedural avenue exposes the individuals in question to an intolerable burden of risk.'

²²⁷ For further criticism of the conclusion that the system of remedies at the EU level could provide 'equivalent protection', see Costello 'The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' 6 *Human Rights Law Review* (2006), 87, 115 ff.

²²⁸ A similar list is expressed in relation to Articles 9 and 10.

²²⁹ *Bosphorus*, para. 156.

²³⁰ ECtHR, *Matthews v UK*, No. 24833/94, 18/2/99, para. 18.

²³¹ Costello, 'The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe', 6 *Human Rights Law Review* (2006), 87, 115.

²³² See report of the International Law Commission on its fifty-ninth session (2007), *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*, chap. VIII. Draft Article 5 provides that the 'conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.' While not of itself binding, this provision of the draft article has been referred to in pertinent cases as authoritative, including by the ECtHR, in *Behrami v France* and *Saramati v France, Germany and Norway*, Application Nos. 71412/01, 78166/01, 2/5/07, para. 31, and the UK House of Lords in *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)*, [2007] UKHL 58, 12.12.07, para. 5.

²³³ *Behrami and Saramati*, *ibid.*, paras. 134-135.

²³⁴ *Ibid.*, para. 141.

²³⁵ See ECtHR, Grand Chamber decision on admissibility, *Behrami and Saramati*, paras. 144-152. This reasoning was subsequently applied in several cases relating to KFOR and the UN High Representative (see ECtHR decisions on admissibility, *Kasumaj v Greece*, No. 6974/05, 5/7/07 and *Gajic v Germany*, No. 31446/02, 28/8/07).

²³⁶ HRC, *H.v.d.P. v The Netherlands*, Communication No. 217/1986, 8 April 1987.

²³⁷ Council Regulation (EC) No. 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, OJ L 139 29.05.2002, p. 9.

²³⁸ See in particular the separate and partly dissenting opinions of the HRC for a discussion.

²³⁹ What was of relevance was that the acts took place within the 'jurisdiction' of Ireland. ECtHR, *Case of Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, Application No. 45036/98, 30/6/06, paras. 135-138.

²⁴⁰ Attribution might play a more appropriate role in determining how the payment of compensation or other reparatory measures should be undertaken as between the Member States and the IGO.

²⁴¹ General Court Case T-315/01, *Kadi*, [2005] ECR II-3649, para. 192 ; Case T-306/01, *Yusuf* [2005] ECR II-3533, para. 242 ; CJEU Joined Cases C-402/05 P and C-415/05 P, *Kadi* [2008] ECR I-6351, paras. 288-289, 299-300.

²⁴² Opinion of AG Maduro of 16 January 2008 in Joined Cases C-402/05 P and C-415/05, *Kadi*, [2008] ECR I-6351, paras. 30, 39.

²⁴³ E.g., McCorquodale and La Forgia, 'Taking off the blindfolds: Torture by Non-State Actors', 1 *Human Rights Law Review* (2001), 189.

²⁴⁴ HRC, General Comment No. 26 (1997), Continuity of obligations.

²⁴⁵ HRC, concluding observations on the UK, UN Doc. CCPR/C/79/Add.69, 18 November 1996, para. 4.

²⁴⁶ See Report submitted by China in respect of Hong Kong, UN Doc. CCPR/C/HKSAR/99/1, 16 June 1999, paras. 1-5.

²⁴⁷ HRC, concluding observations on Serbia and Montenegro, UN Doc. CCPR/CO/81/SEMO, 12 August 2004 ; concluding observations on the report on Kosovo (Serbia) submitted by the United Nations Interim Administration Mission in Kosovo, para. 4. See Official Records of the General Assembly, Sixty-first Session, Supplement No. 40 (A/61/40), Vol. I.

²⁴⁸ Article 4(3) TEU imposes a general duty of 'sincere cooperation' on the Member States with the EU in the implementation of their obligations under EU law: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives.'

²⁴⁹ As noted above, this administration has passed over, to a degree, to EULEX, which now also presents the HRC with an opportunity to engage the EU directly in relation to Kosovo. Were this to occur, it might serve as a testing ground for engaging the EU in more general terms.

²⁵⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum, Communications to and from Governments, UN Doc. A/HRC/14/24/Add.1, 18 June 2010, pp. 196-202.

- ²⁵¹ Memorandum of Understanding between the Council of Europe and the European Union, CM(2007)74, 10 May 2007, paras. 17-18.
- ²⁵² Established by Economic and Social Council decision 2004/249, 22 July 2004 and Commission on Human Rights resolution 2004/7, 13 April 2004.
- ²⁵³ See High-Level Task Force on the Implementation of the Right to Development, 'Application of the criteria for periodic evaluation of global development partnerships – as defined in Millennium Development Goal 8 – from the right to development perspective: the Cotonou Partnership Agreement between the European Union and ACP Countries', UN Doc. A/HRC/8/WG.2/TF/CRP.6, 21 December 2007 ; High-Level Task Force on the Implementation of the Right to Development, 'Technical Mission Report: Cotonou Partnership Agreement between the European Union (EU) and African, Caribbean and Pacific (ACP) countries', UN Doc. A/HRC/8/WG.2/TF/CRP.4, 28 December 2004.
- ²⁵⁴ Exchange of letters between the United Nations High Commissioner for Refugees and the European Commission, of 15 February 2005, available at: <http://www.unhcr.org/refworld/docid/42135cba4.html>.
- ²⁵⁵ *Ibid.*, 2.
- ²⁵⁶ *A.B.A.O. v France*, Communication No. 264/2005, 8 November 2007. Although no violation was found in this case, the complainant had alleged that granting 'subsidiary status' protection did not afford him sufficient protection from refoulement. France noted that 'subsidiary protection' had been introduced in order to implement EU Directive 2004/83 (the Qualification Directive). This illustrates how EU legislation has a direct impact on national asylum policy which is considered by the CAT Committee in cases alleging violation of the principle of non-refoulement.
- ²⁵⁷ Council Decision 2010/48 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, Annex II, OJ L 23, 27.01.2010, p. 55.
- ²⁵⁸ Articles 206-207 TFEU.
- ²⁵⁹ Annex II, Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Rights of Persons with Disabilities, para. 2, OJ L 23, 27.1.2010, p. 55.
- ²⁶⁰ See e.g., Qualification Directive (Directive 2004/83), Article 4.
- ²⁶¹ HRC, General Comment No. 2 (1981), Reporting guidelines, para. 2.
- ²⁶² See Article 1(d) VCLT, and HRC, General Comment No. 24 (1994), Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations made under article 41 of the Covenant'.
- ²⁶³ HRC, General Comment No. 24 (1994), Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations made under article 41 of the Covenant', paras. 17-18. This approach is also supported by the treaty bodies generally. See Recommendations adopted by the working group on reservations in OHCHR, Report on the meeting of the working group on reservations, sixth Inter-Committee Meeting of the human rights treaty bodies, Geneva, 18-20 June 2007, UN Doc. HRI/MC/2007/5, 9 February 2007, para. 5: 'The working group considers that for the purpose of discharging their functions, treaty bodies are competent to assess the validity of reservations and, in the event, the implications of a finding of invalidity of a reservation, particularly in the examination of individual communications or in exercising other fact-finding functions in the case of treaty bodies that have such competence.' For discussion of the practice of the treaty bodies see OHCHR, The practice of human rights treaty bodies with respect to reservations to international human rights treaties, UN Doc. HRI/MC/2005/5, 13 June 2005.
- ²⁶⁴ See HRC, General Comment No. 24 (1994), Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, para. 19 ; ECtHR, *Belilos v Switzerland*, Series A No. 132, para. 55. This also appears to be the approach adopted by the ILC in its current work on reservations. See International Law Commission, Report of the International Law Commission on its fifty-ninth session (2007), *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*, draft guidelines on reservations to treaties (provisionally adopted), chap. IV.C.2, draft guideline 3.1.7 and commentary.
- ²⁶⁵ Available at: <http://www.europarl.europa.eu/parliament/expert/displayFtu.do?language=EN&id=73&ftuld=theme.html>.
- ²⁶⁶ Available at: http://europa.eu/legislation_summaries/index_en.htm.
- ²⁶⁷ Article 290 TFEU. On the practice of 'comitology' see Jens, 'The Origins of the EU Comitology System: a Case of Informal Agenda-Setting by the Commission', 15 *Journal of European Public Policy* (2008), 208.
- ²⁶⁸ For the original Proposal for a directive of the European Parliament and of the Council on services in the internal market, COM (2004) 2 final/3, 5/3/04. For further discussion see Butler, 'NGO Participation in the EU Law-Making Process: the Example of Social NGOs at the Commission, Parliament and Council', 14 *European Law Journal* (2008), 558, 568-569. For the directive as adopted, see Directive 2006/123 on services in the internal market, OJ L 376, 27.12.2006, p. 36.
- ²⁶⁹ Articles 16 and 17 of the original proposal.
- ²⁷⁰ It may be telling that the 60-page impact assessment of the Commission contains the words 'social services' only three times. See Commission staff working paper, 'Extended impact assessment of proposal for a directive on services in the internal market', SEC (2004) 21, 13/1/04.
- ²⁷¹ The (now replaced) CONECCS database of the Commission which listed those organisations with which particular DGs routinely consulted suggest that at the time these were almost exclusively representative of commercial interests. See Butler, 'NGO Participation in the EU Law-Making Process: the Example of Social NGOs at the Commission, Parliament and Council', 14 *European Law Journal* (2008), 558, 568-569. The Registry that has come to replace the database suggests that this may continue to be the case. However, it is now possible to search the database only according to areas of interest as declared by those organisations that have registered (e.g., under 'Internal Market' rather than according to particular DGs. See <http://webgate.ec.europa.eu/transparency/regrin/welcome.do#>).
- ²⁷² See research based on interviews with NGOs and MEPs in Butler, 'NGO Participation in the EU Law-Making Process: the Example of Social NGOs at the Commission, Parliament and Council', 14 *European Law Journal* (2008), 558, 568-569. Compare, for example the original Commission proposal (Proposal for a directive of the European Parliament and of the Council on services in the internal market, COM (2004) 2 final/3, 5/3/04), with the suggested amendments of the European Parliament, which included exemptions covering social services (European Parliament legislative resolution on the Proposal for a directive of the European

Parliament and of the Council on services in the internal market, P6_TA(2006)0061, 16 February 2006) and the Commission's revised proposal, which incorporated many of these alterations (Amended proposal for a directive of the European Parliament and of the Council on services in the internal market, COM (2006) 0160 final, 4 April 2006).

²⁷³ Commission Communication, 'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe', COM(2010) 636 final, 15/11/2010.

²⁷⁴ E.g., the European Network of Legal Experts in the Non-Discrimination Field, established by the European Commission by Commission Decision setting up a non-discrimination governmental expert group, C(2008) 3261 final, 2.VII.2008. For the work of the Network, see its website at: <http://www.non-discrimination.net>.

²⁷⁵ Article 8 ICERD. Similarly: Article 28 ICCPR ; Economic and Social Council resolution 1985/17, 28 May 1985 (with reference to CESCRC) ; Article 17 CEDAW ; Article 17 CAT ; Article 43 CRC ; Article 72, CMW ; Article 34 CRPD ; Article 26 CED.

²⁷⁶ On the inter-State procedure see Article 21 CAT ; Article 74 CMW ; Articles 11-13 ICERD ; Articles 41-43 ICCPR ; Article 29 CEDAW ; Article 30 CAT ; Article 92 CMW. On the inquiry procedure see Article 20 CAT ; Articles 8-10 Optional Protocol to CEDAW.

²⁷⁷ Article 9 ICERD. Similarly: Article 40 ICCPR ; Article 16 ICESCR ; Article 18 CEDAW ; Article 19 CAT ; Article 44 CRC ; Article 73 CMW ; Article 29 CED ; Article 35 CRPD. A compilation of general comments or recommendation relevant to the reporting guidelines of States parties can be found in OHCHR, Compilation of guidelines on the form and content of reports to be submitted by States parties to the international human rights treaties, UN Doc HRI/GEN/2/Rev.6, 3 July 2009. This document also contains 'Harmonised guidelines on reporting under the international human rights treaties including guidelines on a core document and treaty-specific documents'.

²⁷⁸ In this respect see the 'Harmonised guidelines on reporting under the international human rights treaties including guidelines on a core document and treaty-specific documents', *ibid.*

²⁷⁹ For a discussion, see Clapham, 'UN Human Rights Reporting Procedures: an NGO Perspective', in Alston and Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (2000), 175.

²⁸⁰ HRC, General Comment No. 2 (1981), Reporting guidelines, para. 3.

²⁸¹ CESCRC, General Comment No. 3 (1990), The nature of States parties' obligations (art. 2, para. 1, of the Covenant), para. 2. Similarly, CRC, General Comment No. 5 (2003), General measures of implementation of the Convention the Rights of the Child (arts. 4, 42 and 44, para. 6), para. 2 ; CRPD Committee, Guidelines on treaty-specific document submitted by States parties under article 35, paragraph 1, of the Convention on the Rights of Persons with Disabilities, UN Doc. CRPD/C/2/3, 18 November 2009 (hereafter CRPD Committee Guidelines), A.3.2.

²⁸² CRPD Committee Guidelines, *ibid.*, A.3.2(d).

²⁸³ CESCRC, General Comment No. 3 (1990), The nature of States parties' obligations (art. 2, para. 1, of the Covenant), para. 2. Similarly, CRC Committee, General Comment No. 5 (2003), General measures of implementation of the Convention the Rights of the Child (arts. 4, 42 and 44, para. 6), para. 2.

²⁸⁴ CRC Committee, General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), para. 37.

²⁸⁵ *Ibid.*, para. 28.

²⁸⁶ See DG External Relations organigram at: http://ec.europa.eu/dgs/external_relations/organi_en.pdf.

²⁸⁷ CESCRC, General Comment No. 3 (1990), The nature of States parties' obligations (art. 2, para. 1, of the Covenant), para. 3.

²⁸⁸ CERD, General Recommendation No. 4, Reporting by States parties (art. 9, demographic composition of the population).

²⁸⁹ CEDAW Committee, General Recommendation No. 9 (1989), Statistical data concerning the situation of women.

²⁹⁰ CRC Committee, General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), para. 48.

²⁹¹ CRPD, Article 31 ; CRPD Committee Guidelines, A.2.

²⁹² See the 'Harmonised guidelines on reporting under the international human rights treaties including guidelines on a core document and treaty-specific documents', in OHCHR, Compilation of Guidelines on the form and content of reports to be submitted by states parties to the international human rights treaties, UN Doc HRI/GEN/2/Rev.6, 3 June 2009, 3, para. 26. CRPD Committee Guidelines, A.3.2(h).

²⁹³ CESCRC, General Comment No. 3 (1990), The nature of States parties' obligations (art. 2, para. 1, of the Covenant), para. 6 ; CRC Committee, General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), para. 48.

²⁹⁴ CESCRC, General Comment No. 3 (1990), The nature of States parties' obligations (art. 2, para. 1, of the Covenant), para. 4. CRPD Committee Guidelines, A.3.2.

²⁹⁵ CRC Committee, General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), paras. 27, 32.

²⁹⁶ CESCRC, General Comment 3 (1990), The nature of States parties' obligations (art. 2, para. 1, of the Covenant), para. 5. CRC Committee, General Comment No. 5 (2003), *ibid.*, para. 49 ; Article 35(4) CRPD.

²⁹⁷ HRC, General Comment No. 2 (1981), Reporting guidelines, para. 4.

²⁹⁸ See Draft Third Disability High-Level Group Report on Implementation of the UN Convention on the Rights of Persons with Disabilities (March 2010), available at: <http://ec.europa.eu/social/main.jsp?catId=431&langId=en>.

²⁹⁹ Provisional Draft, Information Note from the Commission on progress in implementing the UN Convention on the Rights of Persons with Disabilities. Available via: <http://ec.europa.eu/social/main.jsp?catId=431&langId=en>.

³⁰⁰ Article 9 ICERD ; Article 40 ICCPR ; Article 16 ICESCR ; Article 21 CEDAW ; Article 19 CAT ; Article 44 CRC ; Article 74 CMW ; Article 29 CED ; Article 39 CRPD.

³⁰¹ See 'Compilation of general comments adopted by human rights treaty bodies', UN Doc. HRI/GEN/1/Rev.7, 12 May 2004.

³⁰² See e.g., CESCRC, General Comment No. 3 (1990), The nature of States parties' obligations ; HRC, General Comment No. 3

(1981), Article 2 (Implementation at the national level) ; CRC Committee, General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child.

³⁰³ See e.g., CESCR, General Comment No. 3 (1990), *ibid.* ; HRC, General Comment No. 3 (1981), *ibid.* ; HRC, General Comment No. 31 (2004), The nature of the general legal obligation imposed on States parties to the Covenant, para. 13 ; CRC Committee, General Comment No. 5 (2003), *ibid.*

³⁰⁴ CESCR, General Comment No. 9 (1998), The domestic application of the Covenant, paras. 5-8 ; CRC Committee, General Comment No. 5 (2003), *ibid.*, paras. 19-20 ; HRC, General Comment No. 31 (2004), The nature of the general legal obligation imposed on States parties to the Covenant, para. 13 ; CRPD Committee Guidelines, A.3.2(e).

³⁰⁵ Article 2(3) ICCPR ; Article 2(c) CEDAW ; Article 14 CAT ; Article 84 CMW ; Article 8(2) CED ; Article 13 CRPD.

³⁰⁶ CESCR, General Comment No. 9 (1998), The domestic application of the Covenant, para. 3.

³⁰⁷ CRC Committee, General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child, para. 24. Similarly, the CRPD Committee also requires parties to include information on judicial and other available remedies in periodic reports. See Guidelines, A.3.2(f).

³⁰⁸ HRC, General Comment No. 31 (2004), The nature of the general legal obligation imposed on States parties to the Covenant, para. 16.

³⁰⁹ HRC, General Comment No. 31 (2004), *ibid.* para. 15. In the situation of the EU it would seem that the FRA would constitute an equivalent body.

³¹⁰ HRC, General Comment No. 31 (2004), *ibid.*

³¹¹ Case T-177/01, *Jégo-Quéré v Commission* [2002] ECR II-2365, para. 47.

³¹² E.g., Case 14/83, *Von Colson and Kamman v Land Nordrhein-Westfalen* [1984] ECR 1891 ; Case C-271/91, *Marshall v Southampton and South West Hampshire Area Health Authority II* [1993] ECR I-4367.

³¹³ HRC, General Comment No. 3 (1981), Article 2 (Implementation at the national level), para. 2. Similarly, CRC Committee, General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), paras. 3, 10, 53.

³¹⁴ HRC, General Comment No. 3 (1981), *ibid.*, para. 2. CRC Committee, General Comment No. 5 (2003), *ibid.*, paras. 66-70.

³¹⁵ CEDAW Committee, General Recommendation No. 3 (1987), Education and public information programmes. Similarly, Article 8 CRPD and CRPD Committee Guidelines, 8.

³¹⁶ FRA, *Annual Report 2010* (Conference Edition), 29-32.

³¹⁷ CEDAW Committee, General Recommendation No. 6 (1988), Effective national machinery and publicity ; CERD, General Recommendation No. 17 (1993), Establishment of national institutions to facilitate the implementation of the Convention ; CRC Committee, General Comment No. 2 (2002), The role of independent national human rights institutions in the promotion and protection of the rights of the child.

³¹⁸ Proposal for a Council Decision concerning conclusion, by the European Community, of the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities, COM(2008) 530 final, 28.8.2008.

³¹⁹ Optional Protocol to the Convention the Rights of Persons with Disabilities, General Assembly resolution 61/106, 13 December 2006, annex II.

³²⁰ Optional Protocol to the ICCPR, 1966, 999 UNTS 171 ; Optional Protocol to the ICESCR, General Assembly resolution 63/117, 10 December 2008, annex ; Article 22 CAT ; Article 14 ICERD ; Optional Protocol to CEDAW, General Assembly resolution 54/4, 6 October 1999, annex ; Article 77 CMW ; Article 31 CED.

³²¹ See e.g., Steinberger, 'Judicial Settlement of International Disputes' in Bernhardt (ed.), *Encyclopaedia of Public International Law* (1981) ; Steiner, 'Individual Claims in a World of Mass Violations: What Role for the Human Rights Committee?', in Alston & Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (2000), 15, 29-30.

³²² See e.g., Rules of procedure of the Human Rights Committee, UN Doc. CCPR/C/3/Rev.8, 22 September 2005, Rules 84-104 ; CEDAW Committee, rules of procedure, rule 69 (as amended in 2007 ; see *Official Records of the General Assembly, Sixty-second Session, Supplement No. 38 (A/62/38)*, Part three, chap. V.A, appendix. ; CAT Committee, rules of procedure, UN Doc. CAT/C/3/Rev.4, 9 August 2002, rule 111.

³²³ See Report of the Human Rights Committee, *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 40 (A/64/40)*, Vol. I, para. 138: 'Under the Optional Protocol, the Committee bases its Views on all written information made available by the parties. This implies that if a State party does not provide an answer to an author's allegations, the Committee will give due weight to the uncontested allegations as long as they are substantiated. In the period under review, the Committee recalled this principle in its Views on cases Nos. 1483/2006 (*Basongo Kibaya v. Democratic Republic of the Congo*) and 1587/2007 (*Mamour v. Central African Republic*).'

³²⁴ See e.g., ECtHR, *Timishev v Russia*, Nos. 55762/00 and 55974/00, ECtHR, 2005-XII, para. 39 ; *Nachova and others v Bulgaria* [GC], Nos. 43577/98 and 43579/98 ; ECtHR, 2005-VII, para. 147 ; *D.H. et al. v The Czech Republic* [GC], No. 57325/00, 13 November 2007, para. 178.

³²⁵ See e.g., Case C-381/99, *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG*, ECR [2001] I-4961, paras. 51-62. This is also enshrined in EU legislation: Racial Equality Directive (Article 8), Employment Equality Directive (Article 10), Gender Equality Directive (Recast) (Article 19), Gender Goods and Services Directive (Article 9).

³²⁶ CAT Committee, *Abad v Spain*, Communication No. 59/1996, 14 May 1998, para. 9.

³²⁷ HRC, *Blazek et al. v Czech Republic*, Case No. 857/1999, 9 August 2001 ; *Mansaraj et al. v Sierra Leone*, Cases Nos. 839/1998, 840/1998 and 841/1998, 31 July 2001 ; *Chongwe v Zambia*, Case No. 821/1998, 9 November 2000 ; CERD, *Ahmad v Denmark*, Communication No. 16/1999, 11 May 2001, para. 9 ; *LK v Netherlands*, Communication No. 4/1991, 16 March 1993, para. 6.8 ; CAT Committee, *Ristic v Yugoslavia*, Communication No. 113/1998, 11 May 2001, para. 9.6.

³²⁸ HRC, *Blazek et al. v Czech Republic*, *ibid.*

³²⁹ CAT Committee, *Nedzibi v Austria*, Communication No. 8/1991, 30 November 1993, para. 15.

³³⁰ HRC, *Blazek et al. v Czech Republic*, Case No. 857/1999, 9 August 2001.

- ³³¹ HRC, *Winata v Australia*, Case No. 930/2000, 16 August 2001.
- ³³² HRC, *Mansaraj et al. v Sierra Leone*, Cases Nos. 839/1998, 840/1998 and 841/1998, 31 July 2001.
- ³³³ HRC, *Chongwe v Zambia*, Case No. 821/1998, 9 November 2000.
- ³³⁴ HRC, *Mazou v Cameroon* Case, No. 630/1995, 3 August 2001 ; CERD, *Yilmaz Dogan v Netherlands*, Communication No. 1/1984, 23 September 1998, para. 10.
- ³³⁵ HRC, *Laptsevich v Belarus*, Case No. 780/1997, 13 April 2000 ; CERD, *Habassi v Denmark*, Communication No. 10/1997, 17 March 1999, para. 11.2 ; *LK v Netherlands*, Communication No. 4/1991, para. 6.9 (for moral damage).
- ³³⁶ HRC, *Laptsevich v Belarus*, *ibid.*
- ³³⁷ See further below.
- ³³⁸ Smith, 'The European Union at the Human Rights Council: speaking with one voice by having little influence', 17 *Journal of European Public Policy* (2010) 224.
- ³³⁹ Mandates are now established according to Human Rights Council resolution 5/1, Institution-building of the United Nations Human Rights Council, 18 June 2007, annex, paras. 39-64.
- ³⁴⁰ For further details see the website of the OHCHR at: <http://www2.ohchr.org/english/bodies/chr/special/index.htm>.
- ³⁴¹ See e.g., Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum, Summary of communications sent and replies received from Governments and other actors, UN Doc. A/HRC/13/33/Add.1, 26 February 2010.
- ³⁴² Though some mandate holders do go beyond this. For instance, the Working Group on Arbitrary Detention goes into some detail and issues what is in substance, if not in form, a decision on the merits of complaints. See e.g., Opinions adopted by the Working Group on Arbitrary Detention, UN Doc. A/HRC/10/21/Add.1, 4 February 2009. For a general discussion of the special procedures, see Butler (above, note 7), chap. 4.
- ³⁴³ See Commission on Human Rights resolution 2005/69, 20 April 2005.
- ³⁴⁴ Human Rights Council resolution 5/1, Institution-building of the United Nations Human Rights Council, 18 June 2007, annex, paras. 1-38.
- ³⁴⁵ See e.g., the national report of Sweden, which contains some brief references to positive aspects of EU Law in relation to human rights. National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5.1, Sweden, UN Doc. A/HRC/WG.6/8/SWE/1, 22 February 2010, paras. 7, 15 and 28.
- ³⁴⁶ Tomuschat, 'Evolving Procedural Rules: The United Nations Human Rights Committee's First Two Years of Dealing with Individual Communications', 1 *Human Rights Law Journal* (1980) 249, 255.
- ³⁴⁷ Steiner, 'Individual Claims in a World of Mass Violations: What Role for the Human Rights Committee?' in Alston & Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (2000), 15, 30.
- ³⁴⁸ HRC, *Sooklal v Trinidad and Tobago*, Communication No. 928/2000, 8 November 2001, para. 7. Similarly, CERD, *LR v Slovakia*, Communication No. 31/2003, 10 March 2005.
- ³⁴⁹ See e.g., Judge Lauterpacht in the *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, Advisory Opinion, 1955 ICJ Reports 67, 118-119: 'A Resolution recommending to an Administering State a specific course of action creates some legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision. The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith. If, having regard to its own ultimate responsibility for the good government of the territory, it decides to disregard it, it is bound to explain the reasons for its decision.' This is supported by Judge Klaestad's separate opinion in the same case.
- ³⁵⁰ Interpretation of the Agreement of 25 March 1951 Between the World Health Organisation and Egypt, Advisory Opinion, 1980 ICJ Reports 73, 96.
- ³⁵¹ Judge Lauterpacht in the *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, Advisory Opinion, 1955 ICJ Reports 67, 132 ; Tunkin [Law and Force in the International System?] (1987), 9 ; Amerasinghe, *Principles of Institutional Law of International Organizations* (2005), 180 ; Sloan, *United Nations General Assembly Resolutions in Our Changing World* (1991), 36.
- ³⁵² Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 2009/C 295/01, OJ C 295 4.12.2009, p. 1.
- ³⁵³ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328 final, 28.4.2004 ; Commission Green Paper, Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75 final, 19.2.2003,.
- ³⁵⁴ This is acknowledged as part of the definition of 'indirect' discrimination. It is also expressly contemplated in EU Law under the notion of 'positive action' (not to be confused with positive or reverse discrimination) in the EU's discrimination directives, discussed in Chapter Three.
- ³⁵⁵ HRC, General Comment No. 32 (2007), Right to equality before courts and tribunals and to a fair trial, para. 9. Equal recognition before the law is also expressly provided for in the CRPD.
- ³⁵⁶ Council Framework Decision on the European arrest warrant and the surrender procedures between Member States 2002/584/JHA, Article 1(1), OJ L 190, 18.7.2002, p. 4.
- ³⁵⁷ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328 final, 28.4.2004, para. 28.
- ³⁵⁸ *Ibid.*, para. 24.
- ³⁵⁹ Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings 2009/C 295/01, OJ C 295, 4.12.2009, p. 1.
- ³⁶⁰ Commission Proposal for a Directive on the right to interpretation and translation in criminal proceedings, COM(2010) 82 final, 9.3.2010,.
- ³⁶¹ Commission Proposal for a Directive on the right to information in criminal proceedings, COM(2010) 392/3. Available at:

http://ec.europa.eu/justice_home/news/intro/doc/com_2010_392_3_en.pdf.

³⁶² Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings 2009/C 295/01, Annex, Measure E, OJ C 295, 4.12.2009, p. 1.

³⁶³ Commission Green Paper, Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75 final, 32-34.

³⁶⁴ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, 28.4.2004, COM(2004) 328 final, 19.2.2003, Article 10.

³⁶⁵ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328 final, 28.4.2004, Article 10.

³⁶⁶ This section will not specifically consider the issue of conditions of pre-trial detention, since the 'Roadmap' has signalled that this will be the subject of a separate Green Paper ('Measure F'), and as such a proposal does not appear likely in the immediate future.

³⁶⁷ CRC Committee, General Comment No. 10 (2007), Children's rights in juvenile justice.

³⁶⁸ General Assembly resolution 40/33, 29 November 1985.

³⁶⁹ General Assembly resolution 45/113, 14 December 1990.

³⁷⁰ General Assembly resolution 45/112, 14 December 1990.

³⁷¹ These Guidelines are annexed to Economic and Social Council resolution 1997/30 on Administration of juvenile justice, 21 July 1997.

³⁷² This is also stated in Article 24(2) CFR.

³⁷³ CRC Committee, General Comment No. 10 (2007), Children's rights in juvenile justice, para. 10.

³⁷⁴ *Ibid.*, para. 93.

³⁷⁵ *Ibid.*, para. 90.

³⁷⁶ *Ibid.*, para. 13.

³⁷⁷ *Ibid.*, para. 40.

³⁷⁸ *Ibid.*, para. 49.

³⁷⁹ *Ibid.*, para. 50.

³⁸⁰ *Ibid.*, para. 31.

³⁸¹ This is not to say that those who are vulnerable by virtue of their old age should not also receive protection. Rather, the Commission proposal should specify expressly that those who have not attained the age of 18 should be entitled to protection by virtue of their status as children under the terms of the CRC.

³⁸² CRC Committee, General Comment No. 10 (2007), Children's rights in juvenile justice, para. 13.

³⁸³ *Ibid.*, para. 40.

³⁸⁴ *Ibid.*, paras. 56-58.

³⁸⁵ Similarly, Article 24(1) CFR guarantees the right of children to 'express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity'.

³⁸⁶ CRC Committee, General Comment No. 10 (2007), Children's rights in juvenile justice, para. 44.

³⁸⁷ *Ibid.*, para. 45.

³⁸⁸ *Ibid.*, para. 46.

³⁸⁹ *Ibid.*, paras. 46-48.

³⁹⁰ Commission Proposal for a Directive on the right to interpretation and translation in criminal proceedings, COM(2010) 82 final, 9.3.2010, .

³⁹¹ CRC Committee, General Comment No. 10 (2007), Children's rights in juvenile justice, para. 62.

³⁹² *Ibid.*, para. 63.

³⁹³ *Ibid.*, paras. 64-67. This is also confirmed by the ECtHR in the cases of *T. v U.K.* [GC] No. 24724/94, 16 December 1999, paras. 71-75 and *V. v U.K.* [GC] No. 24888/94, ECHR 1999-IX. Similarly, paras. 73-77. It is noteworthy that the ECtHR was guided by the provisions of the CRC in this regard, as well as 'The Beijing Rules' (noted above).

³⁹⁴ CRC Committee, General Comment No. 10 (2007), Children's rights in juvenile justice, para. 52.

³⁹⁵ *Ibid.*, paras. 51-52.

³⁹⁶ See OHCHR, 'Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities', UN Doc. A/HRC/10/48, 26 January 2009, p. 15.

³⁹⁷ CRPD Committee Guidelines, 10.

³⁹⁸ Article 15(2) CRPD requires parties to ensure that persons with disabilities are given effective protection against such treatment 'on an equal basis with others'. On the subjective nature of the threshold for cruel, inhuman or degrading treatment or punishment and torture, see HRC, *Vuolanne v Finland*, Communication No. 265/1987, 7 April 1989, para. 9.2.

³⁹⁹ ECtHR, *Price v U.K.*, No. 33394/96, ECHR 2001-VII.

⁴⁰⁰ Articles 3(1) and 2 TEU.

