



FUTURE OF EUROPE: INTERNATIONAL HUMAN RIGHTS IN EUROPEAN INTEGRATION

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EXECUTIVE SUMMARY

Under the United Nations Human Rights system, States are the duty bearers. It is States which report to the expert bodies established under human rights treaties and against which individual communications may be filed; and it is States that are monitored by the Human Rights Council under the Universal Periodic Review (UPR), as well as through the Special Procedures the Council has established.

The Member States of the European Union, however, have transferred competences to the EU in a wide range of areas related to implementing their duties under international human rights law. While European integration has generally resulted in strengthening the protection of human rights across the EU, it may also result in accountability gaps. An EU Member State may claim that the source of the violation is in an act adopted by the EU in order to evade its own responsibility, or it may be faced with conflicting obligations, under EU law and international human rights law respectively. Better aligning EU law- and policy-making with the requirements of international human rights law as defined in UN human rights instruments may reduce such risk of conflicts.

This study aims to assess the reality of the gap between human rights commitments at domestic and EU levels, to identify the opportunities a better alignment might provide, and to discuss possible ways forward. It proceeds in five steps.

Chapter I considers the architecture of fundamental rights protection in the EU. While the Court of Justice of the European Union has gone to great lengths to protect fundamental rights, it has been selective in its references to UN human rights treaties. While occasionally acknowledging the role of the International Covenant on Civil and Political Rights as well as the Convention on the Rights of the Child, it has barely mentioned other instruments. This selective approach was confirmed with the proclamation of the European Union Charter of Fundamental Rights in 2000 and its later integration in the EU Treaties: the Charter is silent on a number of rights protected under international human rights law, particularly in the area of economic and social rights, and the Explanations accompanying the Charter make scant reference to UN human rights treaties as a source of inspiration for the EU fundamental rights *acquis* it seeks to codify.

As a result of this selective approach, a mismatch has now emerged between the duties of EU Member States under the various UN human rights treaties they have acceded to, and the human rights duties that apply in the scope of applying EU law. Chapter II examines whether such a mismatch can be compensated by the role of fundamental rights in the law- and policy-making process in the EU. References to UN human rights instruments in the various impact assessment tools that the EU institutions have developed in recent years remain sporadic and uneven. This could be addressed by going beyond references to the EU Charter of Fundamental Rights alone and expanding the range of instruments considered in the scope of applying EU law; by ensuring that the monitoring bodies' interpretation of such instruments is taken into account; and by strengthening fundamental rights impact assessments, using indicators based on the normative components of human rights.

Chapter III presents the political monitoring that EU Member States are subjected to under article 7 of the Treaty on European Union (TEU) to ensure that they comply with the values on which the Union was founded, notably democracy, human rights and the rights of persons belonging to minorities, and the rule of law. The various tools that the institutions have developed to discharge their duties under article 7 TEU should, in principle, allow the findings of UN human rights treaty bodies and Special Procedures of the Human Rights Council to inform their assessments of fundamental rights and the rule of law in EU Member States. In practice, however, such findings have been relied on in a purely *ad hoc* fashion, creating the impression of an arbitrary, "cherry-picking" approach to the findings of UN mechanisms. This could be remedied if the institutions involved in article 7 TEU proceedings relied more routinely on the EU Fundamental Rights Information System (EFRIS) set up by the EU Fundamental Rights Agency, which systematically includes the findings of UN monitoring bodies. Furthermore, if collaboration were deepened between the EU institutions and the UN Human Rights Office, such cooperation would ensure that assessments of the EU institutions

operating under article 7 TEU were more systematically informed by the findings of UN human rights treaty bodies and the Special Procedures.

The marginal role that UN human rights standards play in the EU human rights regime means that EU Member States risk facing conflicting obligations imposed under EU law and UN human rights instruments they have ratified. States may also be subject to certain disciplines – particularly as regards macro-economic adjustment programs – that will conflict with their duty not to adopt retrogressive measures in the area of social rights unless certain strict conditions are met. Chapter IV discusses the risks posed by such a situation. Human rights monitoring bodies and courts may question the delegation of powers to the EU without ensuring that the full range of mandatory human rights are complied with by Member States. The same human rights mechanisms may then increasingly seek to address the EU itself, assessing measures adopted by the EU, either directly or indirectly, when examining the human rights obligations of EU Member States.

Finally, Chapter V explores various more or less ambitious options to better link EU law- and policy-making to UN human rights instruments and thereby ensure that the standards developed by UN human rights mechanisms and their findings are better taken into account. Four routes are examined. UN human rights mechanisms could engage directly with the EU in discharging their monitoring roles. The EU Charter of Fundamental Rights should be more systematically interpreted in light of UN human rights standards. The findings of UN human rights mechanisms could feed into the monitoring of EU Member States under the procedures established by article 7 TEU. Finally, mechanisms could be set up to ensure the mainstreaming of fundamental rights in EU law- and policy-making.

INTRODUCTION

International treaties call upon States to bear responsibility in the area of human rights.¹ It is States which report to the expert bodies (the so-called “UN human rights treaty bodies”) established under these instruments. It is against States that victims of rights violations may file individual communications. It is States, ultimately, that are subjected to the Universal Periodic Review (UPR), the monitoring procedure inaugurated in 2007 when the Human Rights Council was established.

The Member States of the European Union, however, have transferred competences to the EU in a wide range of areas related to implementing their duties under international human rights law. This has had positive impacts in areas such as the equal treatment of women and men, the fight against discrimination, and the protection of personal data – areas in which the EU has strengthened the protection of human rights. The transfer of powers to the supranational institutions of the EU may, however, also result in an accountability gap. In order to evade its own responsibility, or to argue that it faces conflicting EU and international human rights law obligations, an EU Member State may claim that the source of the violation is in an act adopted by the EU. The European arrest warrant, for instance, may lead one Member State to surrender a suspected criminal to another, even though doubts exist as to whether the rights of defense are fulfilled in the receiving State.² An asylum-seeker in one Member State may be returned to another Member State in accordance with the so-called “Dublin” system, which allocates responsibilities across States for treating asylum claims filed in the EU. This transfer can happen even though the conditions for welcoming asylum-seekers and processing their applications in the receiving State may not be satisfactory.³ Or, in a very different domain, the conditionalities set by the European Stability Mechanism (colloquially known as the “European IMF”) for granting financial assistance may be inconsistent with the requirements of social rights.

The Court of Justice of the European Union has, of course, gone to great lengths to ensure that fundamental rights are fully respected in the scope of applying European Union law. It has done so, however, on the basis of the European Union Charter of Fundamental Rights and a range of fundamental rights included in the general principles of EU law; the safeguards developed under the supervision of the Court of Justice thus remain internal to the EU legal order, based on sources which, though closely aligned with international human rights standards applicable to the EU Member States, are not identical to such standards. A gap remains insofar as external bodies, including UN human rights monitoring bodies, cannot provide such an assessment on the basis of the standards that apply to EU Member States. Divergences, therefore, cannot be excluded, and conflicts may become a more frequent occurrence in the future.

Better aligning EU law- and policy-making with the requirements of international human rights law as defined in UN human rights instruments may reduce such risks of conflict. It would also provide an opportunity to explore how the competences attributed to the EU could be exercised in order to move towards the full realisation of human rights. This would be particularly useful in areas where legal bases exist for the EU to take action, such as discrimination, workers’ rights, and protecting the rights of migrants and asylum-seekers. International human rights law should, therefore, not be seen as an obstacle to the progress of integration within the European Union; instead, it can be an engine driving such integration.

This study aims to assess the reality of the gap between human rights commitments at domestic level and EU level, to identify the opportunities that better alignment might provide, and to discuss possible ways forward. It proceeds in five steps. Chapter I considers the architecture of protecting fundamental rights in the EU. Chapter II examines the role of fundamental rights in law- and policy-making. Chapter III presents the political monitoring to which EU Member States are subjected in ensuring that they comply with the values on which the Union was founded. Such values include democracy, human rights and the rights of persons belonging to minorities, and the rule of law. These different layers of fundamental rights protection in the EU assess the extent to which the United Nations human rights treaties and the standards developed by UN human rights mechanisms have influenced the EU system of human rights protection. Chapter IV then assesses whether the status of UN human rights standards is satisfactory, both from the point of view of international law and in terms of policy. On the basis of this assessment, Chapter V examines which steps could be taken – and by which actors – in order to improve the gaps identified.

THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE LEGAL ORDER OF THE EUROPEAN UNION

This chapter examines whether human rights protection in the EU legal order is aligned with the international human rights obligations of the EU Member States, as stipulated in United Nations human rights instruments. It describes the role played by the European Court of Justice as well as the contribution of the EU Charter of Fundamental Rights to such protection. It demonstrates that both the Court's jurisprudence and the Charter have been highly selective in their relationship to international human rights law: whereas Council of Europe instruments (the European Convention on Human Rights and, to a lesser extent, the European Social Charter) have influenced the content of fundamental rights protected in the EU legal order, UN human rights instruments have been largely ignored. While the Court of Justice has occasionally relied on the International Covenant on Civil and Political Rights and on the Convention on the Rights of the Child, other UN human rights instruments have not been seen as equally relevant. Surprisingly, this has been true even for the UN Convention on the Rights of Persons with Disabilities, despite the fact that the Convention has been ratified by all EU Member States and that the EU itself acceded to this instrument in 2011.

Fundamental rights in the "constitutional order" of the European Union

The European Court of Justice (now the Court of Justice of the European Union) has incorporated fundamental rights in its case law since the early 1970s. In 2000, the EU Charter of Fundamental Rights was adopted to make this *acquis* more visible.⁴ The Charter now has (since the entry into force of the Lisbon Treaty) the same legal force as the treaties.⁵ It binds EU institutions as well as EU Member States acting in the scope of applying EU law – that is, when they implement a directive, apply a regulation, execute a decision, or restrict an economic freedom stipulated in the treaties.

While the preamble of the EU Charter of Fundamental Rights only explicitly refers to the main Council of Europe human rights instruments (the European Convention on Human Rights and the European Social Charter) it also states that the Charter contains rights that are part of the "international obligations common to the Member States". However, the Charter provides only a partial codification of internationally recognized human rights. Significant omissions should be noted when compared with UN human rights treaties, particularly in the area of social rights. Thus, for instance, the EU Charter of Fundamental Rights is silent on the right to fair remuneration,⁶ which is guaranteed under the International Covenant on Economic, Social and Cultural Rights, article 7 of which refers to remuneration providing "fair wages" and ensuring workers "a decent living for themselves and their families".⁷ It does mention the right to healthcare, the right to social assistance as a means to combat social exclusion, and the right to housing; the wording, however, reveals that the drafters of these provisions were uncomfortable with the idea of guaranteeing certain entitlements in the area of applying EU law (the only area in which the EU Charter of Fundamental Rights applies, in accordance with article 51) where the subject matter is to be regulated by Member States.⁸

As regards social rights in general, these omissions of the EU Charter of Fundamental Rights, or its hesitant formulations (e.g. "the Union recognises and respects right X in accordance with the rules laid down by Union law and national laws and practices"), can be explained by the absence of any clear link to the competence attributed to the EU in the areas concerned. This betrays a fundamental misunderstanding of the relationship between the duty to comply with fundamental rights and the attribution of competences to the European Union. The duty to comply with fundamental rights is analytically distinct from the competence to implement such rights, since fundamental rights imply primarily negative duties (the responsibility not to take actions that might result in infringements). Only secondarily do they impose certain positive duties (to protect and to fulfil rights). Whereas the EU can only discharge the latter category of duties provided it has been attributed the relevant competences, the former duties involve certain restrictions to the exercise of powers, in whatever areas such powers are attributed.

Other omissions of the EU Charter of Fundamental Rights in the area of fundamental social rights stem from

a narrow understanding of what constitutes social rights, as opposed to mere “objectives for action by the Union”, to reiterate the distinction used by the conclusions adopted at the 3-4 June 1999 Cologne European Council, which established the body tasked with preparing the Charter.⁹ The most notorious example is the right to work, as guaranteed in particular by article 6 of the International Covenant on Economic, Social and Cultural Rights. The same right is also protected, for instance, under article 27(1)(b) of the Convention on the Rights of Persons with Disabilities. The Treaty on European Union lists “full employment” as part of the objectives of the Union, and Article 9 of the Treaty on the Functioning of the European Union (TFEU) provides that the Union shall take into account requirements linked to “the promotion of a high level of employment” in defining and implementing its policies and activities. Nevertheless, whereas Article 6 of the International Covenant on Economic, Social and Cultural Rights recognises the right to work, and commits States parties to “take appropriate steps to safeguard this right”, the equivalent provision in the EU Charter of Fundamental Rights only refers to the freedom of everyone to engage in work; it doesn’t imply a duty of the State to aim to provide employment to all. Although other provisions of the Charter refer to the right of access to placement services free of charge (article 29) or to the right to protection against unjustified dismissal (article 31), these are only specific dimensions of the broader set of duties that correspond to fulfilling the right to work as a human right.¹⁰

Although the European Pillar of Social Rights,¹¹ adopted in 2017, was an important initiative towards achieving greater convergence of the EU Member States within the social dimension, and thus reducing the risk of social dumping, it does not compensate for this lacuna; nor does it compensate for the fact that a range of social rights recognized in international human rights law are either not mentioned, or are not recognized as fully enforceable rights in the EU Charter of Fundamental Rights. Indeed, however promising it may be as an instrument designed to ensure that the macroeconomic policies encouraged under the European Semester go hand in hand, with greater convergence, in the area of social rights, the European Pillar of Social Rights is not a human rights instrument providing for enforceable guarantees; it remains a political document, which shall henceforth allow for regular assessment of the employment and social performances of the EU Member States on the basis of a Social Scoreboard. Moreover, although the commentary accompanying it refers to a number of ILO conventions, it is almost entirely silent on UN human rights instruments.¹²

The EU Charter of Fundamental Rights is also selective when explaining the sources of inspiration for the guarantees it does include. The Explanations appended to the Charter,¹³ which are to be taken into account in its interpretation, make scant reference to UN human rights treaties, despite the strong correspondances that exist and which could have been explicitly acknowledged, with provisions included in the Charter (see Table 1).¹⁴

Table 1. References to human rights treaties in the Explanations accompanying the EU Charter of Fundamental Rights (second column), and human rights treaties omitted from the Explanations (third column).

Source: compilation by the author.

EU Charter of Fundamental Rights	Reference to UN human rights treaties in Explanations	Other correspondances in UN instruments
Title I. Dignity		
Art. 1. Human dignity	Preamble of the 1948 Universal Declaration of Human Rights	UDHR, arts. 1, 22 and 23(3) ICCPR, art. 10 ICESCR, art. 13 MWC, art. 17(1)
Art. 2. Right to life	-	ICCPR, art. 6 CRC, art. 6
Art. 3. Right to the integrity of the person	-	ICCPR, art. 7 CEDAW, art. 16 (as regards reproductive health)

Art. 4. Prohibition of torture and inhuman or degrading treatment or punishment	-	UDHR, art. 5 ICCPR, art. 7 CAT, arts. 1 and 16 CRC, arts. 19 and 37(a) MWC, art. 10
Art. 5. Prohibition of slavery and forced labour	-	UDHR, art. 4 ICCPR, art. 8(1) and (2) MWC, art. 11

Title II. Freedoms

Art. 6. Right to liberty and security	-	UDHR, art. 9 ICCPR, art. 9 CRC, art. 37 (b), (c) and (d) MWC, art. 16
Art. 7. Respect for private and family life	-	UDHR, art. 12 ICCPR, art. 17 CRC, arts. 9-10 MWC, art. 14
Art. 8. Protection of personal data	-	UDHR, art. 12 ICCPR, art. 17 CRC, art. 16
Art. 9. Right to marry and to form a family	-	UDHR, art. 16 ICCPR, art. 23 CEDAW, art. 16
Art. 10. Right to freedom of thought, conscience and religion	-	UDHR, art. 18 ICCPR, art. 18 CRC, art. 14 MWC, art. 12
Art. 11. Freedom of expression and information	-	UDHR, art. 19 ICCPR, art. 19 CRC, arts. 13 and 17 MWC, art. 13
Art. 12. Freedom of assembly and of association	-	UDHR, arts. 20 (assembly and association), 21 (political participation) and 23(4) (trade unions) ICCPR, arts. 21 (assembly), 22 (association) and 25 (political participation) ICESCR, art. 8 (association) CRC, art. 15
Art. 13. Freedom of the arts and sciences	-	UDHR, art. 27 ICCPR, art. 19(2) and (3) ICESCR, art. 15
Art. 14. Right to education	-	UDHR, art. 26 ICESCR, arts. 13 and 14 CRC, arts. 28 and 29

Art. 15. Freedom to choose an occupation and right to engage in work	-	UDHR, art. 23(1) ICCPR, art. 8(3)(a) ICESCR, art. 6 ICERD, art. 5(e)(i) CRC, art. 32 MWC, arts. 11, 25, 26, 40, 52 and 54
Art. 16. Freedom to conduct a business	-	
Art. 17. Right to property	-	UDHR, arts. 17 (right to property) and 27 (right of everyone to the protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author) ICESCR, art. 15(1)(c) (right of everyone to the protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author) MWC, art. 15
Art. 18. Right to asylum	Geneva Convention on the Status of Refugees, 28 July 1951 (referred to in art. 78 TFEU)	UDHR, art. 14 CRC, art. 22
Art. 19. Protection in the event of removal, expulsion or extradition	ICCPR, art. 13	Prohibition of collective expulsion of aliens: MWC, arts. 22(1) and 56 Non-refoulement: ICCPR, art. 7 CAT, art. 3(1) MWC, art. 10

Title III. Equality

Art. 20. Equality before the law	-	UDHR, art. 7 ICCPR, arts. 2(1) and 26 ICESCR, art. 2(2) ICERD, art. 5 CEDAW, art. 2 CRPD, art. 5(1) CRC, art. 2
Art. 21. Non-discrimination	-	Same
Art. 22. Cultural, religious and linguistic diversity	-	UDHR, art. 27(1) ICCPR, art. 27 ICESCR, art. 15(1)(a) CRC, art. 30
Art. 23. Equality between women and men	-	UDHR, art. 7 ICCPR, arts. 2(1), 3 and 26 ICESCR, arts. 2(2) and 3 CEDAW

Art. 24. The rights of the child	"This article is based on the New York Convention on the Rights of the Child ... ratified by all the Member States, particularly articles 3 [best interests of the child as a primary consideration in all actions concerning children], 9 [separation of the child from his/her parents], 12 [views of the child to be given due weight in accordance with the age and maturity of the child] and 13 [freedom of expression] thereof."	
Art. 25. The rights of the elderly	-	
Art. 26. Integration of persons with disabilities	-	CRPD, esp. art. 19 (right of all persons with disabilities to live in the community, and to full inclusion and participation in the community)

Title IV. Solidarity

Art. 27. Workers' right to information and consultation within the undertaking	-	
Art. 28. Right to collective bargaining and action	-	ICESCR, art. 8(1)(d) (right to strike)
Art. 29. Right of access to placement services	-	ICESCR, art. 6(2) CEDAW, art. 10
Art. 30. Protection in the event of unjustified dismissal	-	ICESCR, art. 6
Art. 31. Fair and just working conditions	-	UDHR, art. 23(1) ICESCR, art. 7
Art. 32. Prohibition of child labour and protection of young people at work	-	ICESCR, art. 10(3) CRC, art. 32
Art. 33. Family and professional life	-	ICESCR, art. 10 CEDAW, arts. 5 and 11(2)(c) and (d)
Art. 34. Social security and social assistance	-	UDHR, arts. 22 and 25 ICESCR, art. 9 CRC, art. 26 CRPD, art. 28
Art. 35. The right to health care	-	UDHR, art. 25 ICESCR, art. 12 CRC, art. 24
Art. 36. Access to services of general economic interest	-	
Art. 37. Environmental protection	-	

Art. 38. Consumer protection	-	
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Title V. Citizens' rights		
Art. 39. Right to vote and to stand as a candidate at elections to the European Parliament	-	UDHR, art. 21 ICCPR, art. 25 ICERD, art. 5(c) CEDAW, art. 7 CRPD, art. 29
Art. 40. Right to vote and stand to stand as a candidate at municipal elections	-	Same
Art. 41. Right to good administration	-	
Art. 42. Right of access to documents	-	
Art. 43. European Ombudsman	-	
Art. 44. Right to petition	-	
Art. 45. Freedom of movement and of residence	-	UDHR, art. 13 ICCPR, art. 12(1)
Art. 46. Diplomatic and consular protection	-	

Title VI. Justice		
Art. 47. Right to an effective remedy and to a fair trial	-	UDHR, arts. 8 and 10 ICCPR, arts. 2(3), 9(5) and 14(6) CAT, art. 14 CRC, art. 37(d) CRPD, art. 13 MWC, arts. 16(6) and 18
Art. 48. Presumption of innocence and right of defence	-	UDHR, art. 11 ICCPR, art. 14 CRC, art. 40(2)(b) MWC, art. 18(2) and (3)
Art. 49. Principles of legality and proportionality of criminal offences and penalties	ICCPR, art. 15	UDHR, art. 11(2) MWC, art. 19(1)
Art. 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence	-	ICCPR, art. 14(7) MWC, art. 18(7)

The role of UN human rights instruments in inspiring the development of fundamental rights as part of the general principles of European Union law

As the previous section has shown, when the EU Charter of Fundamental Rights was drafted, an opportunity was missed to anchor the fundamental rights protection of the EU firmly in the body of international human rights law, which would have improved consistency across both systems of protection. The selective approach adopted by the drafters of the Charter is especially surprising since the UN human rights instruments listed in the table above are, in principle, instruments from which the Court of Justice of the European Union may

seek inspiration in order to develop the general principles of Union law that it upholds in accordance with article 6(3) of the Treaty on European Union. Indeed, in developing general principles of EU law, the Court of Justice considers that it may seek inspiration not only from the domestic constitutions of EU Member States, but also from “international treaties for the protection of human rights on which the member States have collaborated or of which they are signatories”, which “can supply guidelines which should be followed within the framework of Community law”.¹⁵ This, in principle, could include all the core UN human rights treaties, with the exception of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (MWC) since, apart from this instrument, these core treaties have been ratified by all EU Member States. (See Box 1 on the failure of EU Member States to ratify the MWC).

Box 1. The failure of EU Member States to accede to the Migrant Workers Convention (MWC)

In contrast to the other core UN human rights treaties, all of which have been ratified by all EU Member States, not a single Member State has ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (MWC), adopted by General Assembly resolution 45/158 of 18 December 1990 and in force since 1 July 2003. This resistance has persisted despite calls from the European Economic and Social Committeeⁱ and the European Parliamentⁱⁱ to accede to the instrument.

This is disappointing. A survey of EU Member State government positions on the possible ratification of the MWC illustrated that the arguments against such ratification are both inconsistent and unconvincing.ⁱⁱⁱ Indeed, whereas some governments justified their reluctance to ratify this instrument by noting that the rights of migrant workers and the members of their families are already covered by other UN human rights instruments (making ratification unnecessary), other governments expressed the opposite fear that,

by granting extensive rights not only to documented migrants (legally employed in the host State) but also to undocumented migrants, the convention would encourage illegal migration. This argument is disingenuous. The MWC explicitly states that none of its provisions can be interpreted “as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation”. Moreover, it has been argued that the MWC, in fact, constitutes a powerful tool against the irregular employment of undocumented migrants, “because it clearly demands that states who ratify it contribute to the elimination of labour exploitation, abusive conditions of work and unauthorized employment and that this happens in a context of collaboration across the migration cycle (art. 68 and 69)”. “The reinforcement of the rights of migrants”, it has been noted, “is a better way to fight against migration in irregular conditions and trafficking and smuggling of human beings”.^{iv}

ⁱ See, e.g., Opinion of the European Economic and Social Committee on the “International Convention on Migrants”, adopted on 30 June 2004 by 162 votes to three with 11 abstentions (OJ C 302, 7 December 2004, p. 49); Opinion of the European Economic and Social Committee on “EU immigration and cooperation policy with countries of origin to foster development”, 2008/C 44/21(OJ C 44 of 16 February 2008, p. 5).

ⁱⁱ See, e.g., Resolution on the situation of fundamental rights in the European Union 2004-2008, P6_TA(2009)0019, 14 January 2009, par. 158; Resolution on a Common Immigration Policy for Europe: Principles, actions and tools (2008/2331(INI), P6_TA(2009)0257, 22 April 2009, par. 38.

ⁱⁱⁱ Ratification of the UN Migrant Workers Convention in the European Union. Survey on the positions of governments and civil society actors, by René Plaetevoet and Marika Sidoti, for December 18 and European Platform for Migrant Workers’ Rights (MPWR) (December 2010).

^{iv} Ibid., p. 91.

On the other hand, while it may base itself on a large range of human rights instruments (including the UN human rights treaties the EU Member States are parties to), the practice of the Court of Justice of the European Union has been uneven and to a certain extent unpredictable. It assigns a “special significance” to the European Convention on Human Rights,¹⁶ and it has also relied on the European Social Charter.¹⁷ References to UN human rights instruments as a source of inspiration for the development of fundamental rights as general principles of Union law nevertheless remain sporadic. It has occasionally made reference to the International Covenant on Civil and Political Rights (ICCPR),¹⁸ as well as to the 1989 Convention on the Rights of the Child.¹⁹ But even when such references are made, the Court of Justice of the European Union

has been reluctant to take into account the views adopted by the human rights treaty bodies tasked with interpreting international human rights instruments.²⁰ And while the EU is a party to the Convention on the Rights of Persons with Disabilities (CRPD),²¹ the Court of Justice has been hesitant to recognize its direct applicability in the EU legal order (see Box 2).

Box 2. The specific status of the Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities (CRPD) is unique insofar as it provides (in article 44) for the possibility of accession, by regional integration, organisations such as the European Union. The Council of the European Union agreed to the EU joining the Convention in 2009,ⁱ and the CRPD has been part of the EU legal order since the European Union became a party to the convention on 22 January 2011.

International agreements binding on the EU prevail over acts of the European Union.ⁱⁱ This does not necessarily imply that all such agreements may be invoked in judicial proceedings against Union acts: the Court of Justice considers that it may assess the validity of an act adopted by the European Union in light of rules of international law binding upon the Union only where “the nature and the broad logic of the international treaty at issue do not preclude this and its provisions appear, as regards their content, to be unconditional and sufficiently precise”.ⁱⁱⁱ In the 2014 case of *Glatzel*, the Court of Justice took the view that “since the provisions of the UN Convention on Disabilities are subject, in their implementation or their effects, to the adoption of subsequent acts of the contracting parties, the provisions of that convention do not constitute, from the point of view of their content, unconditional and sufficiently precise conditions which allow a review of the validity of the

measure of EU law in the light of the provisions of that convention”.^{iv} This proposition appears to rely primarily on the wording of article 4(1) of the CRPD – cited by AG Wahl – which provides that “States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability”.^v The Court of Justice implies from this provision that the CRPD is not “self-executing”; in other words, it cannot be invoked in the absence of further implementation measures by the EU.

International agreements that are not directly applicable within the EU legal order may still be invoked, however, in order to support an interpretation of EU law, where various interpretations are possible.^{vi} The provisions of the CRPD were thus relied upon, for instance, in order to interpret the concepts of “disability” or of “reasonable accommodation”, which appear in EU secondary legislation (the Employment Equality Directive^{vii}).^{viii}

Article 33(2) of the CRPD provides that its parties should establish “a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention”. It adds that in doing so, parties “shall take into account the principles relating to the status and functioning of national institutions for protection

i Council decision (2010/48/EC) on 26 November 2009 concerning the conclusion by the European Community of the UN Convention on the Rights of Persons with Disabilities, OJ L 23 of 27 January 2010, p. 35.

ii See article 216(2) TFEU, which codifies existing case law (e.g., Case 181/73, *R. & V. Haegeman v. the Belgian State* (EU:C:1974:41), para. 5; Joined Cases C 402/05 P and C 415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I 6351, para. 307; Case C 366/10, *Air Transport Association of America and Others* [2011] ECR I 13755 (EU:C:2011:864), para. 50). Concerning the UN Convention on the Rights of Persons with Disabilities, Case C 363/12, *Z. v. A Government department, The Board of management of a community school*, judgment of 18 March 2014 (EU:C:2014:159), para. 73.

iii Case C 308/06, *Intertanko and Others* [2008] ECR I 4057, para. 45; Case C 59/11, *Association Kokopelli*, judgment of 12 July 2012 (EU:C:2012:447), para. 85.

iv Case C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, judgment of 22 May 2014, EU:C:2014:350, para. 69.

v Opinion AG Wahl of 26 September 2013, in Case C-363/12, *Z.*, para. 114.

vi Case C 61/94, *Commission v. Germany* [1996] ECR I 3989, para. 52; Joined Cases C 320/11, C 330/11, C 382/11 and C 383/11, *Digitalnet*, judgment of 22 November 2012 (EU:C:2012:745), para. 39; and see, as regards the CRPD, Joined Cases C 335/11 and C 337/11, *HK Danmark acting on behalf of Jette Ring*, judgment of 11 April 2013 (EU:C:2013:222), para. 29; or Case C 363/12, *Z. v. A Government department, The Board of management of a community school*, judgment of 18 March 2014 (EU:C:2014:159), para. 72.

vii Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

viii Joined Cases C 335/11 and C 337/11 *HK Danmark acting on behalf of Jette Ring*, judgment of 11 April 2013 (EU:C:2013:222).

and promotion of human rights”.^{ix} The implication is that only mechanisms independent from the Executive should be involved in the domestic level monitoring of CRPD implementation: the Paris Principles provide that if governmental departments are included in institutions for the promotion and protection of human rights, “their representatives should participate in the deliberations only in an advisory capacity”.^x When the Committee on the Rights of Persons with Disabilities reviewed the European Union on the basis of its initial report, it noted that it was anomalous to have the European Commission

included within the monitoring framework established in accordance with article 33(2) CRPD. As such, the Committee recommended “that the European Union take measures to decouple the roles of the European Commission in the implementation and monitoring of the Convention, by removing it from the independent monitoring framework, so as to ensure full compliance with the Paris Principles”.^{xi} Following the notification of the Concluding Observations, the Commission immediately suspended its participation in the monitoring framework, while remaining the focal point for the European Union.

ix This refers to the Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (Paris Principles), endorsed by General Assembly Resolution 48/134 of 20 December 1993.

x Paris Principles, para. 1, e), of the section related to “Composition and guarantees of independence and pluralism”.

xi Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of the European Union (CRPD/C/EU/CO/1, 2 October 2015), para. 77.

Conclusion

When fundamental rights first appeared in the EU legal order in the early 1970s, at the initiative of the Court of Justice of the European Communities (as it was known then), “international treaties for the protection of human rights on which the member States have collaborated or of which they are signatories” were listed among the sources which could “supply guidelines” for the gradual development of fundamental rights within the framework of EU law. Since then, however, the Court of Justice has affirmed the “special significance” of the European Convention on Human Rights in developing the general principles of Union law, with which it ensures compliance; moreover, it has been selective in its references to UN human rights treaties, occasionally acknowledging the role of the International Covenant on Civil and Political Rights and of the Convention on the Rights of the Child, while barely ever mentioning other instruments.

The proclamation of the EU Charter of Fundamental Rights in 2000, and its later integration in the EU Treaties, confirmed such a selective approach. The Charter is silent, for instance, on the right to fair remuneration, the right to work (which goes beyond the freedom of everyone to engage in work stipulated in the Charter), and the right to food. And whereas access to healthcare, social assistance as a means to combat social exclusion, and housing are all mentioned in the Charter of Fundamental Rights, the drafters of these provisions deliberately avoided using the language of rights. They did so both because of their concern that they could not guarantee certain entitlements in the area of applying EU law (the only area in which the EU Charter of Fundamental Rights applies, in accordance with article 51) where the subject matter is to be regulated by the Member States, and because their mandate was to refer to social rights only to the extent such rights did not constitute mere “objectives for action by the Union”, i.e., were not purely programmatic in nature. As to the Explanations accompanying the Charter, they refer only, and to a limited extent, to the International Covenant on Civil and Political Rights and to the Convention on the Rights of the Child.

Whatever the reasons for this selective approach, its consequence is that a mismatch has now emerged between the duties of EU Member States under the various UN human rights treaties they have acceded to, and the human rights duties that apply in the scope of applying EU law, under the EU Charter of Fundamental Rights or through the case law of the Court of Justice. This mismatch makes it more difficult for the EU, in multilateral fora, to position itself as a champion of human rights. It also means the EU Member States may face conflicting international obligations, stemming respectively from the human rights treaties they are parties to and from EU legislation. And it may mean that they can be seen to have “circumvented” their obligations under human rights treaties by transferring powers to the EU without ensuring that such powers would be exercised in accordance with the full range of human rights they have pledged to ensure.

PREVENTING VIOLATIONS OF FUNDAMENTAL RIGHTS THROUGH COMPATIBILITY CHECKS AND IMPACT ASSESSMENTS

As fundamental rights gradually played a more important role in the EU, the EU institutions have sought to ensure that, in EU law- and policy-making, they would be more systematically taken into account. This chapter examines successively the initiatives taken in this regard by the European Commission, the Council of the EU, and the European Parliament. It shows how the selective approach towards UN human rights instruments discussed above is reflected in the tools these institutions have designed in order to prevent fundamental rights violations in their activities and to assess the fundamental rights impacts of the measures they adopt.

The European Commission

Following the adoption of the EU Charter of Fundamental Rights, the Commission set up mechanisms to ensure it would avoid proposing legislation or policies that could potentially violate human rights.²² Two separate tools are used to this effect. The first tool is “compatibility checks”. In 2001, shortly after the EU Charter of Fundamental Rights was proclaimed, the Commission had already pledged to systematically verify the compatibility of its legislative proposals with the Charter at an early stage.²³ Later, in 2005, it clarified the methodology it would use in order to assess the compatibility of its legislative proposals with the EU Charter of Fundamental Rights.²⁴ In 2009, it published a report containing an appraisal of this methodology and announcing a range of improvements.²⁵ While the approach of the Commission could be further strengthened,²⁶ it has been effective, for the most part, in preventing the adoption of legislation inconsistent with the requirements of the Charter.

“Impact assessments” are the second tool used by the Commission to ensure the integration of fundamental rights in the law- and policy-making of the EU. Although impact assessments that include a fundamental rights dimension could potentially contribute to ensuring that legislative and policy measures are fully compatible with the requirements of the EU Charter of Fundamental Rights, they actually fulfil a different role. They allow for assessing whether a particular initiative will support the fulfilment or full realization of the fundamental rights affected, or whether they will instead create obstacles to such fulfilment. They do so without such an assessment necessarily leading to the conclusion that, in the latter situation, the right is necessarily violated. Impact assessments serve to guide the decision-makers (which, in the ordinary legislative procedure, are the European Parliament and the Council) as to the full range of impacts the submitted legislative proposal may entail. They are not a substitute for a legal assessment of whether potential interferences with fundamental rights are, or are not, justified as measures that pursue a legitimate objective by proportionate means.

The use of impact assessments has been a standard practice since 2002.²⁷ They were improved in recent years in order to better take into account the requirements of fundamental rights. The guidelines for preparing impact assessments presented in 2005 already paid greater attention to the potential effects of different policy options on the guarantees listed in the EU Charter of Fundamental Rights.²⁸ Including fundamental rights in impact assessments, however, did not lead to modifying the basic structure of such assessments, which still rely on a division between economic, social, and environmental impacts. Despite requests expressed in this regard by the European Parliament,²⁹ the Commission has repeatedly stated that it is unwilling to perform separate human rights impact assessments distinct from the assessment of economic, social, and environmental impacts. This so-called “integrated” approach allows fundamental rights impacts to be factored into a broader set of considerations, making it possible, in the overall assessment presented to decision-makers, to compensate for certain negative impacts (such as a narrowing of civil liberties or a decrease in certain public services) with positive impacts at other levels (e.g., in economic growth and social cohesion). As of 2015, the quality of impact assessments is now rigorously examined by an independent body, the Regulatory Scrutiny Board, which includes members external to the EU institutions. Its role is to “check major evaluations” and conduct “‘fitness checks’ of existing legislation” by delivering an “impartial opinion on the basis of comprehensive know-how of the relevant analytical methods”.³⁰

The role of fundamental rights in impact assessments as practiced by the Commission has been gradually enhanced. While Commission services are provided specific guidance for assessing legislative proposals submitted by the Commission,³¹ tools developed as part of the “Better Regulation” agenda apply to all initiatives. Fundamental rights are explicitly taken into account in tool 24 of the **Better Regulation ‘Toolbox’**. The Guidance provided to Commission services on preparing the fundamental rights component of impact assessments³² refers almost exclusively to the EU Charter of Fundamental Rights: the only international human rights treaty mentioned as part of the EU acquis in the area of fundamental rights is the UN Convention on the Rights of Persons with Disabilities, due to its special status in EU law (see Box 2).³³ Other UN human rights instruments are referred to, but only as a means of guiding the interpretation of the EU Charter of Fundamental Rights.³⁴ The Guidance also refers Commission services to the interpretation of UN human rights treaty bodies:

If it proves necessary in the course of your Impact Assessment to develop a deeper understanding of a certain fundamental right guaranteed by the Charter, you will need to consult the case law of the European Court of Justice, the European Court of Human Rights and in appropriate cases the opinions and general comments of the UN human rights monitoring committees.³⁵

Overall, the Commission relies only occasionally on UN human rights instruments in fundamental rights compatibility checks or impact assessments; the EU Charter of Fundamental Rights has in effect “screened out” such references in law- and policy-making. Although the European Parliament has called on the Commission on various occasions to improve this,³⁶ these calls, so far, have not been heeded.

The Council of the European Union

The Council has adopted guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council’s preparatory bodies. This is important, not only because States may wish to amend proposals submitted by the Commission (requiring that such amendments pass fundamental rights scrutiny), but also because under Article 76 TFEU, a group of Member States (representing at least a quarter of the Member States, i.e., seven States) may submit a legislative proposal relating to judicial cooperation in criminal matters or to police cooperation. These are particularly sensitive areas from the point of view of civil liberties; yet, unless the Council performs a fundamental rights compatibility check, there is no procedure to ascertain that such proposals will comply with the requirements of the EU Charter of Fundamental Rights.

A first set of guidelines was approved by the Committee of Permanent Representatives in May 2011.³⁷ The guidelines were updated in 2014 under the responsibility of the Council’s Working Party on Fundamental Rights, Citizens Rights, and Free Movement of Persons.³⁸ They include a “fundamental rights checklist” almost indistinguishable from the checklist relied on by the Commission.

These Guidelines are, for the most part, silent on the role of human rights instruments other than the EU Charter of Fundamental Rights. The ICCPR and the CRC are referred to explicitly, however, among the “international law instruments which are relevant for the interpretation of the Charter”, owing to the fact that these instruments are mentioned in the Explanations on articles 19, 24 and 49 of the Charter. Four other UN human rights instruments are mentioned among sources that “could be relevant”, but they are barely visible at all, and they are not presented as having to guide the interpretation of the Charter; surprisingly, the CRPD itself – an instrument to which the EU is a party – is not given any special treatment; it is simply cited among these instruments as a treaty that “could be relevant”.³⁹

The European Parliament

Like the Commission and the Council, the European Parliament has provided, in its Rules of Procedure, for a mechanism further strengthening its ability to ensure full respect for fundamental rights as laid down in the EU Charter of Fundamental Rights: the Committee on Civil Liberties, Justice and Home Affairs (LIBE). The LIBE committee may be called upon by the committee responsible for the subject matter, a political group,

or at least 40 Members, “if they are of the opinion that a proposal for a legislative act or parts of it do not comply with rights enshrined in the Charter”. The LIBE Committee will then provide its opinion on the matter, and the opinion “shall be annexed to the report of the committee responsible for the subject-matter”.⁴⁰

Here again, the EU Charter of Fundamental Rights – with its selective approach to the rights protected and its meagre references to UN human rights treaties as a guide to interpreting even guaranteed rights – serves as the reference point. UN human rights standards are not systematically considered; in effect, the Charter operates as a screen that hides them from sight.

Conclusion

The references to UN human rights instruments in the various impact assessment tools that the EU institutions have developed in recent years remain sporadic and uneven. While the adoption of the EU Charter of Fundamental Rights has served to promote a “fundamental rights culture” within the institutions, it has also confirmed a selective approach vis-à-vis the full range of human rights instruments to which the EU Member States are parties. The rights not listed in the Charter are almost entirely ignored, and only certain UN human rights instruments are considered in impact assessments: the Convention on the Rights of Persons with Disabilities, because the EU became a party to this instrument in 2011; the International Covenant on Civil and Political Rights, because it is referred to in the Explanations relating to articles 19 and 29 of the Charter; and the Convention on the Rights of the Child, which the Explanations refer to in article 24 of the Charter.

If references to fundamental rights – beyond the partial codification of the Charter of Fundamental Rights – is to become systematic, and if reliance on international human rights law – beyond the Charter – is to become standard practice, it should be made clear (i) which instruments beyond the Charter of Fundamental Rights should be taken into account, based not on the Explanations to the Charter alone, but on the ratification of these instruments by EU Member States; (ii) the weight that should be given to interpreting such instruments by monitoring bodies; and (iii), especially as regards fundamental rights impact assessments, which indicators should be used in assessing the contribution a particular regulatory or policy initiative makes to fulfilling human rights, or the negative impacts it may cause. Inspiration could be found, in this regard, in the work on human rights indicators by the UN Human Rights Office⁴¹ or in the contribution of UN human rights treaty bodies or Special Procedures.⁴²

POLITICAL MONITORING: ENSURING COMPLIANCE WITH THE VALUES ON WHICH THE UNION WAS FOUNDED

The Treaty of Amsterdam, which entered into force on 1 May 1999, affirmed the values on which the Union was founded: article 2 now lists these values as “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”. It also established a mechanism to ensure that these values would be complied with, providing that sanctions could be imposed on a Member State if it was found that it had acted in “serious and persistent breach” of Union values. The Treaty of Nice added a preventive component to this mechanism, which can be triggered where it is established that there is a “clear risk of a serious breach” of these values; it entered into force on 1 April 2003.

The emergence of self-proclaimed “illiberal democracies” in the European Union has led to a renewed interest in the tools available to EU institutions to enforce these values. This chapter first describes the general mechanism established by article 7 of the Treaty on European Union. It then discusses in greater detail the initiatives taken by the European Commission, the European Parliament, and the Council of the EU to discharge their functions under this provision. The discussion places a particular emphasis on the role of UN human rights instruments, standards, and mechanisms in the monitoring procedure established under the *chapeau* of article 7 of the EU Treaty.

The mechanism of article 7 of the Treaty on European Union

Article 7 TEU sets up a form of political monitoring of Member States’ compliance with the values listed in article 2 TEU. It provides for three possibilities, which are both preventive and remedial. Two preventive mechanisms are provided for in paragraph 1 of article 7 TEU. First, the Council of the EU may decide, by a majority of four fifths of its members, and with the consent of the European Parliament, to address **recommendations** to a Member State. This it may do even prior to any finding that there is a “clear risk of a serious breach” by that Member State of the values listed in article 2 TEU, if the situation is considered to be serious enough to justify such a move.⁴³ The Council may adopt such recommendations based on a “reasoned proposal” put forward by one third of the Member States (i.e., at least nine States, or eight after the United Kingdom has left the EU), by the European Parliament (acting with the same two-thirds majority), or by the European Commission. Each of these institutions may therefore trigger the procedure, taking the initiative in this regard.

The Council of the EU may also determine, according to the same procedure and with the same majority, that “there is a **clear risk of a serious breach** by a Member State of the values referred to in Article 2”. Because of its clearly condemnatory nature, the Treaty provides that the Member State in question shall be heard before such a determination is made. This determination may be made even if no recommendations were initially addressed to the Member State concerned.

Finally, paragraphs 2 and 3 of article 7 TEU provide that the European Council, acting by unanimity (minus the voice of the Member State concerned in the procedure) on a proposal put forward by one third of the Member States or by the Commission, and after obtaining the consent of the European Parliament, may determine the existence of a “**serious and persistent breach**” of the values referred to in article 2, after inviting the Member State in question to submit its own observations. Once such a determination is made, the Council of the EU, acting by a qualified majority, “may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council”.

Each of the institutions involved in the political monitoring of the values on which the Union is built has developed tools to discharge its functions under article 7 TEU. The following paragraphs examine in turn the initiatives adopted by the Commission, by the Council, and by the European Parliament. Until now, these initiatives have developed in an uncoordinated fashion, resulting in a patchy and potentially confusing

ensemble. Moreover, as explained below, the reference to UN human rights standards as well as to the findings of UN human rights monitoring bodies has been uneven.

The initiatives taken by the European Commission: the rule of law framework

In order to clarify the steps it would take before relying on article 7 TEU to ensure compliance with the values of article 2 TEU, on 11 March 2014 the Commission issued a communication on a new EU framework to strengthen the rule of law.⁴⁴ After this procedure was applied in the case of Poland, building on the lessons learned, further improvements were proposed in a communication presented on 17 July 2019, titled "Strengthening the rule of law within the Union: A blueprint for action".⁴⁵

In its 2014 communication presenting the Rule of Law Framework, the Commission had made it clear that its preliminary assessment of the rule of law situation in any EU country would be based "on the indications received from available sources and recognized institutions, including notably the bodies of the Council of Europe and the European Union Agency for Fundamental Rights".⁴⁶ Indeed, at all steps of implementing the Rule of Law Framework, the Commission may refer to any sources of information at its disposal, including assessments by UN human rights mechanisms. Thus, for instance, in its recommendation of 21 December 2016, following up on the first rule of law recommendation it addressed to Poland on 27 July 2016 (2016/1374), expressing its concerns as regards the rule of law in Poland, the Commission took into account, among many other authorities, the concluding observations adopted in October 2016 by the Human Rights Committee on the seventh periodic report of Poland.⁴⁷ And on 20 December 2017, it presented a reasoned proposal in accordance with article 7(1) TEU regarding the rule of law in Poland, proposing a Council decision to determine whether there was a clear risk of a serious breach of the rule of law by the Republic of Poland. The Commission included in the "Factual and procedural background" the results of the Universal Periodic Review of the Human Rights Council, before which Poland had presented its third periodic review. The results of the periodic review included recommendations on judicial independence on the rule of law,⁴⁸ as well as recommendations as to the preliminary observations presented on 27 October 2017 by the United Nations Special Rapporteur for the Independence of Judges and Lawyers, Mr Diego García-Sayán, following his visit to Poland. The Special Rapporteur raised a series of concerns regarding judicial independence in his comments on the two draft laws, on the Supreme Court and the National Council for the Judiciary.⁴⁹ The third part of the Commission's reasoned proposal notes that "a wide range of actors at European and international level (including the United Nations Human Rights Committee and the United Nations Special Rapporteur on the independence of judges and lawyers) have expressed their deep concern about the situation of the rule of law in Poland".⁵⁰

While such references are welcome, it is striking that, while statements from UN mechanisms are cited in support of the conclusions reached by the Commission, the standards themselves are exclusively derived from the case law of the Court of Justice of the European Union or the European Court of Human Rights, from the recommendations adopted by the Council of Europe's Committee of Ministers (bringing together the delegates of the Foreign Affairs Ministers of the 48 Council of Europe Member States), or from the opinions of the European Commission for Democracy through Law (the "Venice Commission"), an independent consultative body established in 1990 under the auspices of the Council of Europe to support legal reforms to ensure the rule of law and democracy. Although UN standards exist on the independence of judges – the key issue in the Polish case – such standards were not referred to, let alone chosen as a basis for the Commission's assessment. It is hoped, however, that the new "Rule of Law Review Cycle" (announced in July 2019), centred on the preparation by the Commission of an annual Rule of Law Report, will explicitly include such references. This would constitute an encouraging step forward. Indeed, although the Commission may consult whatever sources of information it wishes in preparing its assessment, UN human rights mechanisms are barely mentioned at all in the July 2019 communication: a single reference is made to the work of the United Nations Special Rapporteur on the Independence of Judges and Lawyers, which the Commission mentions simply to note that, together with other mechanisms, the Special Rapporteur "contributed to the debate in the international community on the rule of law and its implications".⁵¹

The Commission is currently exploring other means to ensure compliance with the values on which the Union was founded. It has proposed, in particular, to make the delivery of structural funds conditional upon such compliance, by allowing the suspension of EU funding in situations of “generalised deficiencies as regards the rule of law”, which it defines as “a widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law”.⁵² Although, for the activation of this mechanism, the Commission refers to “the use of external expertise from the Council of Europe”, and although the proposal would allow the Commission to take into account “all relevant information” (article 5(2)), again, no explicit mention is made of other human rights mechanisms, such as those established by UN human rights treaties or the Special Procedures of the Human Rights Council.

In order to build trust in its use of the safeguard mechanism established under article 7 TEU, the Commission could define more clearly which sources of information it shall use in order to assess the situation of the rule of law, democracy, and human rights in the EU Member States. In so doing, it could give particular weight to the findings of independent experts and monitoring bodies established by the Council of Europe and the United Nations. Making such references systematic, and clarifying the data on which it bases its assessment, should not be seen as restricting the discretionary powers of the Commission. Article 7 TEU does not impose a duty to act, but if the Commission does choose to launch a dialogue with a Member State about concerns and subsequently wishes to exercise its powers under article 7 TEU, relying on the findings of independent experts and monitoring bodies will significantly enhance the credibility of its position – particularly if those findings come from authorities external to EU institutions. Indeed, it would serve as the best response to the accusations of politicisation and discriminatory treatment sometimes made by the governments under scrutiny. Reliance on the EU Fundamental Rights Information System (EFRIS) would facilitate this, given that EFRIS was set up by the EU Fundamental Rights Agency to facilitate access to relevant existing information and reports on the situation in EU Member States. And EFRIS already systematically includes the findings of UN monitoring bodies.

Initiatives taken by the Council of the EU: “dialogues on the rule of law in the Union”

Within the Council, a new annual “dialogue on the rule of law in the Union” was launched in 2014.⁵³ In establishing this new practice, the Council expressed its intention “to encourage the culture of ‘respect for rule of law’ through a constructive dialogue among the Member States . . . by promoting the political dialogue within the Council in respect of the principles of objectivity, non discrimination, equal treatment, on a non-partisan and evidence-based approach”.⁵⁴ The dialogues are prepared in expert seminars generally bringing together representatives of the EU Member States, EU institutions, the Fundamental Rights Agency, and civil society groups. Whereas the Fundamental Rights Agency and, to a limited extent, the Council of Europe were invited to contribute to the preparation of the dialogues, the expertise of the UN human rights mechanisms was not called upon.

Responses to a questionnaire sent out to EU Member States in September 2016⁵⁵ suggest significant support for some UN involvement in the process. This was the case not only among the approximately ten Member States, who appear to be in favour of strengthening the rule of law dialogue into a peer review mechanism, but also among States who believe that the current dialogues could benefit from a more evidence-based approach. Other Member States, however, expressed objections to any UN involvement preferring the exclusive involvement of EU bodies.

Such answers are difficult to interpret, however. In part the difficulty lies in the varying interpretations of what United Nations involvement might look like. One option would be to formally involve the UN Human Rights Office. It could present EU Member States with a synthesis of the findings of UN human rights treaty bodies as well as the Special Procedures on certain areas related to the rule of law that have been identified for peer review. Such involvement would be analogous with the framework of the Universal Periodic Review (UPR) before the Human Rights Council. This option, however, would probably be perceived as too intrusive and, indeed, as duplicating the UPR itself; it is unlikely it would be supported by a sufficiently large number of Member States. A lighter option would be to strengthen the rule of law dialogue by tasking the Fundamental

Rights Agency with preparing a background report that collects data from both Council of Europe and United Nations mechanisms; this would ensure an evidence-based discussion consistent with the principles of objectivity, impartiality, and non-selectivity that a number of States have been insisting on. This second option would probably achieve a large degree of consensus across Member States.

Initiatives taken by the European Parliament

The Treaty of Amsterdam added a provision to the Treaty on European Union that introduced a form of political monitoring to gauge compliance with the values on which the Union was founded (what is now Article 7 (2) to (5) TEU). After this provision was brought in, the question arose as to whether these innovations should lead to permanent monitoring of the situation of fundamental rights in the Member States. The question became even more pressing after the Treaty of Nice, which introduced the preventive component of Article 7 TEU (corresponding to Article 7(1) TEU). It is in that context that the European Parliament, through its Committee on Civil liberties, Justice and Home Affairs (LIBE Committee), gradually decided to explicitly take on a monitoring role.

Acting on the initiative of its LIBE Committee, the European Parliament adopted annual reports on the situation of fundamental rights in the European Union. It produced reports each year between 2000 and 2004, but then abandoned this practice until 2009. It then adopted a single report on the situation of fundamental rights in the Union from 2004 to 2008.⁵⁶ In the resolution, adopted on 14 January 2009, on the situation of fundamental rights in the European Union from 2004 to 2008, the Parliament noted that “as the directly elected representative of the citizens of the Union and guarantor of their rights, (it) believes that it has a clear responsibility to uphold (the principles listed in Article 6 of the EU Treaty, which states that the European Union is based on a community of values and on respect for fundamental rights), in particular as the Treaties in their current form greatly restrict the individual’s right to bring actions before the Community courts and the European Ombudsman”.⁵⁷ The Parliament also “deplore(d) the fact that the Member States continue to refuse EU scrutiny of their own human rights policies and practices and endeavour to keep protection of those rights on a purely national basis, thereby undermining the active role played by the European Union in the world as a defender of human rights and damaging the credibility of the EU’s external policy in the area of the protection of fundamental rights”. The resolution requested that the EU institutions “establish a monitoring mechanism and a set of objective criteria for the implementation of Article 7 of the EU Treaty”.⁵⁸

The European Parliament has reiterated its call for a more systematic review of the situation of fundamental rights in EU Member States on a number of occasions. In a resolution adopted on 25 October 2016, it went further, proposing the establishment of an EU mechanism on democracy, the rule of law, and fundamental rights, and offering a detailed proposal for an inter-institutional mechanism to that effect.⁵⁹ The proposal was given a cool reception by the European Commission.⁶⁰ It did, however, help to launch a debate on the need to better align the procedures involved in the mechanisms provided for under article 7 TEU.

Quite apart from establishing a permanent monitoring mechanism, however, the Treaty on European Union attributes to the European Parliament a role in triggering the procedure provided for under article 7(1). This procedure is meant to identify a “clear risk of a serious violation” of the values of article 2 TEU. In the first such resolution the Parliament adopted, it stated its view that developments in Hungary “represent a systemic threat to the values of Article 2 TEU and constitute a clear risk of a serious breach thereof”.⁶¹ It went on to recommend that the Council “determine whether there is a clear risk of a serious breach by Hungary of the values referred to in Article 2 TEU and to address appropriate recommendations to Hungary in this regard”.⁶² The Parliament noted that the values listed in article 2 of the Treaty of European Union are not only “reflected in the Charter of Fundamental Rights of the European Union” but are also “embedded in international human rights treaties”.⁶³ Its resolution refers specifically, *inter alia*, to concluding observations of the Human Rights Committee and of the Committee on the Rights of the Child, as well as to findings of the Special Procedures of the Human Rights Council and statements by the UN High Commissioner for Human Rights.

Such references illustrate the important role played by the findings made by UN human rights mechanisms,

which corroborate those of European courts or of the Venice Commission of the Council of Europe. At the same time, like in the reasoned proposal presented by the Commission following the failure of Poland to implement the Rule of Law recommendations, there is no explicit mention of the standards developed at UN level, for instance in the form of general comments/recommendations adopted by UN human rights treaty bodies or guidelines presented by Special Procedures and endorsed by the Human Rights Council.

Conclusion

Article 7 TEU provides for the Commission, the Council of the EU, and the European Parliament, to each have a role in ensuring that EU Member States comply with the values on which the Union was founded. It specifically allows them to address recommendations, identify “clear risks of serious violations”, and adopt sanctions for “serious and persistent breaches” of such values.

The institutions have developed a variety of tools (the Rule of Law framework and now the Rule of Law Review Cycle adopted by the Commission, the Rule of Law dialogues of the Council, as well as reports on the situation of fundamental rights in the Union by the European Parliament), all of which should, in principle, allow the findings of UN human rights treaty bodies and Special Procedures of the Human Rights Council to inform the assessments concerning democracy, the rule of law, and human rights. In practice, however, such findings have been relied on in a purely *ad hoc* fashion, and as a largely secondary source of evidence. Priority has been given to the analysis presented by the Fundamental Rights Agency and the Council of Europe bodies, including, particularly as regards rule of law issues, the Venice Commission. Statements from UN human rights treaty bodies and from Special Procedures have been relied upon only to support assessments that were based primarily on sources of information from the EU or from the Council of Europe.

This is problematic. It creates the impression of an arbitrary, “cherry-picking” approach to the findings of UN mechanisms. Rather than guarantee impartiality, objectivity, and non-selectivity in assessing Member State compliance with the values listed in article 2 TEU, the current approach risks such findings being perceived as merely instrumental. This could be remedied if, for instance, the institutions involved in article 7 TEU proceedings relied more routinely on the EU Fundamental Rights Information System (EFRIS) (set up by the EU Fundamental Rights Agency), as it already systematically includes the findings of UN monitoring bodies.

Beyond this, a Memorandum of Understanding could be concluded between the European Union and the United Nations, or perhaps between the Fundamental Rights Agency and the UN Human Rights Office. The goal would be to ensure that the findings of UN human rights treaty bodies and those of the Special Procedures systematically inform the assessments of EU institutions operating under article 7 TEU. The Memorandum of Understanding, concluded between the Council of Europe and the EU in May 2007, provides a model.⁶⁴ This could be part of a broader reform package implementing article 7 TEU to improve coordination between EU institutions (perhaps in the form of an inter-institutional agreement between them), and clarifying the methodology to be used in assessing the existence of a “clear risk of a serious breach” or a “serious and persistent breach” of the values of article 2 TEU.

THE STATUS OF INTERNATIONAL HUMAN RIGHTS LAW IN THE EUROPEAN UNION LEGAL ORDER

UN human rights instruments and the findings of UN human rights mechanisms remain relatively invisible in the EU legal order. This has a number of problematic consequences. It may make it more difficult for the EU to position itself as a credible advocate of human rights in multilateral fora, since its own commitments can be perceived to be based on a selective reading of human rights or to be poorly informed by universally developed standards. A classic example often cited is the absence of a national institution for the promotion and protection of human rights (in accordance with the Paris Principles), which is a standard recommendation to countries in the UN. Another is the unwillingness of some EU Member States to ratify UN human rights treaties or protocols that the EU itself encourages third countries to ratify – notably their failure to ratify the 1990 Migrant Workers Convention. But perhaps even more striking than these examples is the imbalance between civil and political rights on the one hand, and economic, social, and cultural rights on the other hand, in the promotion of human rights by the EU.

The lack of systematic alignment of EU rules and policies with UN standards also has specific legal consequences. Situations may occur in which EU Member States face conflicting obligations imposed respectively under the UN human rights instruments they are parties to and under EU legislation. The responsibility of EU Member States may be engaged if they have delegated powers to the EU institutions without ensuring that such powers be exercised in full conformity with the human rights duties imposed on these States by the UN instruments they are parties to. And the European Union itself may suffer reputational damage.

The responsibility of EU Member States

It has not been unusual for UN monitoring bodies to adopt a more generous interpretation of the requirements of human rights, setting the bar higher than what is imposed on EU Member States under EU law. Whereas this is not, strictly speaking, a case of conflict – it is sufficient for the Member State concerned to align itself with the highest standard of protection – such divergences are nevertheless problematic for a number of reasons that go beyond strictly legal considerations. They undermine the legitimacy of both the UN monitoring bodies and the Court of Justice, as the authority of the views they express are challenged. They are a source of legal uncertainty for the domestic courts and, generally, for the States parties: although in principle it is the protection most favorable to the individual that should prevail, this principle may be difficult to apply in practice, in situations where rights conflict with one another (and the State frequently puts forward the protection of the rights of others to justify certain interferences). Moreover, as far as political authorities are concerned, such a conclusion is not obvious; in reality, the Executive or the Legislature may feel that, since international level human rights bodies or courts cannot agree among themselves, the State is free to choose the attitude that best suits its circumstances.

Real situations of conflict may occur. Typically, an EU Member State may face certain expectations – linked, in particular, to its membership in the Euro Area, or to the European Semester – that make it more difficult for that State to comply with other, contradictory expectations expressed by human rights bodies. For instance, they may find it difficult to comply with the human rights mandate not to adopt retrogressive measures in the area of social rights unless such measures are strictly necessary and limited in time, do not result in discrimination, and do not affect the core content of economic and social rights.⁶⁵ When the Committee on Economic, Social and Cultural Rights examined the situation of Greece in October 2015, just weeks after that State had agreed to a third financial package conditional upon Greece adopting a series of structural reforms, it recommended that Greece:

review the policies and programmes adopted in the framework of the memorandums of understanding implemented since 2010, and any other subsequent post-crisis economic and financial reforms, with a view to ensuring that austerity measures are progressively waived and the effective protection

of the rights under the Covenant is enhanced in line with the progress achieved in the post-crisis economic recovery. The State party should further ensure that its obligations under the Covenant are duly taken into account when negotiating financial assistance projects and programmes, including with international financial institutions.⁶⁶

That message was ostensibly addressed to Greece; the real addressees were its creditors, who had helped design the reform packages that accompanied the successive bailout schemes.

Situations such as these may lead human rights monitoring bodies to conclude that EU Member States engage their international responsibility by delegating powers to the EU without including the necessary safeguards. Under international law, where a State seeks to avoid compliance with an international obligation by transferring powers to an international organisation and allowing it to take measures that run counter to such international obligations, it engages its responsibility.⁶⁷ A member State of an international organisation is also prohibited from using an international organisation as a vehicle to adopt acts that would be a violation of that State's obligations were they to be committed by that State acting alone.⁶⁸ In sum, States "cannot ignore their human rights obligations when acting in their capacity as members of these organisations".⁶⁹

A broader lesson emerges. The more powers are transferred to the EU, the more situations may arise in which the EU imposes on Member States certain obligations that conflict with the obligations of these States under UN human rights treaties. This can and should be avoided, by ensuring that UN human rights standards are more systematically taken into account in law- and policy-making in the EU.

The responsibility of the European Union

In a supranational organisation such as the EU, it cannot be excluded that certain measures will be adopted against the will of certain Member States. Such measures could lead to human rights violations that were not necessarily anticipated at the time powers were delegated to the organisation. In such circumstances, it cannot be said that the Member State has "circumvented" its human rights obligations; yet, since the source of the violation is the act of the international organisation itself, neither can the act in question be attributed to that State. Where the responsibility of the international organisation cannot be engaged, an accountability gap arises.

Indeed, this is the challenge currently facing the UN human rights mechanisms in their relationships with EU Member States and the European Union. Although an increasingly large set of competences are being transferred to the European Union, the UN human rights treaty bodies and Special Procedures, in principle, can only assess measures taken by EU Member States, not the European Union itself. There arises a growing mismatch between the allocation of powers on the one hand, and the tasks performed by monitoring bodies on the other. While Special Procedures have occasionally adapted their practice to the reality of integration within the EU,⁷⁰ the UN human rights treaty bodies may not be able to operate with the same flexibility. Greece, for example, was reviewed by three separate human rights treaty bodies in the period of 2012 to 2015, and recommendations followed; but most of the concerns related, in fact, to the Memoranda of Understanding negotiated with its European creditors after the Greek government called for financial support.⁷¹ Yet no recommendations could be addressed to the European Union. As situations such as these become more frequent, so do calls for the European Union to take its human rights responsibilities more seriously – not only under the EU Charter of Fundamental Rights, but also under UN human rights instruments as interpreted by UN human rights mechanisms.⁷²

It is also with Greece in mind that, on 24 June 2016, the Committee on Economic, Social and Cultural Rights adopted a statement titled "Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights".⁷³ Specific paragraphs address international organisations such as the European Stability Mechanism (ESM) providing loans, and the role of States as lenders, whether they grant bilateral loans or whether they are members of international organisations providing financial support. International organisations, by definition, are not bound by the International Covenant on Economic, Social and Cultural Rights as such, which is only open to accession by States. The Committee nevertheless recalled:

As any other subjects of international law, international financial institutions and other international organisations are 'bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties' [International Court of Justice, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion (20 December 1980), I.C.J. Reports 1980, 73 at 89–90 (para. 37)]. They are therefore bound to comply with human rights, as listed in particular in the Universal Declaration of Human Rights, that are part of customary international law or of the general principles of law, both of which are sources of international law.⁷⁴

Conclusion

The marginal role of UN human rights standards in the human rights regime of the EU poses the risk that EU Member States will be faced with conflicting obligations, imposed respectively under EU law and under UN human rights instruments to which they are parties. It may also mean that they will be subject to certain disciplines – particularly as regards macro-economic adjustment programs – that conflict with their duties not to adopt retrogressive measures in the area of social rights unless certain strict conditions are complied with. Human rights monitoring bodies and courts may question the delegation of powers to the EU without ensuring that the full range of human rights obligatory for its Member States are complied with. Finally, the same human rights mechanisms may increasingly seek to address the EU itself, assessing measures adopted by the EU, either directly or indirectly, when examining the human rights obligations of EU Member States. This gap can be filled. The next chapter examines the potential ways forward.

OPTIONS FOR THE FUTURE

There are various options, more or less ambitious, to better link EU law- and policy-making to UN human rights instruments and to ensure that the standards developed by UN human rights mechanisms and their findings are better taken into account. First, it is proposed that UN human rights mechanisms engage directly with the EU in discharging their monitoring roles. Second, the EU Charter of Fundamental Rights could be more systematically interpreted in light of UN human rights standards. Third, the findings of UN human rights mechanisms could feed into the monitoring of EU Member States under the procedures established by article 7 TEU. Fourth and finally, mechanisms could be set up to ensure the mainstreaming of fundamental rights in EU law- and policy-making. These four options are briefly examined in turn.

Linking the European Union to UN human rights instruments

While the EU is a party to a number of conventions adopted in the Council of Europe framework, the Convention on the Rights of Persons with Disabilities is the only UN human rights instrument that enables a regional organisation to accede to the treaty (as already mentioned, the EU became a party to the CRPD in 2011). This example remains unique, however, and it is highly unlikely that the EU shall accede to other UN human rights treaties in the future. While the EU may have the power to do so under EU law in areas in which has exercised internal competences,⁷⁵ such a possibility could only be envisaged for instruments which, like the CRPD, provide that international organisations may become parties.

There are alternatives to accession, however, which may be more realistic, both politically and legally. Precedents exist. The Human Rights Committee has been monitoring compliance with the ICCPR in the Serbian province of Kosovo by requesting that the United Nations Mission in Kosovo (UNMIK) submit a report to that effect. Following the departure of the Serbian troops, UNMIK has been tasked with administering the territory, in accordance with Security Council resolution 1244 (1999). The Human Rights Committee, therefore, turned to UNMIK after Serbia declared it could not ensure compliance with the Covenant in a territory over which it did not exercise effective control.⁷⁶ Similarly, UNMIK and the Council of Europe concluded an Agreement on 23 August 2004 whereby UNMIK agreed not only to comply with the substantive provisions of the Council of Europe Framework Convention for the Protection of National Minorities, but also to be bound by the provisions on monitoring the implementation of that Convention by UNMIK in Kosovo.⁷⁷ A similar agreement was concluded between UNMIK and the Council of Europe on technical arrangements related to the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The agreement allowed the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) to make visits and examine the treatment of persons deprived of their liberty in Kosovo, with a view to ensuring their protection and preventing risks of torture or ill-treatment. While emphasising “that the present Agreement does not make UNMIK a Party to the Convention and that it is without prejudice to the future status of Kosovo to be determined in accordance with Security Council resolution 1244 (1999)”, the agreement provides that UNMIK shall permit visits by the CPT to any place in Kosovo where persons are deprived of their liberty by an authority of UNMIK. In 2006, an exchange of letters was concluded between the Secretaries General of the Council of Europe and the North Atlantic Treaty Organization (NATO), allowing the CPT to also exercise its monitoring functions as regards detention facilities managed by the NATO troops under K-FOR.

The cases of UNMIK and NATO in Kosovo may be considered exceptional; these organisations were exercising a form of territorial sovereignty, effectively controlling an area, something the European Union does not do on the territory of EU Member States. Nevertheless, considering the degree of integration reached in the EU in areas such as discrimination, equal treatment of women and men, and working conditions, UN human rights treaty bodies might prefer to address the EU directly on certain matters. This might include matters on which competences have been transferred – either as competences exclusive to the EU, or as competences shared between the EU and its Member States, but in which the EU has taken action, thus preempting action

by individual Member States. This, after all, is already what the Special Procedures of the Human Rights Council have already done on a number of occasions.

Inspiration may also be sought in this regard in the links established with the Geneva Convention on the Status of Refugees. The Court of Justice has repeatedly stated that the Geneva Convention “constitutes the cornerstone of the international legal regime for the protection of refugees” and that EU legislation adopted in this area should, therefore, be interpreted “in a manner consistent with the Geneva Convention”.⁷⁸ In order to support its compliance with the Geneva Convention (as required under article 78(1) TFEU), the EU has developed a close relationship to the UN High Commissioner for Refugees (UNHCR). The High Commissioner is charged with “providing international protection ... to refugees”,⁷⁹ and the role of supervising implementation of the two treaties should be facilitated by the Parties to the 1967 New York Protocol.⁸⁰ In accordance with Declaration No. 17 accompanying the Treaty of Amsterdam, various exchanges of letters between the Commission and the UNHCR define the terms of cooperation between the UNHCR and the EU in developing EU policy in this area. It translates, in practice, to a close collaboration between the EU and the UNHCR, the latter assisting the EU in interpreting the Geneva Convention on the Status of Refugees and commenting on draft legislation. Strictly speaking, the UNHCR does not exercise a monitoring function. But it has adapted its working methods to the reality of transferring competences from EU Member States to the EU in the area of asylum. It does so in a way that is commensurate with the building of a Common European Asylum System. It is this kind of flexibility that other UN bodies may have to demonstrate.

Of course, like other international organisations, the European Union is limited in terms of the powers that have been attributed to it by its Member States. In international law, this is known as the principle of specialty; it is expressed as the principle of conferral in the context of the EU.⁸¹ By committing to comply with human rights, however, international organisations undertake to respect certain minimal standards for the benefit of the persons under their jurisdiction. This implies, first and foremost, that they will not adopt any measures which derogate from these standards. Insofar as the undertaking is purely negative (formulated as an obligation to abstain from), it is irrelevant whether or not the Party has the competence to take measures which implement the given standard. It is only where the undertaking is also designed to adopt certain measures – to fulfil positive obligations (to act) – that the question of competence may play a role. As regards this category of duties, the international organisation is only duty bound to take measures that, in accordance with the principle of specialty, it has been attributed the power to adopt. The EU may, for instance, have to take further measures to combat discrimination, on the basis of article 19 TFEU, or it may have to adopt measures for the completion of the internal market, where this appears necessary – for instance, for the protection of the right to health, on the basis of article 114 TFEU. But the imposition of such positive obligations – which is classic in human rights law – does not violate the principle of specialty; it does not imply that the EU would be exceeding the powers it has been attributed in the name of fulfilling human rights.

Interpreting the EU Charter of Fundamental Rights in line with UN standards

Since the adoption of the EU Charter of Fundamental Rights, a “fundamental rights culture” has developed within the EU institutions: it has now become a routine practice for the Commission, the Council of the EU, and the European Parliament to examine both the compatibility of the legislative proposals considered with the Charter, and the fundamental rights impacts in legislation and policy-making. The Charter, however, is a weak vehicle for ensuring proper alignment of EU laws and policies with the requirements of UN human rights standards. This is because UN human rights treaties are barely considered in interpreting the Charter.

In part, this gap could be addressed by making the correspondences between the provisions of the EU Charter of Fundamental Rights and the provisions of UN human rights more explicit. This could be achieved in the guidance provided to institutions for the preparation of compatibility checks and impact assessments. As illustrated by Table 1, many more such correspondences can be established than those that are mentioned in the Explanations to the Charter prepared by the Presidium. But unless they are made visible, they shall remain unseen. Making these correspondences explicit could also encourage EU institutions to take into account the authoritative interpretation provided to UN instruments by the monitoring mechanisms that they establish.

This would not compensate for the fact that the EU Charter of Fundamental Rights does not include a number of rights protected under UN human rights treaties, such as the right to fair remuneration, the right to work, the right to food, and the right to water. Therefore, while it is important to encourage an interpretation of the Charter that takes full account of the *acquis* of international human rights law, and of UN standards in particular, other steps would be required to ensure that law- and policy-making in the EU remain fully consistent with the human rights duties imposed on EU Member States.

Ensuring that findings of UN human rights mechanisms support monitoring of EU values

Acting under the framework of article 7 TEU, the Commission, the Council of the EU, and the European Parliament have developed tools to ensure that EU Member States comply with the values on which the Union was founded. These tools remain poorly coordinated with one another. The institutions of the EU should make progress in the future towards harmonizing their approaches to monitoring EU Member States, by establishing a framework to ensure that the mechanisms provided for in article 7 TEU are used in an objective, impartial, and non-selective manner. Indeed, this is the objective of the procedure established by the Commission in July 2019, in the form of a “Rule of Law Review Cycle”.

The findings of UN human rights treaty bodies and of Special Procedures could be systematically taken into account in the Commission’s preparation of an annual Rule of Law Report, as well as in the procedures followed by other EU institutions involved in article 7 TEU proceedings.⁸² This would appear to be politically acceptable to a large majority of governments. It is also certainly more realistic than having UN mechanisms directly interact with procedures established under article 7 TEU, or having the UN Human Rights Office intervene on their behalf by presenting a compilation of their findings in the course of such procedures. Indeed, this latter solution, while technically feasible, might be perceived as duplicating the UPR within a regional framework, and as such, it would probably meet with resistance.

Mainstreaming UN standards across the European Union’s legislative and policy agendas

A more ambitious approach towards better integrating UN human rights standards in the EU law- and policy-making process would consist of setting up new governance structures within the Commission to ensure such standards were systematically taken into consideration.

The efforts developed since 2006 to ensure implementation of the rights of the child within the EU can serve as a source of inspiration. The Commission still has a Coordinator on the Rights of the Child, and it still organizes a Forum on the Rights of the Child to identify emerging priorities in this area and to ensure adequate mainstreaming of the requirements of the Convention on the Rights of the Child. Perhaps even more importantly, between 2006 and 2012, an attempt was made to regularly build on the Concluding Observations adopted by the Committee on the Rights of the Child and to set up regular exchanges between Member States concerning the challenges of implementing the Convention on the Rights of the Child.

Though that effort now seems to have been suspended, it does illustrate the potential for proactively mainstreaming the findings of UN human rights mechanisms. The rights of the child are perhaps the most agreed-upon part of the broader human rights agenda; nevertheless, there is no reason, in principle, not to build upon that precedent. It is worth exploring the possibility that findings of UN human rights mechanisms can be systematically discussed in a format involving both EU institutions and EU Member States, in order to identify at which level – that of the EU or of its Member States – the concerns expressed by UN mechanisms would best be addressed. If addressed at the level of the EU, it could be done while fully taking into account the principle of conferral as well as the principles of subsidiarity and proportionality of EU action. The EU Fundamental Rights Agency would be ideally placed to convene such a process.

ENDNOTES

- 1** The Convention on the Rights of Persons with Disabilities (CRPD) provides one remarkable exception to this rule. The CRPD was adopted on 13 December 2006 by Res. 61/106 of the General Assembly and was opened for signature on 30 March 2007; it entered into force on 3 May 2008. On the relationship of the EU to the CRPD, see Box 2.
- 2** See Joined Cases C-404/15 and C-659/15 PPU, Pál Aranyosi and Robert Căldărăru, Judgment of 5 April 2016 (EU:C:2016:198).
- 3** See Joined Cases C-411/10 and C-493/10, N.S. and M.E. and Others, judgment of 21 December 2011 (EU:C:2011:865).
- 4** OJ C 364 of 18.12.2000, p. 1.
- 5** Article 6(1) of the Treaty on European Union. Minor adaptations were made to the EU Charter of Fundamental Rights in order to allow for this incorporation in the treaties; for the current version, see OJ C 303 of 14 December 2007, p. 1.
- 6** It could be argued that a remuneration below the poverty rate, which would thus not allow the worker to live a decent life, should be considered to be contrary to human dignity or to constitute inhuman or degrading treatment, in violation of Articles 1 and 4 of the EU Charter of Fundamental Rights respectively (see, in support of that interpretation, Eur. Ct. HR (GC), M.S.S. v. Belgium and Greece, judgment of 21 January 2011 (Appl. 30696/09), para. 263 (where the Court concludes that the Greek authorities violated Article 3 ECHR, by failing to provide support to an asylum-seeker “living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs”).
- 7** See Committee on Economic, Social and Cultural Rights, General Comment No. 23 (2016) on the right to just and favourable conditions of work (E/C.12/GC/23), paras. 10 and 18-24.
- 8** Although art. 153(1)(j) Treaty on the Functioning of the European Union (TFEU) does mention the “combating of social exclusion” among the fields in which the action of the Union may complement and support that of the Member States, this is an area in which the treaties have not provided for the adoption of EU legislation (see art. 153(2) TFEU).
- 9** Conclusions of the Cologne European Council, 3-4 June 1999, annex IV.
- 10** The protection against unjustified dismissal is considered by the UN Committee on Economic, Social and Cultural Rights as part of the right to work mentioned in article 6 of the International Covenant on Economic, Social and Cultural Rights (see General Comment No. 18 (2006): The right to work (art. 6 of the Covenant) (E/C.12/GC/18, 6 February 2006), paras. 34-35). However, the right to work implies a number of other correlative duties that go significantly beyond the protection against unfair dismissal.
- 11** The European Pillar of Social Rights was endorsed by the European Parliament, the Council, and the Commission on 17 November 2017, at the Social Summit for Fair Jobs and Growth held in Gothenburg; it was further approved by the European Council on 14 December 2017.
- 12** Commission Staff Working Document accompanying the Communication “Monitoring the Implementation of the European Pillar of Social Rights”, SWD(2018) 67 final of 13 March 2018.
- 13** For the text of the Explanations, see OJ C 303 of 14 December 2007, p. 17.
- 14** There are exceptions: the Explanations to articles 19 and 49 of the Charter do include references to the International Covenant on Civil and Political Rights; and the Explanations to article 24 of the Charter make an explicit reference to the Convention on the Rights of the Child as a whole. Another significant exception is the reference made, in the text of article 18 of the EU Charter of Fundamental Rights, to the Geneva Convention of 28 July 1951 on the Status of Refugees (U.N.T.S., vol. 189, p. 150, No 2545 (1954)). The 1951 Convention on the Status of Refugees also has a privileged position in Union law, as this instrument is referred to in the Treaty on the Functioning of the European Union as having to guide the Union’s common policy on asylum, subsidiary protection, and temporary protection (article 78(1) TFEU). The Court of Justice of the European Union has reiterated, on various occasions, that rules of European Union law dealing with

asylum must be interpreted in the light of the Geneva Convention (see, inter alia, Joined Cases C 411/10 and C 493/10, *N.S. and Others* [2011] ECR I 13905, para. 75; Case C 364/11 *Abed El Karem El Kott and Others* [2012] ECR, paragraph 43; Case C-528/11, *Zuheyr Frayeh Halaf* (EU:C:2013:342), para. 44).

15 Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, para. 13 (emphasis added).

16 Joined cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities* (ECLI:EU:C:1989:337), para. 13.

17 The European Social Charter was signed by thirteen member States of the Council of Europe in Turin on 18 October 1961 and entered into force on 26 February 1965 (CETS n° 35; 529 UNTS 89).

18 See, e.g., judgment of 18 October 1989, *Orkem v Commission*, 374/87, [1989] ECR 3283, EU:C:1989:387, para. 31, and judgment of 18 October 1990, *Dzodzi v Belgian State*, C-297/88 and C-197/89, [1990] ECR I-3763, EU:C:1990:360, para. 68.

19 Judgment of 27 June 2006, *European Parliament v. Council of the European Union*, C 540/03, EU:C:2006:429, para. 37.

20 See for instance, as regards the interpretation by the Human Rights Committee of the International Covenant on Civil and Political Rights, Case C-249/96, *Lisa Jacqueline Grant v. South-West Trains Ltd*, [1998] ECR I-621 (judgment of 17 February 1998), para. 46.

21 U.N.T.S., vol. 2515, p. 3. The CRPD was adopted on 13 December 2006 by GA Res. 61/106 and opened for signature on 30 March 2007.

22 For a summary description, see Initial Report of the European Union submitted under article 35 of the Convention on the Rights of Persons with Disabilities (CRPD/C/EU/1, 3 December 2014), para. 28.

23 SEC(2001) 380/3.

24 Communication from the Commission, *Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring*, COM(2005) 172 final of 27 April 2005.

25 See Communication from the 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 of 29 April 2009.

26 See Israel de Jesus Butler, "Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission", *European Law Review*, vol. 37, Issue 4 (2012), pp. 397-418.

27 Communication of 5 June 2002 on Impact Assessment, COM(2002)276.

28 See SEC(2005)791, 15 June 2005.

29 European Parliament resolution of 15 March 2007 on compliance with the Charter of Fundamental Rights in the Commission's legislative proposals: methodology for systematic and rigorous monitoring (2005/2169(INI)), OP 11.

30 Replies of the European Union to the list of issues raised in regard to the initial report submitted in accordance with article 35 of the Convention on the Rights of Persons with Disabilities (CRPD/C/EU/Q/1/Add.1, 8 July 2015), para. 26.

31 See, respectively, SEC(2009) 92 of 15 January 2009 and SEC(2011) 567 final of 6 May 2011. The latter document is a Commission Staff Working Paper providing Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments.

32 Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC(2011) 567 final of 6 May 2011.

33 Annex I to the Guidance lists a number of useful online sources, including the Convention on the Rights of Persons with Disabilities; the Convention on the Rights of the Child; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; as well as the general comments adopted by

the Committee on the Rights of the Child. No explanation is provided for such a selective approach.

34 Ibid., p. 8.

35 Ibid., p. 7.

36 European Parliament resolution of 15 March 2007 on compliance with the Charter of Fundamental Rights in the Commission's legislative proposals: Methodology for systematic and rigorous monitoring (2005/2169(INI)), OP 6; resolution of 12 December 2012 on the situation of fundamental rights in the EU (2010-2011), OP 3.

37 Council of the EU doc. 10140/11.

38 For the revised guidelines, see Council of the EU doc. 16957/14 (16 December 2014) (FREMP 228, JAI 1018, COHOM 182, JURINFO 58, JUSTCIV 327), reissued as doc. 5377/15.

39 The other instruments that are mentioned are the CEDAW, ICERD, and ICESCR.

40 Rule 38 of the Rules of Procedure (version of July 2016).

41 Office of the United Nations High Commissioner for Human Rights, Report on Indicators for Monitoring Compliance with International Human Rights Instruments: a Conceptual and Methodological Framework (HRI/MC/2006/7, 11 May 2006); Report on Indicators for Promoting and Monitoring the Implementation of Human Rights (HRI/MC/2008/3, 6 June 2008).

42 See, e.g., Committee on the Rights of the Child, 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) (CRC/GC/2003/5, 27 November 2003), paras. 48–50; Paul Hunt, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (E/CN.4/2006/48, 3 March 2006), Annex; Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Common violations of the human rights to water and sanitation (A/HRC/27/55, 30 June 2014).

43 Article 7(1) TEU. Article 7 TEU does not, in fact, provide for any substantive condition for such recommendations to be adopted, though the emergence of a “systemic threat to the rule of law” is one example of where such recommendations may be warranted (see Communication of the Commission on a new EU Framework to strengthen the Rule of law, COM(2014) 158 final of 1.3.2014). It is incorrect to state, as the Commission does, that “the preventive mechanism of Article 7(1) TEU can be activated only in case of a ‘clear risk of a serious breach’” of the values of Article 2 TEU (comp. Communication of the Commission on a new EU Framework to strengthen the Rule of law, at p. 5).

44 COM(2014) 158 final.

45 COM(2019) 343 final.

46 European Commission, A new EU Framework, op. cit., p 7.

47 Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374 (C/2016/8950) (OJ L 22, 27 January 2017, p. 65), para. 18; see also Reasoned proposal in accordance with article 7(1) of the Treaty on European Union regarding the rule of law in Poland. Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final of 20 December 2017, para. 33.

48 See Reasoned proposal in accordance with article 7(1) of the Treaty on European Union regarding the rule of law in Poland, paras. 70 and 77.

49 Ibid., para. 80.

50 Ibid., para. 183.

51 COM(2019) 343 final, p. 8.

52 Article 2, b) of the proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States.

53 Council of the EU, press release no. 16936/14, 3362nd Council meeting, General Affairs, 16 December 2014, pp. 20-21.

- 54** Council doc. 15206/14, para. 16.
- 55** See Council of the EU doc. 13230/1/16 REV 1 (3 November 2016). This document was made public following a successful request for access to documents submitted to the Council in December 2016. The answers submitted by Romania were deleted from the version made public. For the position of Cyprus, see Council of the EU doc. 13230/1/16 REV 1 ADD 1.
- 56** See the report on the situation of fundamental rights in the Union 2004-2008 (rapp. G. Catania) (doc. PE A6-9999/08, of 5 December 2008); and the Resolution of the European Parliament of 14 January 2009 on the situation of fundamental rights in the Union 2004-2008 (2007/2145(INI)).
- 57** Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008 (2007/2145 (INI)), Preamble, para. B.
- 58** *Ibid.*, operational paragraphs 3 and 5.
- 59** European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8_TA-PROV (2016) 0409.
- 60** See Follow up to the European Parliament resolution with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, adopted by the Commission on 17 January 2017 (SP(2017)16-0).
- 61** European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union was founded (2017/2131(INL)), para. 2.
- 62** *Ibid.*, para. 3.
- 63** *Ibid.*, para. A.
- 64** Memorandum of Understanding between the Council of Europe and the European Union, adopted at the 117th Session of the Committee of Ministers held in Strasbourg on 10-11 May 2007, CM(2007)74 (10 May 2007) (hereinafter referred to as "Memorandum of Understanding").
- 65** These were, in summary form, the criteria listed by the Chairperson of the Committee on Economic, Social and Cultural Rights in the Open Letter of 16 May 2012 on austerity measures addressed to the States parties to the International Covenant on Economic, Social and Cultural Rights.
- 66** Committee on Economic, Social and Cultural Rights, Concluding Observations: Greece, (27 October 2015) (UN doc. E/C.12/GRC/CO/2), para. 8.
- 67** Art. 61 of the Draft Articles on the responsibility of international organizations, adopted by the International Law Commission at its sixty-third session, in 2011 (A/66/10, para. 87), welcomed by the UN General Assembly in Resolution 66/100 of 9 December 2011.
- 68** For instance, a State would be engaging its international responsibility if it were providing aid or assistance to an international organisation for the commission of an act that would be internationally wrongful if committed by that State (Article 58. Aid or assistance by a State in the commission of an internationally wrongful act by an international organization).
- 69** Committee on Economic, Social and Cultural Rights, Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights (24 June 2016) (E/C.12/2016/1), para. 9.
- 70** See François Crépeau, Report of the Special Rapporteur on the rights of migrants, Addendum: Mission to Greece (25 November - 3 December 2012) (A/HRC/23/46/Add.4), para. 84 and paras. 112-119; François Crépeau, Report of the Special Rapporteur on the rights of migrants, Addendum: Mission to Italy (29 September - 8 October 2012) (A/HRC/23/46/Add.3), para. 126 and 131; Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Addendum: Mission to Greece (22-26 April 2013), (27 March 2014) (UN doc. A/HRC/50/15/Add.1), para. 93.
- 71** Committee on the Rights of the Child, Concluding Observations on the combined second and third

periodic reports of Greece (13 August 2012) (UN doc. CRC/C/GRC/CO/2-3), para. 6 and 29; Committee on the Elimination of Discrimination against Women, Concluding Observations: Greece, (1 March 2013) (UN doc. CEDAW/C/GRC/CO/7), para. 6 and 40; Committee on Economic, Social and Cultural Rights, Concluding Observations: Greece (27 October 2015) (UN doc. E/C.12/GRC/CO/2), para. 7.

72 See, e.g., Juan Pablo Bohoslavsky, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, , on his mission to Greece from 30 November to 8 December 2015 (A/HRC/31/60/Add.2, 6 April 2016), para. 19 and 83, b).

73 Committee on Economic, Social and Cultural Rights, Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights (24 June 2016) (UN doc. E/C.12/2016/1).

74 Ibid., para. 7.

75 See article 216(1) TFEU, which, in substance, allows the EU to enter into international agreements, even without an explicit provision in the Treaties allowing it to do so, where this “is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.” When the EU joined the UN Convention on the Rights of Persons with Disabilities, its competence to do so was derived from the fact that both the EU Member States and the EU itself have certain powers to implement the provisions of the CRPD, and it is therefore by their joint action that they can fully discharge their international obligations (see Council decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC), OJ L 23 of 27 January 2010, p. 35).

76 See Concluding Observations on Serbia (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 UN HRC Report 2005/2006, Vol. I, A/61/40, 68.

77 On this Agreement see R. Hofmann, “Protecting Minority Rights in Kosovo”, in: K. Dicke et al. (eds.), *Weltinnenrecht, Liber amicorum Jost Delbrück*, Duncker & Humblot, Berlin 2005, 347 ff. In accordance with the agreement, UNMIK submitted its Report on 2 June 2005 and, subsequent to a visit to Kosovo in October 2005, the Advisory Committee adopted an opinion on 25 November 2006.

78 See, e.g., judgment of 1 March 2016, Alo and Osso, C 443/14 and C 444/14, EU:C:2016:127, paragraph 28; judgment of 9 November 2010, B and D, C 57/09 and C 101/09, EU:C:2010:661, para. 78; judgment of 1 March 2016, Alo and Osso, C 443/14 and C 444/14, EU:C:2016:127, para. 29; judgment of 31 January 2017, Lounani, C 573/14, EU:C:2017:71, para. 42.

79 GA Res 428 (V), 14/12/50, Statute of the Office of the United Nations High Commissioner for Refugees, Annex, Article 1.

80 1967 Protocol, Articles II, III.

81 In its Advisory Opinion on Legality of the use by a State of nuclear weapons in armed conflict, the International Court of Justice stated that: “[...] international organizations [...] do not, unlike States, possess a general competence. International organizations are governed by the ‘principle of speciality’, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.” (I.C.J. Reports 1996, p. 66 at p. 78 (para. 25)).

82 Office of the United Nations High Commissioner for Human Rights Regional Office for Europe, “The case for a human rights approach to the rule of law in the European Union,” available at <https://europe.ohchr.org/EN/Stories/Documents/Publication.pdf>

