

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

Constitutional Affairs

Justice, Freedom and Security

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Petitions

**The Evolution of
Fundamental Rights
Charters and Case Law**

STUDY



ЕВРОПЕЙСКИ ПАРЛАМЕНТ PARLAMENTO EUROPEO EVROPSKÝ PARLAMENT EUROPA-PARLAMENTET
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DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

The Evolution of Fundamental Rights Charters and Case Law

A Comparison of the United Nations, Council of Europe and European Union systems of human rights protection

Abstract

This report examines the human rights protection systems of the United Nations, the Council of Europe and the European Union. It explores the substantive rights, protection mechanisms, modes of engagement within, and the interactions between each system. The report also outlines the protection of minority rights, and the political processes through which human rights and institutions evolve and interact. A series of recommendations are made on how to advance the EU human rights system.

This document was requested by the European Parliament's Committee on Constitutional Affairs.

AUTHORS

Project Co-ordinator

Dr. Liora Lazarus, University of Oxford

Lead researchers

Dr. Cathryn Costello, University of Oxford

Dr. Nazila Ghanea, University of Oxford

Dr. Katja Ziegler, University of Oxford

Researchers

Rajendra Desai, Matrix Chambers

Lawrence Hill-Cawthorne, University of Oxford

Benjamin Jones, University of Oxford

RESPONSIBLE ADMINISTRATORS

Mr Wilhelm Lehmann

Ms Cristina Castagnoli

Policy Department C - Citizens' Rights and Constitutional Affairs

European Parliament

B-1047 Brussels

E-mail: poldep-citizens@europarl.europa.eu

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ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its newsletter please write to:
poldep-citizens@europarl.europa.eu.

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LIST OF ABBREVIATIONS

ACFC	Advisory Committee on the Framework Convention for the Protection of National Minorities
AFSJ	EU's 'Area of Freedom, Security and Justice'
CAHLR	Committee of Experts on Regional or Minority Languages
CAT	The Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment
CDDH	The Steering Committee of Human Rights (CoE)
CoE	Council of Europe
CEDAW	The Convention on the Elimination of All Forms of Discrimination Against Women
CERD	The International Convention on the Elimination of Racial Discrimination
CEPEJ	The European Commission for the Efficiency of Justice
CESCR	The Committee on Economic, Social and Cultural Rights
CFSP	Common Foreign and Security Policy
Charter	European Union Charter of Fundamental Rights
CJ	Court of Justice of the European Union The CJ include the Court of Justice, the General Court and specialised courts. In order to avoid confusion the report also uses the CJ to refer to decisions made in the past when the Court was named the European Court of Justice (ECJ).
CPED	International Convention for the Protection of all Persons from Enforced Disappearance
CRC	Convention of the Rights of the Child
CRPD	The Convention on the Rights of Persons with Disabilities

CPT	European Committee for the Prevention of Torture and Inhuman and Degrading Treatment
ECHR	European Convention on Human Rights
ECRI	European Commission against Racism and Intolerance
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ECRML	European Charter for Regional and Minority Languages
EU	European Union
ECJ	European Court of Justice (the former title of the now named Court of Justice of the European Union - CJ)
ECSR	European Committee on Social Rights
ESC	European Social Charter
FCNM	Framework Convention on National Minorities
FRA	Fundamental Rights Agency
FRP	Fundamental Rights Platform
GRETA	Group of Experts on Action Against Trafficking in Human Beings
International Bill of Rights	Umbrella term for the UDHR, ICCPR and ICESCR
ICC	International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC)
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRMW	Convention on the Protection of the Rights of Migrant Workers and Members of their Families

NGO	Non-Governmental Organisations
OHCHR	Office of the High Commissioner for Human Rights
OPCAT	Optional Protocol to CAT
PACE	The Parliamentary Committee on Legal Affairs and Human Rights
PCIJ	Permanent Court of International Justice
TCN	Third Country Nationals
TEU	Treaty of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Committee
Venice Commission	The European Commission for Democracy through Law

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EXECUTIVE SUMMARY

Background

The entry into force of the Lisbon Treaty brings a new era for European Union human rights protection, as Article 6 TEU reflects. The European Union Charter of Fundamental Rights (Charter) is now binding and the continued place of fundamental rights as general principles of EU law is secure. The EU's ratification of the Convention on the Rights of Persons with Disabilities in December 2010 and the forthcoming ratification of the European Convention on Human Rights (ECHR) herald a new era of enhanced external scrutiny of the EU. The Court of Justice of the European Union's (CJ) jurisdiction over the human rights sensitive field of the Area of Freedom, Security and Justice is increased, the Fundamental Rights Agency's work has commenced, and EU institutions have all recognised institutional duties to mainstream human rights. The report welcomes in particular the Commission's renewed commitment to promote a 'fundamental rights culture' within the EU and the European Parliament's strong institutional commitment to fundamental rights.

This report seeks to convey the importance of the institutional context of human rights protection. By outlining the human rights instruments and their protection mechanisms, interpretative approaches and modes of engagement with stakeholders it seeks to convey human rights systems as dynamic, participatory processes. While a report of this scale inevitably simplifies, it does not idealize. It recognizes the complexity and opacity of the multiplicity of instruments and mechanisms in the United Nations (UN), Council of Europe (CoE) and EU systems that are outlined here and identifies both opportunities and threats inherent in the multiplicity of overlapping protections.

Omissions are inevitable in a report of this condensed nature. The report does not examine Member State constitutional standards, although these inform EU fundamental rights law in important ways, serving as an important check both on the exercise of EU powers and the content of EU human rights. While the examination of UN-CoE-EU systems takes in most important instruments of international human rights law, it does not look in depth at the International Labour Organization, whose standards have informed EU human rights since the inclusion of the equal pay

guarantee in the Treaty of Rome 1957. As the ECtHR and CJ engage further with the right to collective bargaining and action, International Labour Organization standards provide a key source of binding international standards.

Where glaring shortcomings are evident in the UN and CoE systems they are pointed out in the report, and where the EP could help alleviate these problems, the report makes recommendations for specific courses of action. Where we identify shortcomings in the case-law of the CJ, we urge the EP to seek to address these problems simply by intervening and litigating before the CJ, in particular ensuring that international human rights law is properly cited and engaged with in argumentation. However, the report mainly addresses the recommendations to the EP focusing on the EU's internal activities. The authors acknowledge the importance of the external dimension and the crucial need to ensure consistency in EU practice internally and externally, as highlighted since *Leading by Example* in 2000. However, we take the view that this report's focus on the EU's internal activities is well supplemented by the recent report commissioned by the European Parliament on Human Rights and the EU's external relations.¹

¹ Benoit Rohmer, F et al (2009) *Human Rights Mainstreaming in EU's External Relations* European Parliament: Brussels.

Summary

This report examines the human rights protection systems of the United Nations, the Council of Europe and the European Union. It has five parts. Part A explores conceptual aspects of human rights in order to provide readers with a terminology to apply in the remainder of the report. Part B explores the substance of the rights protection systems (section 1), their protection mechanisms (section 2), and the modes of engagement (section 3) within each system. It concludes with an analysis of the interactions, convergences and divergences between each system (section 4). Part C explores the protection of minority rights within each system through both judicial and non-judicial mechanisms. Part D examines the political processes through which human rights and human rights institutions evolve, and through which systems of rights protection interact. Part E concludes the reports with a series of recommendations on how the EU human rights system might be developed in the future.

Part A of the report explains basic human rights concepts which readers can apply in the remainder of the report. It outlines the distinction between individual rights and group rights, subjective rights and objective rights; negative rights and positive rights; civil and political rights and social, economic and cultural rights; and vertical rights and horizontal rights (Typology 1). These are not sharp dichotomies: rights and duties illustrates duties to 'respect, protect, promote and fulfil' arise out of human rights, as negative rights shade into positive rights. Equally, a range of actors might be considered duty bearers as a consequence of rights (Typology 2). These might include States, the international community, regional actors, and non-state actors. Part A also explores how rights hierarchies arise through limitation devices, which result in rights being given different weight. The limitation techniques identified are narrowed down to 'textually explicit mechanisms', 'textually implied mechanisms', and 'rights interpretation mechanisms' (Typology 3). Again, this account is for illustrative purposes: the report assumes the basic indivisibility of human rights, whilst recognizing that different rights may be limited in different ways.

Part B comprises the main body of the report and provides an overview of three systems that have been central to the development of human rights protection internationally: the United Nations, the Council of Europe and the European Union. At the outset it highlights the extent of the interaction between these systems, and calls for the development of 'constructive human rights pluralism' to avoid the erosion of human rights safeguards. **Part B 1** as a whole compares the substantive rights in each system. The section is supplemented by two comparative rights tables, which are laid out in **Annex 1**. These are designed to demonstrate the gaps and overlaps between the different systems of substantive rights protection.

The UN human rights system consists of a number of 'hard law' treaties and soft law instruments. UN human rights principles are also reflected in and influenced by International Criminal Law. While there are a diverse range of human rights protected under the UN system, there are also concerns that this diversity leads to fragmentation. The CoE rights system is most commonly associated with the European Convention on Human Rights (ECHR). This instrument contains a hierarchy of rights which is reflected in the European Court of Human Rights (ECtHR) jurisprudence. The ECHR is interpreted as a 'living instrument', and the ECtHR has taken a robust approach to the protection of absolute rights. With regard to qualified rights, the ECtHR uses devices such as legality, proportionality, the margin of appreciation and European consensus to create a flexible and adaptive rights protection system. The ECtHR is also to be commended for its development of sexuality rights, environmental rights and rights to sexual autonomy. Aside from the ECHR, the CoE system consists of a range of treaties including in particular the European Social Charter. While this instrument is not subject to the same enforcement mechanisms as the ECHR, there is ongoing interaction between the decisions of the ECtHR and the European Committee of Social Rights. Hence, there is now a trend in the CoE towards 'substantive integration' of civil and political rights and economic, social and cultural rights.

The EU system of human rights protection has developed incrementally from the judicial discovery of human rights as general principles in the late 1960s and early 1970s, to the creation of the Charter of Fundamental rights of the European Union. Article 6 TEU grants the Charter binding force, requires the EU to seek accession to the ECHR and reaffirms human rights as general principles. While the EU is bound

by human rights in all fields, it does not have a general competence to legislate on human rights. Nor do EU human rights standards bind the Member State in all fields, but rather when they act within the scope of EU law. However, various treaty amendments have afforded the EU specific human rights competence in particular areas such as non-discrimination, immigration, asylum, and police and judicial cooperation in criminal matters under the EU's 'Area of Freedom, Security and Justice'. Moreover, the development of human rights beyond EU legislative competence has been evident, as illustrated by the impact of EU internal market freedoms on the right to strike, and EU action against domestic violence. EU Citizenship also expands the scope of EU law. The Charter itself does not extend EU competence and it only binds Member States when implementing EU law. While the report takes these limitations as a given, it does suggest that the EU must strive nonetheless to respect, protect, promote and fulfil human rights in all areas of its activity.

The three main sources of the EU human rights standards consist of general principles of EU law, the Charter, and international human rights law, in particular human rights treaties to which the EU accedes. The general principles of law are recognised under Article 6(3) TEU and remain an important supplement to the Charter. The ECHR has been the dominant inspiration in the CJ's development of human rights as general principles. Its use of other international human rights law has been somewhat lacking. The Charter itself overcomes the artificial divide between civil and political rights, on the one hand, and economic, social and cultural rights on the other hand. Importantly, the Charter's Final Provisions, require a reading of rights which 'correspond' to ECHR rights in light of the hierarchies and limitation techniques adopted by the ECtHR. The EU has recently acceded to the CPRD and is in the process of acceding to the ECHR. Further EU accession to international treaties in the future is to be encouraged.

Finally, EU secondary legislation also plays an important role in shaping human rights protections. We illustrate this role by providing illustrative examples from the fields of equality, immigration and asylum. Human rights standards in EU secondary legislation may support, enhance, undermine even or violate UN or CoE protections.

Part B 2 analyses the judicial and non-judicial protection mechanisms in the UN-CoE-EU human rights systems. UN protection mechanisms are predominantly non-judicial and although these bodies have the power to order specific remedies, these are not technically binding under international law. Nevertheless, there is a growing human rights jurisprudence flowing from indirect application of international human rights law in International Court of Justice decisions. This has been so significant that it has been suggested that the International Court of Justice should establish a human rights and humanitarian issues chamber in order to deliver more timely and efficient judgments in relation to such cases. Beyond the International Court of Justice, domestic courts or regional human rights courts may also apply international human rights law. Where such norms have been incorporated as law, and *embedded* in the domestic system, individuals may receive redress for breaches. However, unless incorporated as domestic law, UN human rights are normally *weakly embedded* and indirectly enforced.

Judicial protection of CoE human rights arises mainly in the ECtHR and domestic courts. The ECtHR has extensive jurisdiction and individuals have the right of application to the Court. This has given rise to growing backlog of cases as the Court has become a victim of its own success. As a consequence, reforms have been introduced to deal with the case-load crisis of the Court including: the Pilot Judgment Procedure, Protocol 14 to the ECHR and the more recent development of the subsidiarity principle in the *Interlaken Declaration and Action Plan*. The judicialisation of human rights within the CoE marks it out from the UN system. Nevertheless, to the CoE must rely on Member States to enforce ECtHR judgments. All CoE Member States have incorporated the ECHR into domestic law to varying degrees. The ECHR is to this extent *diffusely embedded* in domestic systems.

Judicial application of EU human rights norms exist in a number of forms. There are a range of procedures through which actions may be brought. Both institutional and individual litigation forms part of the EU's system of judicial remedies. The Lisbon Treaty has also now removed previous limitations on the CJ's jurisdiction over the EU's 'Area of Freedom, Security and Justice', although we note with concern the continued limitation on jurisdiction over Common Foreign and Security Policy.

The CJ has jurisdiction directly to review the conformity of Member State acts with Union law through infringement actions, and this includes reviews in light of fundamental rights. Although these actions can be brought by Member States, it is the European Commission which routinely pursues Member States for breaches of EU law. There are concerns with the process through which individual complainants interact with the Commission, and current practice does not provide effective protection of human rights. Procedural reform should be utilised to broaden the scope for using infringement proceedings to develop EU human rights.

It is in domestic courts that the routine enforcement of EU human rights law takes place, with national judges acting as the first instance judges of EU law, generally with discretion to refer questions to the CJ. The case-law of the CJ on the domestic effect of EU law shows that the EU human rights system is *directly embedded* in domestic systems. The important role of national courts in this respect is emphasised in Article 19(1) TEU.

The CJ also has jurisdiction to review acts of EU institutions in light of fundamental rights. Strict standing rules apply however and there are limited circumstances in which individuals can bring direct actions in this respect. As a consequence, in most cases individuals still pursue complaints through the preliminary reference procedure, which is unlikely to provide effective judicial protection. The Lisbon reform on 'regulatory acts' does not alleviate these concerns.

The European Parliament is a potentially important human rights litigant, but has made limited use its general *locus standi* to bring actions. The EP should develop its role as a human rights litigant, and create a strategy for strategic litigation. It should also learn from jurisdictions where rights based abstract legality review is brought by privileged institutions. This is all the more important given the practical problems involved in the bringing preliminary reference procedures. The difficulties here also relate to case overload and delays in the CJ, which have not entirely been alleviated by reforms aimed at accelerating procedures. While the new urgent procedure does allow the Court to resolve questions of law swiftly, it risks allowing an unduly narrow view of the legal issues by the CJ.

Typology 4 lays out a framework through which to compare judicial protection mechanisms in the UN-CoE-EU systems. The typology analyses each judicial system by reference to its jurisdiction, parties, interveners, remedies, enforcement powers, and domestic effect of judgments.

Non-judicial human rights mechanisms exist in all of the UN-CoE-EU systems. These can be characterised by reference to their particular powers, or clusters of powers, namely: *quasi-judicial*, *monitoring*, *co-ordination* and *advisory*. In the case of the EU however, a distinctive capacity to 'respect, protect, promote and fulfil' human rights rests in its *lawmaking* capacity.

There are two parallel arms of the non-judicial protection mechanisms under the UN, namely Charter-based bodies and Treaty bodies. There are some concerns with these separate parallel processes. Charter-Based bodies consist in the United Nations Human Rights Council (UNHRC) and the Special Procedures. The UNHRC previous has taken over the role of the previously named UN Commission on Human Rights. It is arguable that these reforms have undermined human rights protections in some respects. The new Universal Periodic Review procedure has given rise to concerns raised by various critics, in particular the shortcomings identified by UPR Watch. Given the difficulties raised, it is the Special Procedures which may be more effective in dealing with specific human rights violations by States.

The under-resourced Treaty monitoring bodies also have their critics, and many propose the creation of one full-time unified treaty body. This proposal was analyzed in the Dublin Statement 2010, but has not yet been implemented. Notwithstanding their limitations, however treaty-based bodies have over time produced a substantial body of international human rights law. Individual communication procedures in particular have produced alternative judicial fora, recognized the individual under international law and facilitated the development of a common universal standard of human rights observance.

National Human Rights Institutions are increasingly important in ensuring that human rights are respected, protected and promoted. National Human Rights Institutions have now been affirmed under the Paris Principles, and are recognized through an accreditation process conducted by the International Coordinating

Committee of National Institutions for the Promotion and Protection of Human Rights. Finally, UN High Commissioner for Human Rights plays an important role in international human rights law. The Commissioner is crucial to the co-ordination of the complex UN human rights network.

The CoE system contains an extensive non-judicial protection system with a range of different bodies. Particular examples can be found in the work of the European Committee on Social Rights, and its collective complaints system. While the Committee does not directly enforce the European Social Charter, it has significant *quasi-judicial* powers. Its weakness in forcing State compliance is a hindrance however, and there are arguments for the development of a European Social Rights Court. Another example can be found in the European Commissioner for Human Rights, who has broad *monitoring and co-ordinatory* powers. As an elected representative of the CoE Parliamentary Assembly, the Commissioner has a strong integrative role in bringing together human rights actors, in particular National Human Rights Institutions. The proposal to broaden standing rules before the ECtHR in order to allow the Commissioner to bring test cases is as yet unfulfilled, but new powers have been afforded to this office to intervene in proceedings. A final example of *supervisory monitoring* powers exists in the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment. The capacity of this Committee to make country visits and to issue frank and critical reports are seen as two of its most effective powers.

There are a number of non-judicial mechanisms within the EU related to rights protection. The EU is distinguished from the UN and CoE as it has extensive legislative and executive powers, all of which are subject to duties to respect, protect, promote and fulfil human rights. It is noteworthy that the European Commission has committed itself to scrutinising all its legislative proposals for compatibility with the Charter. In addition, fundamental rights have been included in the impact assessments of EU measures conducted by the Commission. However, EU lawmaking processes are complex and variable in relation to human rights. In some human rights sensitive fields, the EP has only a weak legislative role and cannot take the opportunity to develop human rights in this respect. However, it is also regrettable that in some fields where the EP has a co-legislative role, it has been

seen to be complicit in the erosion of human rights standards (e.g. the Return Directive)

Aside from the lawmaking function, non-judicial protection mechanisms also exist in the EU. The European Ombudsman has the potential for advancing human rights protections. Complaints to the European Ombudsman frequently raise fair procedures aspects of fundamental rights. The emphasis by the European Ombudsman on national institutions and the European Network of Ombudsmen to prevent the abuse of fundamental rights is to be credited. Further non-judicial protection of human rights might arise in the EU monitoring of Member State acts. While the European Commission must monitor Member States' implementation of EU law, the role of the EU in monitoring human rights beyond this sphere is more contentious. While the general principles and the Charter only bind Member States when acting within the scope of or when implementing EU law, Article 7 TEU presupposes that the general human rights situation in the Member States may in extremis lead to sanctions. This tension is manifest in the contrasting remits of the former EU Network of Experts on Fundamental Rights and the current Fundamental Rights Agency.

A primary non-judicial human rights protection mechanism in the EU consists in the Fundamental Rights Agency (FRA). The FRA does not enforce rights, but acts as a source of expertise, and as an investigator, advisor and facilitator to the EU. The FRA is also mandated to co-operate with National Human Rights Institutions. The FRA's lack of enforcement powers are seen by critics as a serious shortcoming. There are also questions raised about the independence of the FRA from the EU institutions, and the limited role that it has to intervene in EU legislative and judicial processes.

Potential for human rights promotion exists through new governance methods such as the Open Method of Coordination (OMC). There are various OMC's in areas of European Employment Strategy, Social Inclusion, Pensions, Healthcare and Occupational Health & Safety. New governance methods may provide a useful supplement to hard law and judicial enforcement, but effective human rights monitoring depends on transparency and civil society participation that the OMC tends to lack.

Typology 5 classifies the UN-CoE-EU non-judicial institutions by reference to their powers or cluster of powers namely, law-making, quasi-judicial, monitoring, co-ordinating and advisory.

Part B 3 explores the way civil society actors engage with institutions of the UN-CoE-EU. In the UN system, civil society actors are involved in lobbying for new normative standards and human rights mechanisms, contributing to the development of soft law in a large variety of UN fora. NGOs often drive standard setting within the international arena, although with some exceptions there has been relatively less success for NGOs in the instigation of hard law reforms. NGOs also play a key role in reporting, monitoring and fact-finding. This work supports treaty and charter bodies as well as the special procedures. The shadow reporting process is seen to be a particularly effective use of NGO resources, as opposed to generalized lobbying. Some concern has been raised about the exclusive focus, and UN dependence, on NGO engagement, at the expense of more expert or local actors at the national level.

Civil society actors engage also with CoE bodies. There are restrictions on standing afforded to NGOs and individuals under Article 34 ECHR. The 'victim' test often stands as a hindrance to NGO standing before the ECtHR, and there are further admissibility factors (delay, exhaustion of domestic remedies) which may hinder individual applicants who lack sufficient resources. In the absence of significant legal aid, NGO support of individual applicants in bringing strategic litigation is crucial. There is also significant potential for third party interventions before the ECtHR under Article 36 afforded to States, NGOs and international actors. Given the strict standing requirements before the Court, these interventions are crucial. It is also welcome that the Protocol 14 reform allowing the CoE Commissioner for Human Rights third party intervention rights.

Another important avenue for civic, in particular NGO, engagement exists in the collective complaint system of the European Committee for Social Rights. NGO engagement here exists alongside their shadow reporting function to this Committee. However that the ability to render such complaints is restricted to institutions falling within three narrow categories identified in Article 1 of the Additional Protocol to the Social Charter. Further sources of NGO engagement with non-judicial institutions of the CoE may occur through informal channels or through officially mandated

interactions. The work of the Venice Commission and the European Commission for the Efficiency of Justice is particularly bound up with co-ordinating with domestic and international NGOs, networks of legal professionals and other research institutes or interest groups. Likewise, the CoE Parliamentary Assembly and the Parliamentary Committee on Legal Affairs and Human Rights in particular, engages a range of civil society actors in its enquiries. Importantly, they liaise with parallel parliamentary institutions within Member States, as well as political groups and other inter-governmental organizations.

Civil society engagement with EU judicial institutions exists to varying degrees. Individual access to the CJ and the Commission is restricted, and overall individual litigation in national courts emerges as the primary means of enforcing EU fundamental rights. The European Parliament has made limited use of its general *locus standi* before the CJ, a power which has the potential to considerably enhance democratic engagement with the legal enforcement of human rights. Rules on third party interventions before the CJ are considerably more restrictive to those of the ECtHR. The practical result of the standing rules is that governmental and EU institutional interventions are commonplace, while NGO and civil society interventions are relatively rare. This may distort the range of argumentation before the CJ in human rights cases, as governmental voices are not balanced by authoritative defenders of those rights. However, national equality bodies, as required by the EU Race and Sex Equality Directives, do play an important role in supporting strategic litigation.

Civic society engagement with EU non-judicial processes is also varied. There is a relative lack of EU engagement with NGOs and civil society in pre-legislative and legislative processes relative to CoE institutions, as well as in early impact assessments relating to EU legislation. However, National Parliaments may play an important role in scrutinising EU policymaking, particularly where there are strong Human Rights and EU Committees. The role of the Ombudsman on EU maladministration is another route for human rights engagement, while the FRA's Fundamental Rights Platform and its other formal links with EQUINET, National Human Rights Institutions, and other human rights systems are similarly well placed. The political activity of the European Parliament with regard to human rights policies is crucial.

Part B 4 examines the dynamic interaction between the UN-CoE-EU systems, examining the opportunities and threats emerging from the interaction, convergence and divergence between the systems. Annex 1 demonstrates that there is a considerable overlap in enumerated rights protections. Nevertheless, while the Charter is a strong advance in combining political, civil, economic, social and cultural rights in one instrument it has a number of gaps in protection. These include the right to housing, the right to adequate standard of living, right to protection from poverty, the right to fair remuneration for work and the right to democratic governance. Extensive elaboration of minority rights is also absent in the Charter. These gaps might be filled by interpretive techniques drawing on general EU human rights principles and crucially, international human rights law beyond the ECHR. There are various ways in which dynamic judicial interpretation arises. Each system's judicial interpretive strategies are institutionally shaped. Techniques of dynamic interpretation may also differ. The development of meta-rights or values such as dignity as a source of judicial creativity might be one route. Another beneficial route may exist in judges drawing on sources of human rights protection outside of their own system.

There are opportunities and threats which arise where human rights protections overlap and diverge. Opportunities arise where extensive mutual citation and borrowing between the ECtHR and CJ that has led to gradual convergence and rising of standards between the two systems. This has occurred in relation to the right to privacy and business premises, and sexual orientation (Annex 4). Dynamic divergence between systems may also raise regional standards. Positive divergence occurs when the different functions of the CoE and EU systems are understood: the ECHR embodies an international minimum standard while the EU's is quasi-constitutional. This has arisen in respect to family migration, where a higher protection is available under EU law. However, interaction between the EU and international human rights law may also produce mixed results. This is demonstrated in two case studies (Annex 6 on Detention of Migrants and Annex 7 on Refugee Protection), where EU standards simultaneously enhance and detract from human rights protection.

Overlapping human rights protections may also present threats. These arise where

excessive deference occurs between systems; pressure is exercised to converge on the lowest standards, and in fragmentation between systems. The deference of the ECtHR to the EU and UN is noteworthy, and there is potential for more robust ECtHR scrutiny of EU activity post EU accession. Equally, overlapping systems may increase the opportunity structures to dilute protections and degrade human rights protection. The risk of fragmentation is evident in the clash between UN and EU requirements for anti-terrorist measures. Hence, while the potential for progressive development of human rights through dynamic interaction exists, it also gives rise to potential for undermining protections. Importantly, we must guard against complacency in the face of what may be perceived as a 'rights surfeit' over the three overlapping systems of human rights protection.

Having outlined the substantive rights and enforcement and protection mechanisms of each system, the report turns in **Part C** to explore the interrelationship between human rights, minority rights and identity claims. The term minority is given a broad meaning to include groups defined by sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, nationality, membership of a national minority, property, birth, disability, age or sexual orientation. Human rights systems protect minorities and provide a venue for identity claims in three principal contexts: 1) substantive human rights; 2) non-discrimination and equality rights and 3) express group rights.

UN treaties have consistently prohibited discrimination, while there is a specific provision relating to minority rights protection in Article 27 of the International Covenant on Civil and Political Rights (ICCPR). The United Nations Human Rights Committee (UNHRC) Communications have developed minority rights under general human rights guarantees and under Article 27 ICCPR specifically. The UNHRC interpretation of Article 27 ICCPR has been criticized for setting the procedural and substantive benchmarks too high, and for taking too strict a view of what constitutes a minority within a State. Soft law and institutional developments within the UN have also taken place with regard to minority rights protection: in particular the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, and the establishment of the office of the UN Independent Expert on Minority Issues in 2005.

The CoE has made a concerted effort to bring together a number of different institutions and instruments in order to strengthen minority rights protection, and positive co-operation and interaction between these bodies is evident. There is an extensive jurisprudence of the ECtHR on minority rights. On the other hand, the ECHR contains no specific reference to minority rights, multicultural questions fall to be addressed under Article 8 (right to private life), 9 (freedom of religion), 10 (freedom of expression), Article 2 of Protocol 1 (right to education) and 14 (prohibition of discrimination). The Strasbourg case law amply illustrates that national minorities gain important protections under the ECHR and that its individual rights provisions can serve multicultural ends. This has been demonstrated with respect to Roma and other ethnic and linguistic minorities in a variety of contexts: voting, education, condemnation and investigation of racially motivated crimes, housing evictions, nomadism, access to health care, and rights to property of spouses. In all of this case law, the influence of minority rights bodies and treaties both within the CoE and outside is more than evident. In particular, the influence of UN and EU instruments is noteworthy, as is the importance of NGO intervention in these cases. There is also an extensive case law on religious identification in the public sphere, and cases concerning Muslim religious practices in particular as manifested in the wearing of headscarves by Muslim women. These decisions of the ECtHR have met with a diverse range of critical opinion however.

The protection of social and economic rights without discrimination is guaranteed by the European Committee of Social Rights (ECSR). Minority rights protection is strongly assisted by the collective complaints procedure as groups and representative organisations are able to bring crucial test complaints to the Committee. This has been advantageous for persons seeking protection of disability rights in particular, as well as the housing, health and social assistance rights of the Roma. The most recent decision of the ECSR on the Roma and Sinti also address how racial discrimination and xenophobic and racist propaganda has aggravated their social exclusion and poverty. Again, the interaction between the decisions of the ECSR and the ECtHR jurisprudence here is important, as is the influence of the UN and EU.

A key role is played by the CoE Framework Convention for the Protection of National Minorities (FCNM). The Advisory Committee on the Framework Convention has

facilitated important dialogue and contributed to a body of law for the protection of minorities, which has also influenced the approach of the ECtHR. Hence, while not formally justiciable, the FCNM guides CoE judicial and other institutions in their activities. However, a number of Member States resist a broad notion of national minority, as well as the programme type objectives set by the FCNM. States who adopt a narrow view of what constitutes a minority can significantly undermine the protections that minority groups receive under the FCNM. A further key role in minority protection is played by the European Charter for Regional and Minority Languages (ECRML) which is the world's only convention focused solely on the protection and promotion of languages used by national or ethnic minorities. There is a strong complementarity between the ECRML with other CoE instruments, in particular the FCNM. States in achieving the objectives of the ECRML will fulfil the rights in the FCNM in the linguistic sphere. A three stage compliance process is applied by the Committee of Experts on Regional or Minority Languages. Finally, the work of the European Commission Against Racism and Intolerance is key. The Commission has a specific mandate to monitor racism, xenophobia, anti-Semitism and intolerance. Its statutory activities are: country-by-country monitoring, general policy recommendations, and information and communication activities with civil society. The reporting process for the European Commission against Racism and Intolerance (ECRI) follows a country-by-country approach and all Member States of the CoE are monitored. ECRI's general policy recommendations have covered a wide range of fields including: intolerance and discrimination of Muslims; racism on the internet; and racism while fighting terrorism, in policing and in sport activity. The recommendations have been praised by observers who regard ECRI as one of the stronger bodies internationally in the field.

Minority protection has not traditionally been an express part of EU internal fundamental rights law, and protection remains inconsistent. This is the case despite the fact that the EU requires States acceding to the EU to protect minorities, using the FCNM as a benchmark. One route to obtaining coherency, though not without its pitfalls, might be formal EU accession to the FCNM. The protection of minorities forms part of the EU constitutional framework, and novel references to minorities exist in the Lisbon Treaty and the Charter. However, these references are more symbolic than practical. EU Citizenship and free movement provisions protect EU citizens living in another Member State from discrimination on grounds of nationality

in host States. Equal treatment requires some accommodation of EU citizens' distinct linguistic and cultural position, though this does not extend to Third Country Nationals and may be in tension with Member States' obligations under the FCNM.

EU equality law requires accommodation of group diversity. Council Directive 2000/78/EC prohibits discrimination on various grounds in the workplace, including 'religion or belief' and disability. The stronger instrument is Council Directive 2000/43/EC, the hybrid character of which has prompted suggestions that it will come to accommodate minority protections for racial and ethnic minorities. This potential has yet to be exploited, and the position of vulnerable minorities remains as noted in the FRA's survey on European Union Minorities and Discrimination. It is noteworthy that proposals to adopt a Roma Integration Directive have not been acted upon, despite growing concerns about EU Member States' expulsions of Roma EU citizens. Finally, EU uses new governance tools to promote minority rights. However, the non-binding character of both the European Employment Strategy and migrant integration processes makes their contribution to the development and enforcement of rights unclear at best.

In sum, minority protection across the UN-CoE-EU system is uneven, raising the importance of the interaction within and between systems. UN protection of minorities tends to focus on protecting discrete indigenous groups rather than minorities in general. These protection mechanisms need to be widened to give effective access and redress for both individuals and groups in relation to calls for equality and non-discrimination, especially considering the express requirement to accommodate diversity. In contrast, EU law protects EU Citizens living in another Member State in particular, and Third Country Nationals who are long-term residents. The equal treatment approach remains the dominant paradigm in EU law, and it is unclear that soft law protections are effective at minority rights protection. The CoE system is the most extensive with the special instruments directed at minority rights radiating through to other general protection mechanisms and institutions within the CoE and other rights protection systems more generally.

Part D examines different legal and political opportunity structures for domestic, transnational and international political actors within the UN-CoE-EU systems. When analysing the enactment and elaboration of human rights standards within the UN

and CoE systems, we note that political processes can sometimes advance and sometimes thwart the human rights agenda. Typology 6 elaborates on the relationship between human rights law and political actors within the UN and CoE systems. Human rights advances are found in the contribution of NGOs to the development of the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment and its Optional Protocol, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and reforms of the European Social Charter. These in turn are linked to domestic and transnational political activism regarding economic, social and cultural rights. On the other hand, the CoE Framework Convention on National Minorities was attributed to the resistance of States to an Optional Protocol to the ECHR, and also recognition of the need for a human rights framework to complement the work of the Organization for Security and Co-operation in Europe. The EU may drive, support or thwart the processes of elaborating human rights at the UN level. These conflicting processes are exemplified on the one hand by the Convention on the Rights of Persons with Disabilities, and the Convention on the Protection of Migrant Workers on the other. The ratification of more international human rights instruments by the EU is recommended. This would enhance external scrutiny of EU actions, bolster external systems of rights protection, and reduce fragmentation of international human rights law. International human rights instruments may also be developed by political resolutions leading to soft law. Often these resolutions are initiated by experts outside official fora. This is evident in the Limburg Principles which provide guidelines on the implementation of the International Covenant on Economic, Social and Cultural Rights, and the Yogyakarta Principles which provide interpretive guidelines of international human rights instruments to further the protection of sexual orientation and gender identity. Finally, human rights may be challenged through political developments within international human rights law. This is evident in the case study on the 'Defamation of Religion' resolutions.

The enactment and elaboration of human rights standards in the EU work differently to that in the UN and CoE. There is a key interrelationship between the CJ's development of human rights general principles and the Charter. The CJ provides the key institutional linkage to domestic courts, engaging in a judicial dialogue which has provided both catalyst and context for the development of human rights law generally. In contrast, the Charter was drafted in an open political process. EU

Treaties have been amended over time to include legislative competences in many human rights sensitive fields. Unlike the UN and CoE, the legislative competence of the EU provides far-reaching opportunity structures for human rights advancement. This is highlighted in the development of EU equality law which is also attributed to transnational activists engaging with EU political bodies and Member States. Typology 7 and 8 explore the relationship between human rights law and politics in the EU.

Part E concludes the report drawing together various insights and identifying areas of improvement for the EU. It contains 22 recommendations. The section takes the basic constitutional specificities of the EU as given and seeks to develop proposals within those constraints. The proposals focus on developing the content of EU human rights standards, judicial protection of human rights, the potential for EU legislation to 'respect, protect, promote and fulfil' human rights and non-judicial protection mechanisms within the EU". The report mainly focuses on the EU's *internal* activities. The authors acknowledge the importance of the external dimension and the crucial need to ensure consistency in EU practice internally and externally, as highlighted in the Report 'Leading by Example: A Human Rights Agenda for the European Union for the Year 2000'². As Part C identifies, the inconsistency in the position of minority rights in the external and internal policies of the EU remains problematic. We therefore begin with the following recommendation:

Recommendation 1: Integrate duties to respect, protect, promote and fulfil human rights into all areas of EU activity.

While the Charter has gaps in human rights protection, the EU has three binding sources of law including general principles and international human rights law. The CJ's development of fundamental rights as general principles has drawn on the common constitutional traditions of the Member States. It has also drawn on international human rights law, although in practice the ECHR dominates. The authors stress the indivisibility of human rights, noting international efforts to overcome the divide between civil and political rights on the one hand, and economic, social and cultural rights on the other. We note that the EU has only ratified one international human rights treaty, the Convention on the Rights of

² 'Leading by Example: A Human Rights Agenda for the European Union for the Year 2000'. Agenda of the Comité des Sages and Final Project Report (1998).

Persons with Disabilities, with the ratification of the second, the ECHR, in process. We also note the patchy ratification of UN instruments by EU Member States. Systematic analysis of the EU's external competences is required in order to identify which Treaties the EU is competent to ratify, and UN and CoE human rights instruments (other than the ECHR) will usually require reform to allow the accession of regional integration organizations. Nevertheless, ratification of other international human rights law would bring coherence between UN, CoE and EU law, and is a key recommendation of this report. Certainly, it is evident that acceding to the Convention on the Elimination of Discrimination Against Women, the International Convention on the Elimination of Racial Discrimination, the Refugee Convention (as undertaken in the Stockholm Programme) and Revised European Social Charter would be appropriate. Given the long-term nature of such a process, the report also draws on previous proposals and recommends that the EU should devise practical devices to subject itself to UN and CoE human rights mechanisms, even in the absence of formal accession. Some of these proposals also guard against the threat of excessive deference arising from the use of overlapping systems, and the danger of downgrading human rights standards. We therefore propose the following recommendations:

Recommendation 2: Support the development of general principles of EU law in light of the full range of appropriate 'common constitutional traditions' and in particular international human rights law, including the jurisprudence of quasi-judicial UN and CoE bodies.

Recommendation 3: Support the indivisibility of human rights, in particular by ensuring that the general principles and Charter are interpreted to reflect the successful integration of civil and political rights on the one hand, and economic, social and cultural rights on the other.

Recommendation 4: Embrace the three sources of EU human rights standards, the Charter, general principles of EU law and international human rights law.

Recommendation 5: Establish stronger external human rights scrutiny of EU activities by acceding to international human rights instruments and, pending accession, creating practical devices to subject the EU to the full rigor of UN and CoE human rights mechanisms.

Recommendation 6: Support the effective and progressive development of human rights protections in the UN and CoE.

Recommendation 7: Support activities within the UN which aim to avoid fragmentation within the UN human rights system, including the call for a unified standing treaty body.

Recommendation 8: Support the ratification of UN instruments by EU Member States.

The report notes the variation between the systems in terms of judicialisation, and the extent to which the CJ and ECtHR have been overburdened. To the extent that it is competent so to do, the EU should support the role of national courts in the enforcement of human rights. The CJ is itself constrained by limitations on its own jurisdiction within EU Treaties. Failing the reform of these limitations, the authors promote strategic litigation by the European Commission and European Parliament with respect to human rights. We also note the comparative rarity of human rights interventions before the CJ by the NGOs and National Human Rights Institutions, and the limited role of the Fundamental Rights Agency (FRA) in this respect. The following recommendations are therefore made:

Recommendation 9: Promote effective judicial protection of human rights in national courts.

Recommendation 10: Amend the EU Treaties to ensure full CJ jurisdiction over all areas of EU activity, including Common Foreign and Security Policy.

Recommendation 11: Amend the EU Treaties to widen standing for individuals to challenge EU acts directly before the CJ.

Recommendation 12: The European Commission should develop a strategy to ensure that infringement proceedings secure effective protection of human rights when Member States act within the scope of EU law.

Recommendation 13: The European Parliament should develop a strategy to use its powers to act as a human rights litigant, in particular to ensure that EU legislative and executive acts respect, protect, promote and fulfil human rights.

Recommendation 14: The procedural rules of the CJ and General Court should be revised to facilitate third-party interventions, by human rights NGOs in particular.

Recommendation 15: Consideration should be given to developing the capacity of Equality Bodies, National Human Rights Institutions and the FRA as human rights litigants.

The authors reiterate the potential for the progressive development of human rights through the use of the EU's lawmaking capacity. We note that this process requires the general engagement of a range of political actors. There is a problem however where EU legislation detracts from human rights standards. We therefore propose a number of specific legislative actions relating to fields covered in the report.

Recommendation 16: Strengthen proactive institutional engagement with human rights within EU legislative processes.

Recommendation 17: EU asylum legislation should be amended to ensure compliance with international human rights law and also contribute to its progressive development.

Recommendation 18: EU equality legislation should be further expanded beyond the workplace, and that further specific legislation be adopted, in particular, on disabled

access and Roma integration, in order to give effect to international human rights law and contribute to its progressive development.

Finally, the authors stress the importance of the non-judicial protection mechanisms to develop human rights within the EU, and the role of the FRA in particular. We also note the potential of National Human Rights Institutions and National Parliaments to support the EU human rights protection system. The authors therefore propose the following recommendations:

Recommendation 19: The Paris Principles on National Human Rights Institutions should be used as a model for future FRA reforms, with the FRA serving as a National Human Rights Institution for the EU (given the EU's own extensive legislative and executive powers) and as a Network Agency to coordinate and support the work of National Human Rights Institutions.

Recommendation 20: The remit of the FRA should be extended to ensure that it covers all EU and Member States activities. However, any extension of the FRA's remit should be undertaken with care to avoid duplication of UN and CoE activities. Institutional co-operation across the three systems UN-CoE-EU is vital.

Recommendation 21: The EU should support the development and networking of National Human Rights Institutions, Equality Bodies and other national institutions for the protection of human rights.

Recommendation 22: National Parliaments' role in human rights scrutiny of EU activities and national implementation of EU acts should be supported and enhanced.

Part A

This report examines compares and explores the interrelationship between the human rights systems of the UN-CoE-EU systems. Before doing so, however, we seek here in Part A to give readers a brief introduction to basic concepts in human rights law. Section 1 will explore how rights conceptions have evolved over time, while Section 2 will explore how rights might be placed in a hierarchy of importance and weight. Both these sections are designed to provide a clearer sense of how rights work before delving into the detail of the substance of rights protections within each system. The concepts introduced in Part A will be applied in the explanation of each rights system in subsequent sections.

1. Conceptions of human rights

Human rights are far from universally accepted. They are the product of conceptions of human nature and political society, which have gained ascendancy within different societies in various ways over time. Contestation about human rights remains one of the central challenges faced by those developing and advancing human rights protections within any international, regional or domestic jurisdiction. This relates not only to the question of cultural diversity or relativity and the supposed universality of human rights³. It arises also with respect to the moral or political foundation of human rights, the institutional frameworks that should be in place to protect them, and whether some rights are worthy of greater protection and enforcement than others.⁴ Rights sceptics remain, not only because rights often conflict with certain cultural conceptions, but also because rights rhetoric is said to undermine collective life, political participation and democratic engagement⁵.

In this environment it is useful briefly to remind ourselves of the political and historical foundations of human rights which underpin the rights protections developed within the UN-CoE-EU systems. In the European context, contemporary human rights systems are the culmination of philosophical ideas underpinning political struggles against absolutism in the eighteenth and nineteenth centuries. The

³ Donnelly 2010.

⁴ Whelan and Donnelly 2007 and 2009; Kirkup and Evans 2009.

⁵ Glendon 1991; Kennedy 2002; Waldron 1999.

theories of Locke, Voltaire, Rousseau, Montesquieu, Paine and Kant all contributed to a political movement dedicated to the fulfilment of freedom and equality of individuals. Central to these liberal democratic theories was the notion that the State must be limited by the rights of individuals and that individuals were themselves deserving of such rights by virtue of their human nature and place in political society. The notion that autonomy, equality and dignity must be safeguarded by the State, and that the State requires no such protection from individuals, continues to define liberal democratic philosophy and the human rights movement.

While a number of democratic countries have been founded on notions of political and civil rights since this time, the traditions underpinning human rights received profound international expression after the Second World War. This marked a particular moment of global overlapping consensus allowing for abstract expression of the universal commitment to human rights through the Universal Declaration of Human Rights of 1948 (UDHR). Since this moment, the idea of human rights has been the animating framework for the establishment of an international order dedicated to peace between nations. The UDHR contains civil, political, economic, social and cultural rights; however, the distinction between these two categories of rights very quickly became evident in the development of international human rights law⁶.

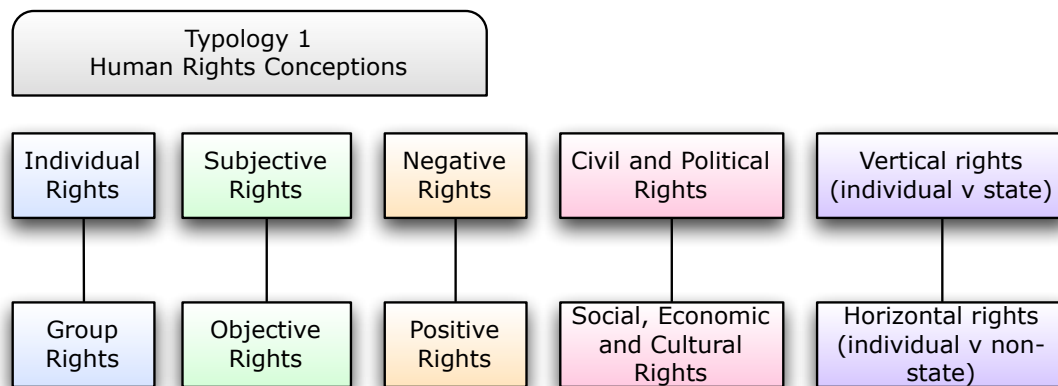
The global overlapping consensus found in 1945 has varied over time, not least because the establishment of abstract rights invites debate and disagreement about the content of the rights, the duties correlative upon them, and the actors upon whom these duties fall. Similarly, rights thinking continues to evolve, and contemporary rights theorists now offer a range of justifications for human rights. These draw on notions of human agency, interests, or capabilities; on theories of liberalism, cosmopolitanism and post-modernism; as well as rights to political participation⁷. Most theorists recognise that rights go beyond subjective individual entitlements that place limitations on the State or other duty bearers, and that rights incorporate the notion that States or other actors have duties to respect and protect rights and not merely a duty to desist from violating them⁸. In international human

⁶ Weston 1993 in Steiner, Alston and Goodman 2007; Ssenyonjo 2010; Woods 2003.

⁷ Dworkin 1978; Waldron 1984 and 2005; Finnis 1980; Gewirth 1978 and 1982; Nickel 1987; Sen 1999; Anderson Gold 2001; Douzinas 2007.

⁸ Shue 1996; Jones 1994; Pogge 2008; Sen 1999; Bilchitz 2007; Fredman 2008; Pogge 2008.

rights law, the verbs 'respect, protect, promote and fulfil' are used to capture the multifaceted nature of the duties the rights entail. Rather than a sharp divide between negative and positive rights, we find that most rights create various forms and clusters of duties, requiring and precluding various forms of action by a range of duty bearers.

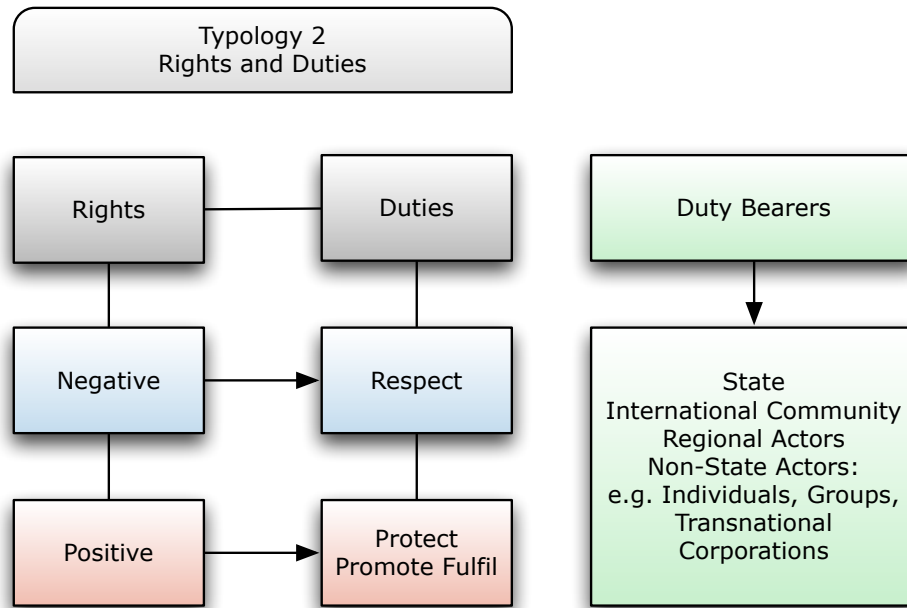


Equally, rights are seen not merely as subjectively held, but also as principles which constitute objective norms which frame State action.⁹ Hence, rights are viewed as arising in relations not only vertically between the individual and the State, but potentially also horizontally between private individuals. Increasingly, non-State actors are viewed as equally important potential threats to the realisation of individual rights¹⁰. Moreover, the individualistic notion of rights is complemented by an understanding that group rights may be a crucial part of human rights, and identity claims may be central to the achievement of full social equality and equality of political participation¹¹.

⁹ Alexy 2002.

¹⁰ Clapham 2006.

¹¹ Barzilai 2003; Toft 2003; Ghai 2003; Casals 2006; Jenkins 2008.



The theoretical debate regarding human rights as moral and political concepts evolves dynamically as novel rights claims and new political struggles arise within international, regional and domestic settings. The debate also exists alongside controversy amongst and within States regarding the legal content and enforcement of human rights. In the domestic and international context, the question of the democratic legitimacy of the institutions which protect rights remains live¹². This inherent difficulty in balancing democratic institutions and human rights has given rise to a range of interpretive principles which balance the institutional competence of democratic powers with institutions designed to protect enforceable human rights at the international, regional and domestic level. Hence, while rights thinking may continue to develop and influence the substance of rights protected within different systems, institutional dynamics play an equally significant role in determining how rights are interpreted, enforced and balanced against competing political imperatives. In the course of this report these influences will become evident as we explore how each of the systems respect, protect, promote and fulfil human rights.

¹² Waldron 1999.

2. Rights limitations and hierarchies

Human rights are normally divided between absolute rights, those never capable of limitation for any reason, and qualified rights and those amenable to limitation on specified grounds. With absolute rights, the crucial question lies in the determination of the scope of the right. With qualified rights, the central question arises as to whether the rights limitation by the State or other duty bearer is permissible, or whether it constitutes a violation of the right. Human rights law is thus largely concerned with justification requirements that arise where States or non-State actors seek to limit rights. These are determined by the range of devices available to States to limit the rights protections that apply to them. These limitation devices will be explored throughout this report, but it is important at the outset to clarify the processes by which limitations of rights arise, and through which an implicit hierarchy of rights has emerged¹³. Demanding justification for permissible limitations of human rights is central to their protection.

Hierarchies of rights arise where certain rights are given greater weight over others. This is done either in the formulation of the scope of the right (as absolute or qualified) or in the specification of permissible derogations, limitations or qualifications of other rights. The limitations permitted may in turn be more or less extensive, and the onus of justification on States with respect to these limitations may be more or less exacting. Different systems may adopt different approaches in this respect.

The first way in which rights hierarchies are created can be found in textually explicit mechanisms. These can include the explicit entrenchment of a right; for example, the right to human dignity under Article 1 of the German Basic Law is protected from constitutional amendment under Art 79 (3). A similar approach is adopted with respect to Section 10 of the South African Constitution which protects human dignity and lists it as one of the principles upon which South African society is based in Sections 1 and 36. The right to human dignity, in both of these constitutions, is also explicitly formulated as an absolute right in that no textual limitation arises. This is also the case with Article 3 of the European Convention on Human Rights (ECHR) which prohibits torture in a simple sentence: 'no one shall be subject to torture or

¹³ Koji 2001.

inhuman or degrading treatment or punishment’ and admits of no further textually explicit limitations. A similar construction is used in the first amendment of the US Constitution which at least *prima facie* seems to protect freedom of speech absolutely.

Just as textually explicit mechanisms can be used to declare a right unamendable or absolute, so too can they be used to outline permissible limitations or derogations from a right¹⁴. These may be used to create gradated justification requirements with respect to the limitation of a right or with respect to exceptions to a right. For example, Articles 8 – 10 of the ECHR contain broad express limitation clauses allowing for limitations of rights which are acceptable in a democratic society on the basis of national security and a range of other factors. In contrast, Article 5 ECHR contains narrow express exceptions to the right to liberty and security which specify the conditions in which liberty can properly be restricted. Another example of an explicit limitation mechanism can be found in section 36 of the South African Constitution which sets out the general framework for the limitation of all rights in the Constitution while also making explicit that human dignity, equality and freedom are the foundations upon which South African democracy is based.

Derogation clauses, or rights suspension clauses, are another manifestation of textually explicit limitation mechanisms. In Article 15 ECHR the Convention lays out the grounds upon which certain rights may be derogated from by States under conditions ‘threatening the life of the nation’. At the same time, certain rights, such as Article 3, are listed as being immune from derogation under Article 15. Similarly, Section 37 of the South African Constitution, which sets out the basis upon which States of Emergency may be declared, also sets out a table of non-derogable rights including equality, dignity and life. Another mechanism under international law through which to suspend the application of a right might exist in specific reservations which States implement when signing a Treaty.

A distinct route through which rights hierarchies may arise is through textually implied limitations. Such hierarchies are derived from the context of the bill of rights and/or Constitution. The most likely context is provided by the formulation of limitation clauses which provide a gradated system of justification, implying that

¹⁴ Miller 2008.

some rights can be more easily restricted (and therefore are 'lower down' in the implied normative hierarchy) than others. An example of a right with heightened protection is Article 6 ECHR (fair trial) which contains no explicit qualification clause but has been balanced by the European Court of Human Rights (ECtHR) against the public interest. In contrast, Arts 8-11 ECHR (respectively, rights to private life, religious expression, freedom of speech and assembly) are subject to qualification clauses under which the legality and proportionality principles are implied. While the European Union Charter of Fundamental Rights (Charter) contains a general limitation clause (Article 52(1)), its protections must not go below the ECHR minimum (Article 52(3)). Accordingly, its general limitation clause should not be taken to undermine the absolute nature of certain specific ECHR rights. This is also the case with the general freedom of action and the right to assemble in public spaces in Art 2(1) and Art 8(2) of the German Basic Law.

All of these limitation clauses, and the application of the proportionality principle, are also subject to implied judicial principles of self-restraint. For example, the doctrine of the margin of appreciation applies in determining when the ECtHR will allow State parties the competence to determine their own interpretation of rights (e.g. when life begins with respect to the right to life) and of rights limitations (e.g. what is required by national security in a particular context). In addition, the ECtHR's doctrine of European consensus allows it to develop its case law progressively. In contrast, the Court of Justice of the European Union (CJ) uses different jurisprudential tools and is often bolder in its interpretations. Consequently, textually implied hierarchies may be very nuanced and require a detailed analysis of the precise conditions under which a right may be restricted.

Hierarchies may also result from interpretations of rights. These interpretations may become apparent if certain rights are given a positive dimension placing obligations on the State, where rights are interpreted as principles which create an objective value system within the constitutional order, or where the text explicitly requires that certain principles should be taken into account which guide the interpretation of human rights. These interpretive techniques share the common dimension that they construct constitutional meta-principles which can add weight to one side in the process of balancing the right with other interests. The right to human dignity has been accorded this status both in Germany and in South Africa. In the South African

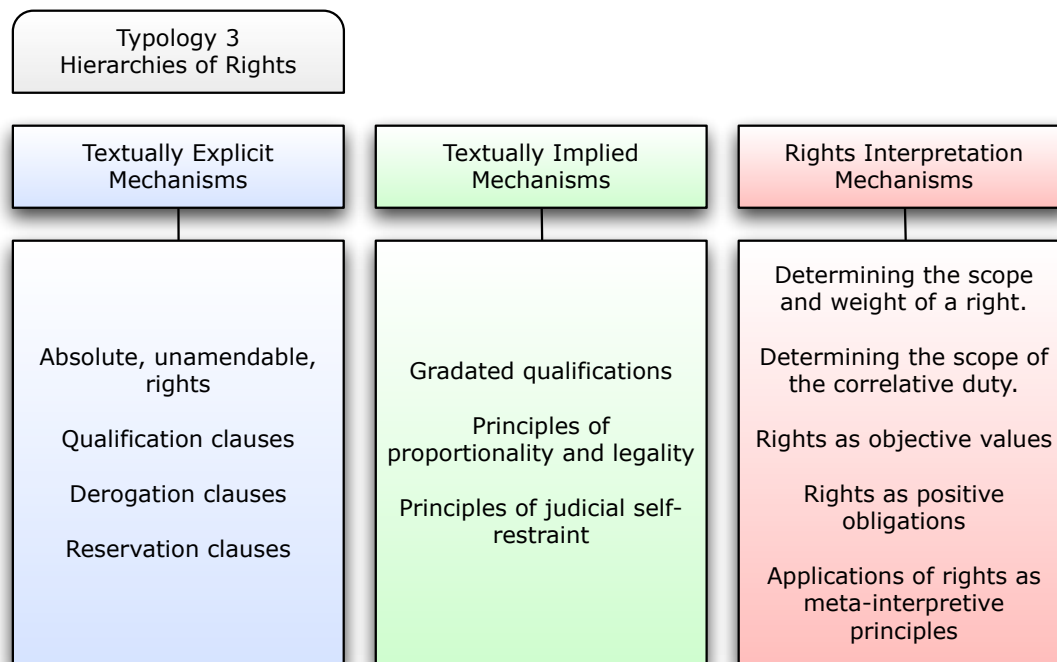
Constitution scope is provided for an interpretation of all rights according to the principles upon which it is founded, amongst them, 'human dignity' and 'non-racialism and non-sexism' (Section 1). In the German Basic Law Article 19(2) prohibits limitations of rights which touch the core (*Wesensgehalt*) of a right. Although there is no consensus about what amounts to the 'core' of a right, one interpretation used by the German Constitutional Court, is to consider the core of every human right as synonymous with its relevance to human dignity, as no rights may be limited beyond that core.¹⁵

These explicit requirements as to the interpretation of rights within a constitutional order, or Treaty framework, are also exemplified by Section 27 of the Canadian Charter which establishes the meta-principle that it 'shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians'. Similarly, Article 22 Charter states that the 'Union shall respect cultural, religious and linguistic diversity'. In EU law, fundamental rights protection needs to be adapted to the legal context where economic freedoms already enjoy extensive legal protection¹⁶.

In contrast to principles that bolster the protective scope of a right, courts may also imply rights limitations when interpreting the protective scope of a right (e.g. in the process of determining what constitutes torture). Other implied rights limitations may also arise in the process of interpreting rights which conflict with one another (privacy versus freedom of expression). Interpretative techniques, as can be seen from the examples, often reflect a particular historical or social context to which the test responds. The specific response thus can vary greatly.

¹⁵ German Federal Constitutional Court, BVerfGE 80, 367, 373f.

¹⁶ Cf for example, Barnard 2010, p. 171; Arnall et al 2006, p. 257 ff.



The mechanisms employed in the creation of rights hierarchies can be instrumental for the dynamic development of human rights regimes. The evolving interpretation of the scope of the prohibition on torture and inhuman and degrading treatment (Article 3 ECHR) by the ECtHR shows this very clearly. Article 3 now not only prohibits physical torture but also psychological torture¹⁷, caning as inhuman and degrading treatment¹⁸, extradition where there is a threat of prolonged periods on death row¹⁹, deportation where the threat in the home country results from third parties or in extreme cases merely from the socio-economic circumstances of the country²⁰. International law has also developed hierarchies inherent in the notion of obligations of *jus cogens* and *erga omnes*. Both doctrines suggest that certain values (such as the prohibition of genocide, aggression and crimes against humanity) have become especially important and therefore, especially protected, either by being non-derogable or by being enforceable *erga omnes*, rather than just between the parties. Part B of this report will thus include an exploration of the substance of rights hierarchies within each of the UN-CoE-EU systems.

¹⁷ *Ireland v United Kingdom* (1978) 2 EHRR 25.

¹⁸ *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293.

¹⁹ *Soering v United Kingdom* (1989) 11 EHRR 439.

²⁰ *Chahal v UK* (1997) 23 EHRR 413; *Saadi v Italy* App. No. 37201/06 222; *N v UK* (2008) Application no. 2656/05.

Part B: A comparison of the protection of human rights under the UN, Council of Europe and EU human rights systems

This Part provides an overview of the three human rights systems: the United Nations, the Council of Europe and the European Union. While the UN and CoE have had human rights at the centre of their activities from the outset, human rights have gradually taken on a central role in the EU. This Part outlines the rights protected by (section 1), the enforcement mechanisms developed within (section 2), and the modes of engagement with (section 3) each system with a view to exploring points of divergence and convergence between them in section 4. Section 1 is supplemented by two comparative rights tables which are laid out in Annex 1. These are designed to demonstrate the gaps and overlaps between the different systems of substantive rights protection. Sections 2 and 3 include typologies 3, 4, and 5 which model the systems of judicial and non-judicial rights enforcement, and modes of engagement with each system.

While this report is structured to examine the systems separately, it is important to stress at the outset the extent of the interplay between and within these systems²¹. Indeed, interaction between human rights systems is so pervasive that the development of constructive human rights pluralism is urgently required (see “Recommendations”, Part E) to ensure that overlapping systems do not converge on the minimum standard²². In our research we came across numerous examples of decisions and institutional statements within the UN-CoE-EU systems which draw on the other systems. This is a theme that will recur in our outlines below (see Textbox 2), and it is explored in more depth in Parts B 4 and D of this report.

²¹ Martinez 2003; Scheeck 2005; Wildhaber 2007; Costello 2006, 2009a; De Schutter 2008; Krisch 2008; 2010.

²² Costello 2009a; Ziegler 2011.

1. Human Rights Instruments

International human rights law now protects a range of civil, political, economic, social, and cultural rights, as well as group rights, which place obligations upon States and other actors to take action or allocate resources in order for these rights to be fulfilled. This section examines how these substantive rights are protected in the UN, the CoE and the EU.

1.1 UN Human Rights Instruments

The United Nations has developed an extensive set of human rights instruments since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. The key binding instruments ('hard law') which constitute the nine core UN human rights treaties listed below in Textbox 1 are complemented by a range of non-binding instruments ('soft law') listed in Annex 2 to this report. Soft law ranges from non-binding declarations to resolutions adopted at the UN Charter-based bodies or UN world conferences. Such instruments 'rarely stand in isolation' but are frequently used 'either as a precursor to hard law or as a supplement to a hard-law instrument'²³.

The standards adopted by each of the UN human rights instruments are coloured by the historical period of their emergence, the drafting history of the instruments, and the lobbying and advocacy during their adoption. As Textbox 1 below demonstrates, the UN human rights protection system has evolved over time in response to the growing sensibilities of both State and non-State actors²⁴. Beginning with the development of traditional civil and political rights and the protections of refugees in the early 1950s, the rising awareness of racial equality and social and economic rights were developed during the 1960s. Groundbreaking treaties were developed with regard to gender discrimination during the 1970s, torture during the 1980s, while the 1990s heralded a growing development of the rights of children and migrant workers. More recent evolutions include the protection of the rights of disabled persons.

²³ Shelton 2006, p. 320.

²⁴ Baderin and Ssenyonjo 2010, p. 3 ff.

A continuing theme in the development of international human rights law has been efforts to see the equal recognition of economic, social and cultural rights alongside civil and political rights. At the 1993 Vienna World Conference on Human Rights, the international community sought to end decades of contention over the secondary status of economic, social and cultural rights, by resolving that all human rights are 'universal, indivisible and interdependent and interrelated' and that the international community 'must treat human rights globally in a fair and equal manner'²⁵. Since Vienna, there are far fewer voices dismissing the International Covenant on Economic, Social and Cultural rights as the 'holidays with pay treaty'²⁶, as being 'utopian' and as constituting aspirational goals rather than legal rights. The soft law support of expert opinions such as the 1986 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights²⁷, and the 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights²⁸, were helpful in assisting this change, as was the jurisprudence of the UN Committee on Economic, Social and Cultural Rights through its General Comments. An Optional Protocol providing the Committee with competence to receive and consider individual complaints was adopted by the General Assembly on 10 December 2008 but is not yet in force. As of 3 December 2010, Spain is the only European state to have ratified the Optional Protocol and is one of only three parties to it²⁹.

As Textbox 1 shows below there are now various UN treaties which have 'further codified and more specifically defined international human right law', helping create legal obligations and facilitating 'the issuance of worldwide human rights standards'³⁰. However, the proliferation of these treaties and monitoring bodies has led to concerns about 'the sustainability of a system which is fragmented, complex, and under-resourced'³¹. These disparate developments were not foreseen. Mobilisation for new drafting efforts arose incrementally as potential beneficiaries or rights interest groups made new cases for detailing the legal obligations stemming from the International Bill of Rights (the term used to convey the indivisible character of the UDHR, ICCPR and ICESCR). The fragmentation of the system has

²⁵ World Conference on Human Rights 1993, para. 5.

²⁶ Alston 1990, p. 368.

²⁷ www.unimaas.nl/bestand.asp?id=2453.

²⁸ See <http://www1.umn.edu/humanrts/instate/Maastrichtguidelines.html>.

²⁹ See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en

³⁰ Weissbrodt et al 2001, pp. 18 and 20.

³¹ Steiner et al 2008, p. 919.

been partly addressed by allowing states to report on all treaty bodies through a Common Core Document. This has satisfied some critics, but others continue to call for a unified standing treaty body (see Part B 2.2).³²

TEXTBOX 1

THE KEY UN HUMAN RIGHTS INSTRUMENTS AND MONITORING BODIES

- The Convention Relating to the Status of Refugees 1951 (RC) – monitored by the UN High Commissioner for Refugees
- Protocol to the Convention Relating to the Status of Refugees RC 1967
- The International Convention on the Elimination of Racial Discrimination (CERD) – monitored by the Committee on the Elimination of Racial Discrimination 1965
- International Covenant on Civil and Political Rights (ICCPR) – monitored by the Human Rights Committee (HRC) 1966
- Optional Protocol to the ICCPR 1966
- Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty 1989
- International Covenant on Economic, Social and Cultural Rights (ICESCR) – monitored by the Committee on Economic, Social and Cultural Rights (CESCR) 1966
- Optional Protocol of the ICESCR 2008
- The Convention on the Rights of the Child (CRC) 1989 – monitored by the Committee on the Rights of the Child
- Optional Protocol to the CRC on the involvement of children in Armed Conflict 2000
- Optional protocol to the CRC on the sale of children, child prostitution and child pornography 2000
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) – monitored by the Committee on the Elimination of Discrimination Against Women 1979
- Optional Protocol to the CEDAW 1999
- The Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment (CAT) – monitored by the Committee Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment 1984
- Optional Protocol to the CAT - monitored by the Subcommittee on Prevention of Torture 2002
- The Convention on the Protection of the Rights of Migrant Workers and members of their Families 1990 (ICRMW) – monitored by the Committee on the Protection of the Rights of Migrant Workers and members of their Families
- The Convention on the Rights of Persons with Disabilities (CRPD) – monitored by the Committee on the Rights of Persons with Disabilities 2006
- Optional Protocol to the CRPD 2006
- The Convention on Enforced Disappearances – to be monitored by the Committee on Enforced Disappearances 2006 (not yet in force).

³² De Schutter 2010a, p. 851.

The rights upheld in these instruments vary in their normative force, and a hierarchy of rights can be said to exist within the UN system³³. The strongest rights in the UN system are those that constitute *jus cogens* or peremptory norms in addition to their codification within a UN treaty. *Jus cogens* norms bind every State in the world, and indeed the EU, regardless of whether they are party to the relevant treaties, permit of no derogation and override any other inconsistent norm. Norms prohibiting genocide, slavery, gross violations of human rights, torture and racial discrimination, as well as the right of people to self-determination are considered peremptory norms of general international law or *jus cogens*, which 'states are not allowed to contract out of'³⁴. Importantly, the Vienna Convention makes plain that 'a treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'³⁵. Other international human rights law, while not of a *jus cogens* nature, may constitute customary international law in addition to being codified within a treaty and may also bind States not party to the treaties in question (*erga omnes* obligations). The process of crystallisation into customary international law may also apply to soft human rights law provisions where these relate to a body of human rights standards. These soft law provisions are set out in Annex 2 to this report.

Treaty rights which bind only those States party to the treaties also vary in weight. Rights may be 'drafted in general or weak terms', undermining their prescriptive force³⁶. Other rights may be subject to doctrines which weaken the correlative obligation on States. This is particularly the case with respect to some social and economic rights which are subject to progressive realisation standards. States often wrongly take these progressive obligations as an excuse for indefinite delay in the realisation of these rights³⁷, a view refuted by the Limburg Principles and Maastricht Guidelines.

Treaty rights may also be subject to derogation or limitation in certain circumstances (see Part A 2). While some treaty rights are subject to derogation and limitation, others are not. For example, the ICCPR establishes conditions for derogation from rights in times of public emergency included in the Treaty in Article 4(1). However,

³³ Shelton 2006; De Wet 2007.

³⁴ Malanczuk, 1997, p. 57 and 58.

³⁵ 1969 Vienna Convention on the Law of Treaties, Article 53.

³⁶ Shelton 2006, p. 319.

³⁷ Ssenyonjo 2010, p. 58.

Article 4(2) of the ICCPR does not allow for any derogation from articles 6 (right to life), 7 (prohibition of torture), 8 (1) and (2) (slavery and servitude), 11 (imprisonment merely on the ground of inability to fulfil a contractual obligation), 15 (fair trial guarantees), 16 (recognition before the law) and 18 (freedom of religion or belief). Furthermore, some of the rights upheld in the ICCPR are subject to limitation, for example, manifestation of religion or belief (Article 18(3)) or freedom of expression (Article 19(3)). However other rights in the ICCPR contain no limitations, for example Article 3 on the equal rights of women and men in the enjoyment of the rights upheld in the ICCPR does not include any limitation provision. A slightly different position applies to the ICESCR which contains a general limitations clause in Article 4 but no derogations clause. The ICESCR has taken this to mean that at the 'minimum States cannot derogate from its core obligations'³⁸. It should be noted that, in all cases, limitations and derogations should only be taken to the extent strictly required, should not result in discrimination and are subject to review.

Obligations under international human rights law are shaped by States' ratifications, including any reservations and declarations at the time of ratification. States often seek to limit their obligations in this way³⁹. Baylis notes that, 'by creating such reservations, state parties can remain in technical compliance with the Covenant while engaging in practices that the Covenant condemns'⁴⁰. Whereas reservations are not clearly limited to human rights instruments, their impact on human rights protections is unique. As human rights obligations are owed to individuals rather than the other State parties, States have less incentive to condemn one another's human rights reservations. As a result the scale of reservations to these multilateral treaties has 'become so commonplace and comprehensive that often States did not in fact agree to any change in their laws or policies by signing the Covenant'⁴¹.

Given the range of rights protections under the various UN instruments, this section of the report has only been able to provide a general overview. Annex 1 of this report includes two comparative tables of specific rights within the UN-CoE-EU systems. These highlight overlaps and divergences between the different rights

³⁸ Ssenyonjo 2010, 75f.

³⁹ Hampson 2003, paras. 28–31.

⁴⁰ Baylis 1999, p. 277.

⁴¹ Baylis 1999, p. 277.

protected under each system. At this stage, however, we wish to highlight a case study on the most recent UN human rights treaty. We focus here on the Convention on the Rights of Persons with Disabilities 2006 (CRPD) because it is illustrative of the diverse range of rights protected under the UN system. The CRPD also exemplifies a running theme in this report highlighting the increasing interplay between the rights systems examined here, in this case between the UN and the EU.

TEXTBOX 2

THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD) (2006)

A case study of the interplay between the UN and the EU systems of rights protections

Disability has been described as the 'invisible element' of international human rights law⁴². With the exception of the CRC (Articles 2 and 23), the equality provisions of other international human rights treaties do not address disability. Historically, the UN largely addressed disability through policy and programmatic documents. The UN Human Rights Committee's General Comment 18 recognized the concept of substantive equality. More specifically, the Committee for Economic Social and Cultural Rights recognised that Article 2(2) ICESCR — which requires that the rights 'enunciated ... be exercised without discrimination of any kind' — encompasses discrimination on the ground of disability⁴³.

The CRPD is a massive advance. It integrates civil, political, economic, social and cultural rights and sets out various positive obligations to protect, promote and fulfil the rights of disabled persons. It not only clarifies that States should not discriminate against persons with disabilities, but also sets out the many positive duties on States to create an enabling environment, so that persons with disabilities can enjoy substantive equality.

The CRPD definition of discrimination prohibits both 'distinctions, exclusions or restrictions' which impacting on 'equal recognition, enjoyment or exercise of human rights' and also denial of reasonable accommodation, (Article 2 CRPD) The concept of reasonable accommodation is found in US domestic disability law and under Council Directive 2000/78/EC⁴⁴. It was reflected also in par. 19 of General Comment 5 of the Committee for Economic Social and Cultural Rights⁴⁵.

De Búrca notes the active participation of the EU in the drafting the CRPD⁴⁶, striving to project its own internal model of disability discrimination. This was the first occasion on which the EU participated in the drafting of an international human rights treaty, and it is the first such treaty the EU has itself ratified. While all of the EU Member States have signed, not all have yet ratified. Council Directive 2000/78/EC only applies to employment. It does not define disability, so this has fallen to the CJ⁴⁷. The definition adopted draws a line between sickness and disability. De Búrca explains that the decision prompted the EU to accept a definition in the UN Convention, rather than leave the matter to further judicial elaboration.

⁴² Kayess and French 2008, p. 12.

⁴³ CESCR, General Comment 5, 1994, para. 5.

⁴⁴ Council Directive 2000/78/EC (Framework Directive) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

⁴⁵ Lord and Brown, 2010, p. 4.

⁴⁶ De Búrca 2010.

⁴⁷ Case C-13/05 *Chacon Navas* [2006] ECR I-6467.

In November 2010, the EU Commission issued a European Disability Strategy 2010-2020 and will report thereon to the UN bodies.⁴⁸ While Council Directive 2000/78/EC applies only to employment, the Strategy mainstreams disability equality into other areas of EU activity. The Commission undertakes to 'consider whether to propose a 'European Accessibility Act' by 2012', which would use its internal market regulatory powers to ensure access for disabled person to products and services. The Strategy also mentions enhancing political participation, for example by facilitating the use of sign language and Braille when exercising EU citizens' electoral rights or dealing with EU institutions. The Strategy also mentions EU funding mechanisms and softer promotional measures.

1.1.1 International Criminal Law

While not formally part of the UN human rights system, international criminal law has both influenced and fragmented the development of international human rights law⁴⁹. To the extent that international criminal law criminalises gross human rights abuses, especially the violation of human rights norms of *jus cogens* rank, and to the extent that international criminal tribunals deal with procedural and substantive human rights questions, international criminal law plays a part in the development of international human rights law. The decisions of the International Criminal Court and the ad hoc Tribunals (the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda) have had a bearing on the development of these principles both internationally and within other regional and domestic human rights systems. This is evident, for example, in the development of human rights standards on the treatment of the victims of rape⁵⁰.

1.2 Council of Europe Human Rights Instruments

The Council of Europe, founded in 1949, was the product of the Hague Congress of the International Committee of Movements for European Unity in May 1948. The CoE's central objective was to respond to the gross violations of fundamental human rights which arose during the Second World War. It was, moreover, a response by ten founding European States to the rise of post-war totalitarian regimes in Europe. Since then the Council has evolved significantly and now contains 47 member countries in Europe.

⁴⁸ Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe (COM(2010) 636 final).

⁴⁹ De Than and Shorts 2003.

⁵⁰ Lazarus 2010.

TEXTBOX 3

KEY TREATIES OF THE COUNCIL OF EUROPE

- The European Convention on Human Rights (ECHR) 1950 and its protocols – enforced by the European Court of Human Rights (ECtHR)
- The European Social Charter (ESC) 1961 revised 1999 - monitored by the European Committee of Social Rights (ECSR)
- The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment (ECPT) 1987 – monitored by the Committee for the Prevention of Torture (CPT)
- European Charter for Regional or Minority Languages (ECRML) 1992 – monitored by the Committee of Ministers Committee of Experts on Regional or Minority Languages (CAHLR)
- Framework Convention for the Protection of National Minorities (FCNM) 1995 – monitored by the Committee of Ministers Advisory Committee on the Framework Convention for the FCNM
- Convention on Action Against Trafficking in Human Beings 2008 – monitored by Group of Experts on Action Against Trafficking in Human Beings (GRETA)

1.2.1 The European Convention on Human Rights

The CoE's most significant and widely known achievement was the drafting of the European Convention on Human Rights (ECHR) of 4 November 1950⁵¹. Having been in force since 3 September 1953, the ECHR is viewed by the institutions of the CoE as a 'living instrument' that evolves with time. The ultimate enforcement of the ECHR is now the responsibility of the European Court of Human Rights (ECtHR) to which individuals have a right of direct complaint. This distinguishes the ECHR from the UN human rights system which relies predominantly on non-judicial enforcement mechanisms (see further below section 2.1 on enforcement). The Court's view of the scope and meaning of the Convention has evolved over the last 57 years, and its case law is now extensive⁵². Moreover, the Convention has been supplemented by an additional 15 protocols which have added additional rights to the Convention and altered the institutional mechanisms surrounding its enforcement. The protocols vary in terms of the number of CoE Member States who have signed and ratified them,

⁵¹ Boyle 2009.

⁵² Van Dijk et al 2006; Harris et al 2009.

but fulfilment of Protocol 13 (abolition of the death penalty) is now a pre-requisite for a State to become a member of the CoE⁵³.

TEXTBOX 4

KEY RIGHTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

- Right to life (Article 2)
- Freedom from torture and inhuman or degrading treatment (Article 3)
- Freedom from slavery, servitude or enforced labour (Article 4)
- Right to liberty and security (Article 5)
- Right to fair trial (Article 6)
- Prohibition on retrospective criminalisation (Article 7)
- Respect for one's private and family life, home and correspondence (Article 8)
- Freedom of thought, conscience and religion (Article 9)
- Freedom of expression (Article 10)
- Freedom of association (Article 11)
- Right to marry (Article 12)
- Right to an effective remedy (Article 13)
- Prohibition of discrimination (Article 14)
- Right to education (Protocol 1, Article 2)
- Right to free and fair elections (Protocol 1, Article 3)
- Right to equality between spouses (Protocol 7, Article 5)
- The abolition of the death penalty (Protocol 13)
- Right of direct application to the European Court of Human Rights (Article 34)

For a diagrammatic comparative analysis of the substantive rights protected under the different human rights systems addressed in this report see Annex 1.

The ECHR creates a hierarchy of rights that follows partly from their scope and partly from the way the Convention provides for their limitations. The ECHR distinguishes absolute rights and qualified rights, whereas the latter category can be divided into those rights which are just subject to a simple limitation clause (in essence the limitation requires compliance with the principles of legality and proportionality) and those where limitations are subject to heightened conditions. Absolute rights are non-derogable according to Art 15 ECHR. These include the right to life (Art 2), the right not to be subjected to torture or inhuman or degrading treatment (Art 3), the right not to be subjected to forced labour (Art 4(1)) and the right not to be subjected to retrospective criminal laws or penalties (Art 7). Examples of rights which are subject to a simple limitations clause are the right to private life, as well as the freedoms of religion, expression, assembly and association (Art 8-11 ECHR). Subject

⁵³ Yorke 2009.

to stricter limitation clauses are, for example, the right to liberty and security of the person (Art 5) and the right to a fair trial (Art 6).

The jurisprudence of the ECtHR has developed the principles of interpretation around the hierarchy of rights implicit in the Convention. However, the Court's interpretation of the scope of rights and of rights qualifications is not always without its difficulties⁵⁴. While the ECtHR has left us in no doubt that the right against torture is absolute and can permit of no qualification (See Annex 7 for discussion)⁵⁵, defining 'inhuman and degrading treatment' remains contentious⁵⁶. Even in the context of torture, the ECtHR can circumscribe the right through interpretation of the standard of 'minimum severity'⁵⁷. Notwithstanding, it is fair to say that the ECtHR has given more weight to non-derogable, non-qualified rights than it has to those subject to both derogation and qualification.

Where rights are subject to qualifications, the ECtHR requires that all limitations are legally explicit and proportionate to their end. In the language of the Court, any limitations on rights must be 'necessary in a democratic society'⁵⁸. The ECtHR also applies the principle of the margin of appreciation doctrine in these instances as a doctrine of judicial self-restraint in deciding the proportionality of State measures. All in all these doctrines tend toward a greater level of State flexibility in the determination of qualified rights, while also facilitating a European consensus in the development of rights safeguards (See Annex 4 on Sexual Orientation). As Helfer and Slaughter argue,

'[a]s a result [of the link] between the consensus approach and the margins doctrine the ECHR is able to identify potentially problematic practices for the contracting States before they actually become violations, thereby permitting the States to anticipate that their laws may be one day called into question. In the meantime, a State government lagging behind in the protection of a certain right is allowed to maintain its national policy but is forced to bear a heavier burden of proof before the ECHR – whose future opinions will turn in part on its own conception of how far the trends in

⁵⁴ Mahoney 1998; Arai-Takahashi 2001; Koji 2001; Dembour 2006; Greer 2006; Rivers 2006; Goold et al 2007; Clayton and Tomlinson 2010, pp. 314-354.

⁵⁵ *Chahal v UK* (1997) 23 EHRR 413; *Saadi v United Kingdom* (2008) 44 EHRR 50.

⁵⁶ *Jalloh v Germany* (2007) 44 EHRR 32.

⁵⁷ *Ireland v United Kingdom* (1978) 2 EHRR 25.

⁵⁸ *Sunday Times v United Kingdom* (1979) 2 EHRR 245, para. 59.

European domestic law have evolved⁵⁹.

While the express rights contained in the Convention are a guide to the rights protections therein, it is in the body of the ECtHR jurisprudence that the full range of protected Convention rights can be found. Important in this respect has been the Court's development of rights of environmental protections⁶⁰, first under Article 8 (right to private life) and then Article 2 (right to life)⁶¹. The Court has evidently been influenced in this respect by broader developments in international environmental law⁶². Similarly, developments of the right to 'sexual autonomy' by the ECtHR under Articles 8 (right to respect for private and family life) and 3 (prohibition of torture and inhuman and degrading treatment) have been influenced by international criminal law and the treaty bodies under CEDAW⁶³.

A similar picture can be found in respect of the protection of minority rights not expressly protected under the Convention. Here instruments and institutions both within and outside the CoE have been important in defining the ECtHR's assertive approach. The Court's jurisprudence on minority rights protection will be examined in more detail in Part C 2.1 below, and the Court's general enforcement function will be explored more fully in Part B 2.1.2 below.

1.2.2 The European Social Charter

Alongside the civil and political rights of the European Convention on Human Rights are the economic and social rights contained in the European Social Charter (ESC). The ESC was adopted in 1961, revised in 1996 and came into force in 1999⁶⁴.

⁵⁹ Helfer and Slaughter 1997, pp. 316-317.

⁶⁰ DeMerieux 2001.

⁶¹ *Powell v United Kingdom* (2000) 30 EHRR 15; *Lopez Ostra v Spain*, Application (1994) 20 EHRR 277; *Guerra et al. v Italy* (1998) 26 EHRR 357; *Oneryildiz v Turkey* [2004] ECHR 657; *Hatton v UK* (2003) 37 EHRR 28; *Moreno Gomez v Spain* (2005) 41 EHRR 40; *Taskin v Turkey* (2006) 42 EHRR 50; *Budayeva and Others v Russia* [2008] ECHR 15339/02.

⁶² *Tatar v Romania* Appl. No. 67021/01 2009.

⁶³ *MC v Bulgaria* (39272/98) [2003] ECHR 646; Lazarus 2010.

⁶⁴ De Burca and De Witte 2005, Part II; De Schutter 2010b.

TEXTBOX 5

THE EUROPEAN SOCIAL CHARTER

The European Social Charter (ESC) 'guarantees a series of "rights and principles" with respect to employment conditions and "social cohesion". The former relate to: non-discrimination, prohibition of forced labour, trade union rights, decent working conditions, equal pay for equal work, prohibition of child labour and maternity protection. Among the latter are: health protection, social security, and certain rights for children, families, migrant workers and the elderly'⁶⁵.

More specifically, among the rights protected by the ESC are:

- Right to work (Article 1)
- Right to just, safe and healthy conditions of work (Articles 2 and 3)
- Right to fair remuneration (Article 4)
- Right to organise and collectively bargain (Article 6)
- Protection of children and young persons (Article 7 and 17)
- Right to maternity leave from work (Article 8)
- Vocational guidance and training (Article 9 and 10)
- Right to benefit from measures protecting health (Article 11)
- Right to social security, social and medical assistance, and social welfare services (Articles 12, 13, 14)
- Right of persons with disabilities to independence, social integration and participation in the life of the community (Article 15)
- Right to protection and assistance for migrant workers and their families (Article 19)
- Right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (Article 20)
- Right to protection against poverty and social exclusion (Article 30)
- Right of the family to social, legal and economic protection, for example, through the provision of family housing (Article 31)

Unlike other rights instruments, the ESC does not require signatory states to accept its entire contents with specific notices of reservation required to absent a state from specific terms. Instead Member States are obliged to select at least sixteen articles (or, if unwilling to accept whole articles, then 63 discretely numbered paragraphs) from the Charter as a whole. Of this total at least six articles must be adopted from the nine 'hard core' provisions (Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20). The quasi-judicial enforcement procedures of the European Committee of Social Rights (ECSR) will be explored in section 2.1.2 below.

While the ESC and the ECHR are distinct treaties within the CoE system and are separately and variably enforced, the distinction between civil and political rights on the one hand, and economic, social and cultural rights on the other, is not

⁶⁵ Steiner, Alston and Goodman 2007, p.1018.

watertight. The ECtHR has made a number of decisions which have developed social and economic rights 'such as the right to a healthy environment, the right to earn a livelihood and the right to health care'⁶⁶. To this extent, the ECtHR has 'laid the jurisprudential basis for the protection of the ancillary or corollary aspects of social and economic rights, while leaving the monitoring of the primary obligation ... to the ESC system'⁶⁷. This suggests that the ECtHR is developing a 'substantive integrated approach' to ESC rights (see Textbox 6 below)⁶⁸. This is a consequence not only of the presence of the ESC within the CoE system but also of a growing acceptance within the international human rights system of social, economic, cultural and environmental rights generally. The indivisibility of civil, political, social and economic rights was explicitly reinforced by the Ministerial Conference on Human Rights held on 5 November 1990 where it 'stressed the need, on the one hand, to preserve the indivisible nature of all human rights, be they civil, political, economic, social and cultural, and on the other hand, to give the European Social Charter fresh impetus'⁶⁹.

Apart from the core CoE treaties, the CoE has made a particular impact in the development of minority rights. This is manifest in the European Charter for Regional or Minority Languages (ECRML) and the Framework Convention for the Protection of National Minorities (FCNM)⁷⁰. These more specialised treaties, and other institutional protections of minority rights within the CoE, will be discussed in more detail at Part C 2 below.

1.3 European Union Human Rights Instruments

1.3.1 EU Competence Concerning Human Rights

EU human rights law has its origins in judicial developments in the late 1960s and early 1970s⁷¹, triggered by challenges from national courts. National courts, most notably in Germany, Italy, France and Denmark threatened to reject the supremacy of EU law over national law if the EU did not adequately protect human rights itself. The insistence of national courts in asserting their own human rights standards as

⁶⁶ O'Connell 2009, p. 1.

⁶⁷ O'Connell 2009, p. 18.

⁶⁸ Mantouvalou 2005 and 2006.

⁶⁹ Preamble Revised European Social Charter 1996.

⁷⁰ CETS 148.

⁷¹ Case 29-69 *Erich Stauder v City of Ulm – Sozialamt* [1969] ECR 419; Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

long as the EU standard was found lacking was thus crucial for the development an EU body of human rights law⁷².

These judicial developments were gradually recognised in the EU Treaties. Article 2 TEU now provides:

‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’.

The values in Article 2 are backed up by a political mechanism in Article 7 TEU in cases either of ‘risk of serious breach’ or ‘serious and persistent breach’ of these values, culminating in the restriction of the offending States’ EU rights.

The drafting of the Charter of Fundamental Rights of the European Union (set out in full in Annex 3) in 2000 marked a politicisation of what had previously been a predominantly judicial process of development of fundamental rights as general principles. The central aim of the Charter was to make protections more visible, yet its mode of drafting ensured an instrument with a wide range of rights and progressive tenor⁷³. The Treaty of Lisbon in 2009 afforded the Charter the same legal status as the Treaties, whilst also requiring the EU to seek accession to the ECHR and reaffirming human rights as general principles. Article 6 TEU provides:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the

⁷² German Federal Constitutional Court, *Internationale Handelsgesellschaft* BVerfGE 37, 271 2 BvL 52/71 (‘Solange I’) German Federal Constitutional Court, *Wünsche Handelsgesellschaft* BVerfGE 73, 339 2 BvR 197/83 (‘Solange II’).

⁷³ De Búrca 2001.

Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

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

Article 6 TEU heralds a new era of EU human rights protection. Nonetheless, it remains the case that the EU does not have a general legislative competence in the area of human rights. While the Charter contains a wide array of rights, it does not confer new competences on the EU⁷⁴. The negative dimension of human rights, the duty to respect them, sits easily with the EU's limited competences. However, the positive dimension, encompassing the duties to protect, promote and fulfil, appears to be more of a challenge. The EU's role in human rights has been criticised for many years for its piecemeal nature and incoherence, leading to repeated calls for a coherent EU human rights policy. Such a call was most convincingly made in the Report 'Leading by Example: A Human Rights Agenda for the European Union for the Year 2000'⁷⁵. Similarly, this report believes that all EU activities require a human rights underpinning. While the authors take the existing limits on EU competence as given, we share the view that moving from a negative conception of human rights to a positive one does not require new competences for the EU, but rather proactive institutional engagement with human rights⁷⁶. We do not go so far as to suggest that the EU should become a fully-fledged human rights organisation⁷⁷, although the breadth of the EU's human rights role is now, post-Lisbon, even more evident.

⁷⁴ Article 51(2) Charter.

⁷⁵ 'Leading by Example: A Human Rights Agenda for the European Union for the Year 2000'. Agenda of the Comité des Sages and Final Project Report (1998). Alston 1999.

⁷⁶ Weiler and Alston 1999.

⁷⁷ Von Bogdandy 2000, Besson 2006.

Aside from the Lisbon Treaty, other Treaty amendments since 2000 have also expanded EU legislative competence into new human rights fields, including non-discrimination under Article 19 TFEU and immigration, asylum and police and judicial cooperation in criminal matters under the EU's 'Area of Freedom, Security and Justice' (AFSJ). In the AFSJ, EU law frequently imposes duties of mutual recognition on the Member States, in a manner that may imperil human rights. In Annex 5 on the Dublin Regulation we illustrate the importance of effective protection of human rights as a prerequisite for the mutual recognition of asylum procedures inherent in the Dublin system, as exemplified in the 2011 ECtHR ruling in *MSS v Belgium and Greece*⁷⁸.

The EU's considerable impact on fundamental rights also follows from the breadth of EU internal market freedoms and EU Citizenship. EU law often has an impact far beyond the EU's clear legislative competence. Internal market freedoms may mirror particular human rights, for example, the right to non-discrimination protected by Article 21 of the Charter is essential to the effective functioning of the internal market. In some cases, market freedoms can reinforce human rights, such as when the internal market freedoms protect commercial speech or cross-border movement. However, internal market freedoms may also clash with human rights, requiring the CJ to balance internal market freedoms and action taken in furtherance of human rights. The perceived danger is that the internal market freedoms will be given precedence. Although this perception is not borne out in all the case law⁷⁹, ultimately much depends on the weight that the CJ gives to human rights. An example of a clash between internal market freedoms and human rights can be found in Textbox 6 below on the Right to Strike. Although the TFEU precludes harmonisation of national laws on 'the right of association, the right to strike or the right to impose lock-outs'⁸⁰, EU internal market freedoms came to limit strike action.

EU citizenship may expand and reinforce EU human rights, at least for those who hold that privileged status and their family members. First, it may create additional rights beyond the ECHR minimum, as Textbox 16 below on Family Migration illustrates concerning third-country national family members of EU Citizens. It also

⁷⁸ *MSS v Belgium and Greece* (2011) Application No 30696/09.

⁷⁹ Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659; Case C-36/02 *Omega Spielhallen v Bonn* [2004] ECR I-09609.

⁸⁰ Article 153(5) TFEU.

seems to diminish the link between EU rights and economic activity. This move may expand the scope of EU law, and thereby EU human rights.

The EU also takes action in fields where it may not have clear legislative competence. For example, although the EU does not have competence to harmonise substantive criminal law, it has taken extensive action against domestic violence, supporting transnational civil society activities⁸¹.

Nonetheless, because of the limited human rights competence of the EU some human rights issues still fall out with the EU's remit, as Article 51 Charter reflects. Many rights in the Charter are drafted so as to reflect the limited positive EU role in the particular fields. For example, Article 9 of the Charter on the right to marry and found a family is guaranteed 'in accordance with the national laws governing the exercise of those rights'. A similar formulation is contained, *inter alia*, in Article 10(2) (conscientious objection), Article 14(3) (freedom to found educational establishments), and Article 35 (healthcare). Article 30 Charter on protection against unjustified dismissal refers to the right 'in accordance with Union law and national laws and practices.' This formulation also appears, *inter alia*, in Article 16 Charter (freedom to conduct a business), Article 27 (workers' right to information and consultation within the undertaking), Article 28 (right of collective bargaining and action), and Article 34(3) (social and housing assistance).

Moreover, the Charter purports only to bind Member States when 'implementing' EU law⁸². The case law on the general principles states that the Member States are bound 'within the scope of EU law', which connotes both implementing.⁸³ and derogating from EU law⁸⁴. The term 'implementing' is taken to encompass pre-existing EU case law, as the Interpretative Note to the Charter makes clear⁸⁵.

⁸¹ Montoya 2008, 2009.

⁸² Article 51(1) Charter.

⁸³ Case C-5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 02609; Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd and Hydro Seafood GSP Ltd v The Scottish Ministers* [2003] 3 CMLR 6.

⁸⁴ Case C-260/89 *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925.

⁸⁵ Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17; see also Case C-400/10 *PPU (J McB v LE)* [2010] ECR I-nyr.

TEXTBOX 6**THE EVOLUTION OF THE RIGHT TO STRIKE IN EUROPEAN LAW**

Dynamic interplay between the human rights regimes is evident in the development of the right to strike in European law.

The right of collective bargaining and action is enshrined in Article 28 Charter. The CJ deemed this right a general principle of EU law in *Viking Line* and *Laval*⁸⁶. The Charter, at the time non-binding, was treated as indicative of general principles as it drew on pertinent sources, in particular the European Social Charter. However, it did not engage in any detailed examination of the understanding of that right under the jurisprudence of the European Social Committee or the International Labour Organisation standards. It tightly circumscribed both the permissible aims and means available to trade unions. Most notably, the EU context meant that employers' EU internal market freedoms were treated as setting the limits on the exercise of the right to collective action. The cases prompted widespread concern that the right to strike was rendered subordinate to the internal market freedoms.

Subsequently, in a novel move, the ECtHR⁸⁷ held that the right to collective bargaining and action was an aspect of the freedom of association⁸⁸. The Strasbourg case law is seen as a potential counterweight against to the CJ's curtailment of the right to strike⁸⁹. The ECtHR integrated the jurisprudence of the International Labour Organisation and the European Social Charter into Article 11 ECHR. This is but one example of the ECtHR's integrated approach, which has expanded the range of social rights protected by the Court.

1.3.2 Primary Sources of EU Human Rights

Today the EU human rights acquis has three main formal sources: (1) the general principles of EU law; (2) the Charter and (3) international human rights law, in particular international human rights treaties the EU ratifies.

Fundamental Rights as General Principles of EU Law

Fundamental rights *qua* general principles of EU law bind the EU institutions and the Member States when acting within the scope of EU law. The general principles are also capable of being applied between private individuals (so-called 'horizontal effect')⁹⁰. Art 6(3) TEU confirms that general principles remain a binding source of EU

⁸⁶ Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektriker förbundet* [2007] ECR I-11767.

⁸⁷ *Demir and Baykara v Turkey* (2008) (App. No. 34503/97); *Enerji Yapi-Yol Sen v Turkey* (2009) (Application No. 68959/01).

⁸⁸ Article 11 ECHR.

⁸⁹ Ewing and Hendy 2010.

⁹⁰ Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981, Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG*, judgment of 19 January [2010] ECR I- nyr.

human rights law even after the entry into force of the Charter. The CJ develops these general principles by drawing inspiration from the common constitutional traditions of the Member States including the international human rights law standards that apply to Member States.

The Charter

The Charter is now the second binding source of EU human rights law (see Textbox 7 below and Annex 3). The Charter successfully overcomes the false dichotomy between civil and political rights on the one hand, and economic, social and cultural rights on the other. Its Preamble, structure and text all support this view.

Article 1 Charter simply lays down that human dignity is inviolable, suggesting a meta-principle. Beyond that guarantee, the Charter does not include an express formal hierarchy between different rights, simply setting out each right in turn. For example, Article 4 guarantees that 'no one shall be subjected to torture or to inhuman and degrading treatment' and Article 7 that 'everyone has the right to respect for his or her private and family life'.

In contrast to the graded system of limitation clauses in the ECHR, the Charter only contains a general limitation clause in Article 52(1). At first glance, this might suggest that *all* Charter rights can be limited. However, Article 52(3) states that Charter rights which 'correspond to' ECHR rights shall have the same 'meaning and scope' as under the ECHR, with the EU of course entitled to provide 'more extensive protection'. Accordingly, where rights are absolute under the ECHR, their counterparts under the Charter are similarly to be regarded as absolute⁹¹. The Explanations provide a list of corresponding rights and state that 'the meaning and scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the [ECtHR] and by the [CJ]'⁹². This supports the view that Article 52(3) incorporates the ECtHR's interpretation of the ECHR⁹³. In addition, Article 53 seeks to ensure that the Charter does not lower human rights protection, including that provided by 'international agreements to which the Union or all the Member States are party'.

⁹¹ Peers 2004.

⁹² Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17.

⁹³ Lenaerts and De Smijter 2001, p.99ff; however cf. Lock 2009, pp.383–387.

The Charter appears to introduce an implicit hierarchy between Charter guarantees by formulating a dichotomy between 'rights' and 'principles' in Article 52(5) Charter. This seems to suggest a 'softer', more malleable status for principles. The section provides that principles 'may' be implemented by legislative and executive acts and are only 'judicially cognisable' to the extent that they have been enshrined in legislative or executive acts. This dichotomy was introduced after the substantive provisions of the Charter were drafted and does not clearly map onto them. While the Explanations give some guidance⁹⁴, they acknowledge that it is ultimately for the CJ to determine⁹⁵. The Explanations provide examples of principles, e.g. Articles 25 (rights of the elderly), 26 (integration of persons with disabilities) and 37 (environmental protection). They also note that in some cases, 'an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23 (equality between women and men), 33 (family and professional life) and 34 (social security and assistance)⁹⁶. The Explanations lend no support to the view that there is a category of rights to be regarded ipso facto as principles. Crucially, the rights/principles dichotomy should not be read as a revival of the old dichotomy between civil and political and economic, social and cultural rights⁹⁷.

It is hoped that the Charter may reshape the hierarchy between internal market freedoms and EU human rights. EU human rights ought to be afforded a particular importance or 'weight' to counter-balance the instrumental, economic, internal market freedoms. The CJ's ruling in *Kadi*⁹⁸, although concerning review of the validity of an EU act, illustrates the CJ affording particular weight to human rights. It identified 'the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Articles 6(1) EU' as 'a foundation of the Union'. Accordingly, these were afforded a higher rank than other treaty rules⁹⁹, protecting them from limitation¹⁰⁰.

⁹⁴ Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17.

⁹⁵ Article 52(7) Charter states that 'The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States'.

⁹⁶ Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17.

⁹⁷ De Witte 2005.

⁹⁸ Joined Cases C-402/05 and C-415/05 *Kadi, Al Barakaat v Council of the European Union and the Commission of the European Communities* [2008] ECR I-6351.

⁹⁹ Paragraph 303.

¹⁰⁰ Ziegler 2009, p. 297.

TEXTBOX 7

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (Charter)

(See Annex 3 for the complete text)

The Charter aims to bring visibility and coherence to the protection of human rights within the EU, clarifying their hierarchical position within the EU legal order. At the same time, the Charter was to become a tool through which to win the hearts of European citizens and thereby trigger more engagement with its democratic processes.

The Charter overcomes the old artificial divide between civil and political rights, on the one hand, and economic, social and cultural rights, on the other. Instead, the rights in the Charter are set out in various Titles which cut across this divide (Title I- Dignity; Title II – Freedoms; Title III – Equality; Title IV – Solidarity; Title V – Citizens’ Rights; Title VI – Justice), and the Preamble refers to the ‘indivisible, universal values of human dignity, freedom, equality and solidarity’.

TITLE I - DIGNITY

Article 1 - Human dignity

Article 2 - Right to life

Article 3 - Right to the integrity of the person

Article 4 - Prohibition of torture and inhuman or degrading treatment or punishment

Article 5 - Prohibition of slavery and forced labour

TITLE II - FREEDOMS

Article 6 - Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7 - Respect for private and family life

Article 8 - Protection of personal data

Article 9 - Right to marry and right to found a family

Article 10 - Freedom of thought, conscience and religion

Article 11 - Freedom of expression and information

Article 12 - Freedom of assembly and of association

Article 13 - Freedom of the arts and sciences

Article 14 - Right to education

Article 15 - Freedom to choose an occupation and right to engage in work

Article 16 - Freedom to conduct a business

Article 17 - Right to property

Article 18 - Right to asylum

Article 19 - Protection in the event of removal, expulsion or extradition

TITLE III - EQUALITY

Article 20 Equality before the law

Article 21- Non-discrimination

Article 22 - Cultural, religious and linguistic diversity

Article 23 - Equality between men and women

Article 24 - The rights of the child

Article 25 - The rights of the elderly

Article 26 - Integration of persons with disabilities

TITLE IV - SOLIDARITY

Article 27 - Workers' right to information and consultation within the undertaking

Article 28 - Right of collective bargaining and action

Article 29 - Right of access to placement services

Article 30 - Protection in the event of unjustified dismissal

Article 31 - Fair and just working conditions

Article 32 - Prohibition of child labour and protection of young people at work

Article 33 - Family and professional life
Article 34 - Social security and social assistance
Article 35 - Health care
Article 36 - Access to services of general economic interest
Article 37 - Environmental protection
Article 38 - Consumer protection

TITLE V - CITIZENS' RIGHTS

Article 39 - Right to vote and to stand as a candidate at elections to the European Parliament
Article 40 - Right to vote and to stand as a candidate at municipal elections
Article 41 - Right to good administration
Article 42 - Right of access to documents
Article 43 - Ombudsman
Article 44 - Right to petition
Article 45 - Freedom of movement and of residence
Article 46 - Diplomatic and consular protection

TITLE VI - JUSTICE

Article 47 - Right to an effective remedy and to a fair trial
Article 48 - Presumption of innocence and right of defence
Article 49 - Principles of legality and proportionality of criminal offences and penalties
Article 50 - Right not to be tried or punished twice in criminal proceedings for the same criminal offence

The Charter's Final Provisions (Articles 51-54) seek to constrain its scope and ensure its consistency with other sources. However, although it does draw on a range of existing sources (UN, CoE and existing EU law), it is not entirely comprehensive. For example, while the ESC contains a right to housing, the Charter does not (see Annex 1).

International human rights law

International human rights law forms part of EU law in two ways: as binding norms, and as interpretive material in the development of general principles of EU law and the Charter.

To the extent that international human rights law reflects norms of customary international law and in particular *jus cogens* norms, these already bind the EU. However, formal EU accession to international human rights treaties is a new and more significant development. The EU has recently acceded to the Convention on the Rights of Persons with Disabilities and is in the process of acceding to the ECHR. International treaties to which the EU is party are usually directly effective in national systems¹⁰¹. Acceding to international human rights law instruments is also an important means of anchoring EU human rights in the UN and CoE systems. This process also ensures external accountability of EU institutions and in turn supports

¹⁰¹ Case C-104/81 *Kupferberg v Hauptzollamt Mainz* [1982] ECR I-3641.

the progressive development of human rights in those systems by ensuring the EU's voice is heard in those fora¹⁰².

When giving substance to the general principles in its case law, the CJ has drawn on guidelines provided by international human rights treaties on which the Member States have collaborated or to which they are signatories. While this formulation allows the CJ leeway as to which international human rights law it draws from, in practice, the ECHR dominates. This tendency is also reflected in Article 6(3) TEU which regrettably only refers to the ECHR as a source of inspiration for the general principles. However, given the importance of anchoring EU human rights in international human rights law, this provision should not be taken to limit the CJ's engagement sources beyond the ECHR.

It is unfortunate that the CJ has not engaged deeply with other international human rights law. While the CJ has cited sources beyond the ECtHR case law¹⁰³, it has been 'parsimonious and selective' in this¹⁰⁴. In particular, the CJ has been strikingly dismissive of the jurisprudence of quasi-judicial bodies, including the United Nations Human Rights Council (see Annex 4 on Sexual Orientation)¹⁰⁵. While the CJ has cited the European Social Charter in *Viking Line* and *Laval*¹⁰⁶, it did not engage with the detailed decisions of the European Committee of Social Rights. A rare example of engagement with that Committee is evident in the Opinion of AG Kokott in the *FRD* Ruling¹⁰⁷, although the CJ did not follow this Opinion. Another exceptional reference to international human rights law consists in the CJ's engagement with the 'best interests of the child' standard from the Convention on the Rights of the Child.

¹⁰² Butler and De Schutter 2008; Ahmed and Butler 2006.

¹⁰³ e.g. Case C-540/03 *Parliament v Council* [2006] ECR I-5769.

¹⁰⁴ Butler and De Schutter 2008, p. 282.

¹⁰⁵ e.g. Case C-249/96 *Grant v South West Trains* [1998] ECR I-621.

¹⁰⁶ Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektriker förbundet* [2007] ECR I-11767.

¹⁰⁷ Case C-540/03 *Parliament v Council* [2006] ECR I-5769, par. 74 of Opinion.

1.3.3 Fundamental Rights in EU Secondary Legislation

EU secondary legislation also sets human rights standards in a manner that may support, enhance, undermine even or violate UN or CoE protections. Here we provide some illustrations, by no means an exhaustive overview.

In the equality field, the Sex Equality Directives¹⁰⁸, the Race Directive and the Framework Directive contribute to human rights protection both within and without the EU system¹⁰⁹. For example, the EU concept of indirect discrimination has influenced the ECtHR case law as well as Member States' approaches to gender equality¹¹⁰. We also identified the influence of the EU concept of reasonable accommodation on the UN Convention on the Rights of Persons with Disabilities.

EU legislation on asylum and immigration has been highly controversial from a human rights perspective. The European Parliament challenged the validity of the Family Reunification Directive on human rights grounds¹¹¹. While the CJ upheld the validity of the Directive, it emphasised the importance of compliance with fundamental rights when Member States implement EU law. In some respects, the Family Reunification Directive sets higher standards than the jurisprudence of the ECtHR on Article 8 (see Textbox 16). However, in permitting the use of integration conditions to limit entry of children, the case reflects a restrictive turn (see Part C 3).

On detention, EU Directives set conditions on both the detention of asylum seekers (mainly under the Reception Conditions Directive¹¹²) and pre-deportation detention under the Return Directive¹¹³. As is explored further below, EU norms appear to permit extensive detention. However, they may come to have some added value

¹⁰⁸ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

¹⁰⁹ Council Directive 2000/43/EC (Race Directive) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22; Council Directive 2000/78/EC (Framework Directive) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

¹¹⁰ e.g. *DH and others v Czech Republic* [2007] ECHR 922.

¹¹¹ Council Directive 2003/86 of 22 September 2003 on the right to family reunification [2003] OJ L 251/12; see Case C-540/03 *Parliament v Council* [2006] ECR I-5769.

¹¹² Council Directive 2003/9 of 27 January 2003 (Receptions Conditions Directive) laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18.

¹¹³ Directive 2008/115 (Return Directive) of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

over the ECtHR case law, in particular in setting fixed-time limits for detention (see Annex 6). On refugee protection, the Qualification Directive¹¹⁴ incorporates and develops the law of the UN Refugee Convention and ECHR case law, contributing and detracting from the international standards in different respects (see Annex 7).

1.3.4 Interim Conclusions on the European Union

EU human rights is characterised by a multiplicity of formal and substantive sources. While the Charter strengthens human rights by contributing to visibility, foreseeability and legal certainty, the integration of civil, political and economic, social and cultural rights is its key novel feature. The rights/principles dichotomy should not revive that defunct distinction. While it was initially feared that the Charter might stifle judicial creativity in EU human rights¹¹⁵, this report points to the potential of openness to other sources as a source of creativity.

Moreover, human rights as general principles will continue to develop along with the Charter, as Article 6(3) TEU affirms, and, it is hoped, will equip EU human rights law with a large degree of flexibility and openness to international human rights law, including, but not restricted to the ECHR. General principles will continue to be of particular significance and will be relied on by litigants, particularly as they are not subject to Protocol No. 30 to the Lisbon Treaty¹¹⁶ and have horizontal effect¹¹⁷. Protocol No. 30 limits the application of the Charter in Poland and the UK, casting doubt on the Charter's uniform application across the 27 Member States. However, it is not an opt-out, seeking rather to reaffirm the Charter's Final Provisions¹¹⁸. Interpretative questions on Protocol No. 30 are currently before the CJ¹¹⁹. The CJ case law, both pre- and post-Lisbon suggests that the general principles remain vigorous, with the Charter decisively informing their content.¹²⁰

¹¹⁴ Council Directive 2004/83 (Qualification Directive) of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L/304/12.

¹¹⁵ Weiler 2000.

¹¹⁶ Barnard 2008.

¹¹⁷ Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981; Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG*, judgment of 19 January [2010] ECR I- nyr.

¹¹⁸ Barnard 2008.

¹¹⁹ Pending Case C-411/10 *NS v Secretary of State for the Home Department*.

¹²⁰ Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981; Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG*, judgment of 19 January [2010] ECR I- nyr; Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779.

The EU's ratification of the Convention on the Rights of Persons with Disabilities and pending ratification of the ECHR herald a new era of formal engagement with international human rights law.

2. Protection mechanisms

2.1 Judicial Protection Mechanisms

2.1.1 Judicial protection of UN rights

Many reasons may be given for why the UN human rights system often resorts to non-judicial rather than judicial remedies¹²¹. Some argue that the protection of UN rights was 'fudged' at the very outset of the drafting of the UN Charter, on the basis that 'international legal adjudication was not appropriate' and leaving implementation mechanisms to arise 'from either the treaties themselves or from specific resolutions dealing with gross and consistent patterns of violation'¹²². Suffice it to note that '[n]one of the permanent United Nations treaty or internal bodies has legal competence to order compensation or other remedies'¹²³. These bodies call on States to provide remedies, require good faith compliance, have follow up procedures, study and report on violations, and carry out in situ visits and accept petitions. But they are not able to order remedies directly.

However, UN human rights may enjoy indirect judicial protection from the International Court of Justice (ICJ) – the principal judicial organ of the UN – or through regional and domestic courts. These are essential in creating 'an international climate less willing to tolerate abuses'¹²⁴. The duty of the State to 'respect, promote, protect and fulfill' rights is nevertheless primary, and that of regional or international tribunals subsidiary, coming into play 'particularly when the state deliberately and consistently denies remedies, creating a climate of impunity'¹²⁵. A number of studies have outlined the constitutional recognition of UN treaty norms as well as legislative reforms and judicial decisions that have been

¹²¹ Steiner 2003, pp. 773-784.

¹²² O'Rawe 1999, p. 26.

¹²³ Shelton 2005b, p. 106.

¹²⁴ Shelton 2005b, p. 113.

¹²⁵ Shelton 2005b, p. 114.

prompted by them at the domestic level. Such legal influences vary from playing a significant role in constitutional human rights provisions, legislation where explicit reference is made to UN standards and frequent utilisation as an interpretive tool in domestic cases, to countries where the evidence is less overt or where no reference to such standards can be found at all¹²⁶. Unless incorporated as domestic law, UN human rights norms are usually weakly embedded in domestic systems. The term 'embedded' captures the domestic protections of human rights, including effective judicial remedies and political mechanisms¹²⁷.

Nevertheless, despite the obstacles of the lack of standing of individuals, the reluctance of States and the jurisdiction of the Court, the ICJ's role has also been significant as it has 'been able to progressively develop and interpret rules and principles of international human rights and humanitarian law, contributing thus to an international legal order where the protection of the individual is given the importance it deserves'¹²⁸. Advisory Opinions and interstate cases concerning violations of international human rights law give the ICJ an important human rights jurisdiction¹²⁹. From its early pronouncements on some UN rights, such as self-determination¹³⁰ and non-discrimination¹³¹, the ICJ's human rights jurisprudence has expanded to cover further rights such as freedom of movement¹³² and the right to consular assistance in the context of death penalty cases¹³³.

There has been an increasing reference by the ICJ to 'the jurisprudence of [UN] human rights treaty bodies ... and the practice of such treaty bodies in the context of its own judicial work'¹³⁴. This increased engagement has also been evident in the General Assembly Advisory Opinions on The Legal Consequences of the Construction

¹²⁶ Heyns and Viljoen 2008, pp. 1089-1092.

¹²⁷ Helfer 2008.

¹²⁸ Zyberi 2007, p. 137.

¹²⁹ Higgins 2007, p. 746.

¹³⁰ *South West Africa*, Second Phase, Judgment of 18 July 1966 [1966] ICJ Rep. 6; *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (South West Africa)* (1970), Advisory Opinion of 21 June 1971 [1971] ICJ Rep. 16; *Western Sahara*, Advisory Opinion of 16 October 1975 (1975) ICJ Rep. 12.

¹³¹ Permanent Court of International Justice, *Certain German Interests in Upper Silesia (Germany v. Poland)*, PCIJ Rep. Series A No. 7 (1925-26); Permanent Court of International Justice, *Rights of Minorities in Upper Silesia (Minority Schools) (Germany v. Poland)*, PCIJ Rep. Series A No. 7 (1931).

¹³² *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (South West Africa)* (1970), Advisory Opinion of 21 June 1971 [1971] ICJ Rep. 16.

¹³³ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Merits, Judgment of 31 March 2004 [2004] ICJ Rep. 12 at 61; *LeGrand (Germany v. United States of America)*, Merits, Judgment of 27 June 2001 [2001] ICJ Rep. 466 at 494; Higgins 2007, pp. 747-749.

¹³⁴ Higgins 2007, p. 748.

of a Wall in the Occupied Palestinian Territory (2004), the Armed Activities on the Territory of the Congo¹³⁵, and the Application of the Convention on the Prevention and Punishment of the Crime of Genocide¹³⁶. All in all, it is clear that 'the recognition of many principles of human rights such as the prohibition of genocide, the prohibition of torture, inhuman and degrading treatment and the prohibition of slavery, as part of customary international law or even *jus cogens*, finds support in the case-law of the Court'¹³⁷. The ICJ's introduction of the concepts of 'elementary considerations of humanity' and 'obligations *erga omnes*' has provided 'a basic, but solid legal and philosophical foundation for States' obligation to respect and ensure respect for human rights and humanitarian law ... [and] the necessary legal foundations for holding States, companies, groups of people or individuals accountable in case they commit violations'¹³⁸. This role has been so significant that it has been suggested that the ICJ should establish a human rights and humanitarian issues chamber in order to deliver more timely and efficient judgments in relation to such cases¹³⁹.

In sum, 'although the ICJ is not a forum where individuals themselves can bring their claims, it is, nevertheless, a judicial body that has and can continue to contribute to furthering the human rights cause through a two-fold function. First, through interpreting and developing rules and principles of international human rights law, the court enforces and further clarifies this part of international law. Second, by keeping the fabric of international law together, it can ensure a better interaction between the different branches of international law in order to achieve an optimum protection of human rights within the framework of international law'¹⁴⁰.

¹³⁵ *Armed activities on the territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment of 3 February 2006 [2006] ICJ Rep. 6 at 126.

¹³⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment of 27 February 2007 [2007] ICJ at 91.

¹³⁷ Zyberi 2007, p. 136; see also Zyberi 2010, 303, which lists 25 ICJ cases applying human rights since 1991.

¹³⁸ Zyberi 2007, p. 137.

¹³⁹ Zyberi 2009.

¹⁴⁰ Zyberi 2010, 302.

2.1.2 Judicial protection of Council of Europe rights

2.1.2.1 Enforcement by the European Court of Human Rights

The ECtHR receives applications from individual victims who have exhausted domestic remedies available to them¹⁴¹. The requirement of exhaustion of domestic remedies reflects the subsidiary nature of the Court's jurisdiction: its entire structure is premised on States' obligations to develop effective domestic remedies¹⁴². Strasbourg may also hear interstate disputes¹⁴³. The fact that any State may litigate any human rights violation reflects an important collective recognition that all have an interest in human rights protection.

The Court's competence is restricted to the rights contained within the ECHR and those protocols that the member state in question has chosen to ratify. In addition, the ECtHR increasingly adopts an integrated approach, reading ESC rights and drawing on other international human rights law instruments. All members of the CoE are subject to the ECtHR's jurisdiction. Following the entry into force of the 14th Protocol (see Textbox 8 below), negotiations regarding European Union accession, which would subject the EU and its institutions to the jurisdiction of the ECtHR, are under way. The Lisbon Treaty requires the EU to seek accession to the ECHR. Pending accession, the ECtHR indirectly scrutinises some EU acts, via its jurisdiction over EU Member States.

Under Article 1 ECHR 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention'. 'Jurisdiction' is not only territorial, but also protects individuals against removal to face human rights violations elsewhere¹⁴⁴ and extraterritorially over areas where states exercise control. The meaning of 'jurisdiction' is evolving and both domestic courts and the ECtHR are increasingly confronted with novel claims to clarify the scope of jurisdiction under the ECHR¹⁴⁵.

ECHR obligations include positive obligations (to legislate, regulate or otherwise act), providing some indirect protection against breaches of Convention rights by non-

¹⁴¹ Article 34(1) ECHR.

¹⁴² Article 13 ECHR.

¹⁴³ Article 33 ECHR.

¹⁴⁴ See Annex 7 on Refugee Protection.

¹⁴⁵ Wilde 2005; Gondek 2009; Miller 2009.

state parties, and also enabling the Court to order remedial changes to national law or practice¹⁴⁶. While it does not have the power to invalidate domestic acts, the ECtHR does exercise a form of constitutional jurisdiction. Many of its rulings in effect condemn domestic legislation and demand reform, as evident for instance in its rulings on the children's status of illegitimacy or the criminalisation of homosexual conduct¹⁴⁷. This 'constitutional' dimension of its jurisdiction has now been explicitly recognized in the CoE's development of the 'pilot judgment procedure' alongside the Protocol 14 reforms of the ECtHR (see Textbox 8 below)¹⁴⁸. As Sadurski notes, 'the fiction according to which, before its pilot judgments, the Strasbourg rulings deal with specific cases, and not with the law, was just that: a fiction'¹⁴⁹.

The Court makes orders against the state to bring it into compliance, as well as awarding financial compensation to those whose rights have been breached. The ECtHR may also make interim orders that are binding upon the state and which if breached will constitute a violation of Article 34 ECHR¹⁵⁰. (See Annex 5 on the Dublin Regulation for an illustration of recourse to Article 34 ECHR to prevent human rights abuses in the context of an EU instrument). Orders are enforced by the CoE Committee of Ministers (the CoE's most senior body, made up of representatives of each member state's government), and Member State adherence is monitored by the CoE Secretary General.

The jurisprudence of the ECtHR is extensive, having developed over the last fifty years. This aspect of the CoE human rights protection system has set it apart from many other regional human rights systems as well as the UN system: 'while the Universal Declaration of Human Rights sought to proclaim the rights and freedoms enshrined in the text, it did not provide any system to enforce these provisions'. In contrast, 'a pioneering feat of the ECHR has been its creation of a system of international adjudication which enables aggrieved persons to assert their convention rights and freedoms against Member States'¹⁵¹. Equally, the extensive jurisprudence of the ECtHR, in particular its creativity in developing positive obligations and drawing on external sources of international human rights law, has been greeted with overall approval. Though criticised at times for its casuistic approach, which can

¹⁴⁶ Mowbray 2004.

¹⁴⁷ *Marckx v Belgium* (1979) 2 EHRR 330, in particular paras 26 and 27; *Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Norris v Ireland* (1989) 13 EHRR 186.

¹⁴⁸ Fribergh 2008.

¹⁴⁹ Sadurski 2009, p. 421.

¹⁵⁰ *Mamatuklov and Askarov v Turkey* [2005] ECHR 165; *Letsas* 2003.

¹⁵¹ Mowbray 2010, 276 and 288.

create inconsistency and unpredictability¹⁵², the Court has nevertheless been hailed as 'a major achievement for the entire world'¹⁵³ and as 'the crown jewel of the world's most advanced international system for protecting civil and political liberties'¹⁵⁴.

Notwithstanding the success of the ECtHR in terms of its substantive decisions, the CoE must rely on Member States to enforce ECtHR judgments. With regards to this the CoE human rights system can be characterized as diffusely embedded in domestic jurisdictions. The CoE has had to address the difficulties of such continuing direct judicial enforcement. The Court has, in many respects, become a victim of its own success¹⁵⁵. Noting that 'the court protects the rights of 800 million people in 47 States', the CoE is concerned that the 'number of pending applications before the Court has constantly grown. Whereas in 1999 8.400 applications were allocated to a judge committee or chamber, this figure rose to 27.200 in 2003, when around 65.000 applications were already pending. In 2009 57.200 applications were allocated to a judicial formation and the backlog reached 119.300 applications'¹⁵⁶.

This concern with the growing backlog of applications to the ECtHR led the CoE to initiate procedural reforms under Protocol 14 to the ECHR which were adopted in 2004 and entered into force on 1 June 2010 after being ratified by all Member States. In addition to the Courts role in retrospectively addressing potential breaches of Convention rights, Protocol 14 affords the Court the ability to make proactive rulings on interpretation. At the request of the Committee of Ministers the Court may now provide a clarificatory ruling on the interpretation of Convention rights so as to enable a member state pre-emptively to take such action as is necessary to comply and thus hopefully to avoid the necessity of a later complaint.

The novelty of this measure means that its potential to strengthen protection of Convention rights, through proactive engagement with developing issues, has yet to be determined.

¹⁵² See *inter alia* Sottiaux and Van Der Schyff 2008; Greer 2003; Goold and Lazarus 2007.

¹⁵³ McKaskle 2005, p. 72-3.

¹⁵⁴ Heffler 2008, p. 125. (See further on ECtHR case law on minority rights protection, Part C 2.1)

¹⁵⁵ Morgan 2006; Heffler 2008; Altiparmak 2009; Mowbray 2010, p. 279f.

¹⁵⁶ Council of Europe Factsheet on Protocol (<http://www.echr.coe.int/NR/rdonlyres/57211BCC-C88A-43C6-B540-AF0642E81D2C/0/CPProtocole14EN.pdf>).

TEXTBOX 8

PILOT JUDGMENT PROCEDURE AND PROTOCOL 14

Pilot Judgment Procedure: a process whereby the ECtHR can decide to select one or more of a number of cases deriving from the same root cause. The Court will seek to achieve a solution that extends beyond the particular case or cases so as to cover all similar cases raising the same issue. One important feature of the procedure is the possibility of adjourning or “freezing” the examination of all other related cases for a certain period of time. The system has been in place since 2004 as a means to alleviate the excessive case overload of the Court (Source: ECtHR Information Note issued by the Registrar on the Pilot Judgment Procedure).

Protocol 14 introduces changes in three main areas:

- reinforcement of the Court's filtering capacity to deal with clearly inadmissible applications
- a new admissibility criterion concerning cases in which the applicant has not suffered a significant disadvantage
- measures for dealing more efficiently with repetitive cases

The key amendments to the Convention are the following:

Election of judges: Judges will be elected for a non-renewable term of office of nine years rather than six years renewable for a further six. The aim of the reform is to increase their independence and impartiality. The age limit remains at 70.

Competences of single judges: A single judge, rather than a committee of three judges, will be able to reject plainly inadmissible applications, those “where a decision can be taken without further consideration”. This decision will be final.

Competences of three judge committees: A three judge committee will be able to declare applications admissible and decide on their merits in clearly well-founded cases and those in which there is a well-established case law. Currently three judge committees can only declare applications inadmissible by unanimity but not decide on the merits. These cases are handled by chambers of seven judges or the Grand Chamber (17 judges).

Decisions on admissibility and merits: In order to allow the registry and the judges to process cases faster, the decisions on admissibility and merits of individual applications will be taken jointly. This has already become the common practice of the Court. However the Court may always decide to take separate decisions on particular applications. This does not apply for interstate applications.

New admissibility criterion: The protocol creates an additional tool to allow the Court to concentrate on cases which raise important human rights issues. It empowers it to declare inadmissible applications where the applicant has not suffered a significant disadvantage and which, in terms of respect for human rights, do not require an examination of the merits by the Court or do not raise serious questions affecting the application or the interpretation of the Convention or important questions concerning national law.

Commissioner for Human Rights: The Commissioner will have the right to intervene as a third party, by submitting written comments and taking part in hearings. So far, it was possible for the president of the Court to invite the Commissioner to intervene in pending cases.

Friendly settlements: In order to reduce the Court's workload, Protocol 14 encourages friendly settlements at an early stage of the proceedings, in particular for repetitive cases. It also provides for the supervision of the execution of the decisions on these settlements by the

Committee of Ministers.

Execution of judgments: The Protocol empowers the Committee of Ministers to ask the Court to interpret a final judgment if it encounters difficulties to do it when supervising its execution. In order not to over-burden the Court, if there are disagreements in the Committee with regard to the interpretation of a judgment, a decision can be taken by a qualified majority.

Considering the importance of rapid execution of judgments, in particular in cases concerning structural problems, in order to prevent repetitive applications, the Protocol will allow the Committee of Ministers to decide, in exceptional circumstances and with a 2/3 majority, to initiate proceedings of non-compliance in the Grand Chamber of the Court in order to make the state concerned execute the Court's initial judgment. These proceedings before the Court would result in another judgment related to the lack of an effective execution.

Accession by European Union: Article 17 of the Protocol contains the possibility of the European Union becoming a party to the Convention. The Lisbon Treaty, which entered into force in December 2009, states that the European Union shall accede to the Convention. To provide for this accession the Convention will have to be further modified. The accession of the EU would be a major step towards creating a European fundamental rights area.

Source: Council of Europe Factsheet on Protocol 14

The delay in bringing Protocol 14 into force has exacerbated the problems of the Court's backlog. Further measures have been taken to face what is now an acute crisis for the Court and the CoE generally. These problems were addressed in the Interlaken Declaration and Action Plan (19 February 2010)¹⁵⁷. The Declaration notes with 'deep concern that the number of applications brought before the Court and the deficit between applications introduced and applications disposed of continues to grow'¹⁵⁸. In seeking to address this problem, the Declaration reaffirms and elaborates on the 'principle of subsidiarity' which underpins the obligation on State Parties to ensure Convention rights are secured at the national level. This includes ensuring that ECtHR judgments are implemented at a national level; that National Human Rights Institutions, national authorities, courts and parliaments play a strong role in guaranteeing and protecting human rights at the national level; and that redress for breach of Convention rights are available at the national level. The Declaration's inclusion of national parliaments in the protection of Convention rights, and in the implementation of ECtHR judgments, is a new emphasis in the interpretation of the subsidiarity principle, and has also been highlighted by the European Commissioner for Human Rights¹⁵⁹.

¹⁵⁷ http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf.

¹⁵⁸ pp7.

¹⁵⁹ Hammarberg 2009; see also Drzemczewski and Gaughan 2010.

2.1.2.2 Enforcement by Courts of Member States

As an international treaty, the domestic status of the ECHR is a matter of domestic law. However, over time as all CoE Member States have incorporated the ECHR it has come to be diffusely embedded in domestic systems¹⁶⁰. Admittedly, modes of incorporation vary across States, as does the status of ECtHR judgments in domestic law. While the ECHR does not have the same status in domestic law as EU law, which is directly effective or embedded in all Member States' domestic legal orders, as Lawson notes: 'in 2006 – i.e. at the time that the ECHR had finally been incorporated by all Contracting States –... the Court state[d] that the Convention 'directly creates rights for private individuals within their jurisdiction'¹⁶¹.

ECtHR case law on effective remedies under Article 13 ECHR requires national courts to protect human rights, so that litigants do not have to have recourse as a last resort to the ECtHR. In stipulating domestic remedies, the ECtHR draws national courts into the system of protection of ECHR rights¹⁶².

2.1.3 Judicial protection of EU rights

As Textbox 9 below shows, the Court of Justice of the European Union (CJ) has jurisdiction to review the compliance with EU law (including EU human rights law) of both Member State acts which fall within the scope of EU law and most acts of the EU institutions, with the notable exception of those related to Common Foreign and Security Policy (CFSP). For both tasks, there are distinct direct and indirect avenues for review. While direct legality review is initiated before the CJ, indirect legality review is initiated before Member State domestic courts and then referred to the CJ. Different actions may be brought by different actors, with both institutional (at the suit of the European Commission, Council or Parliament) and individual litigation (mainly but not only in domestic courts) forming part of the EU's complete system of judicial remedies. Member States too are frequent applicants and respondents before the CJ.

The Lisbon Treaty brings about significant changes in removing previous limitations on the CJ's jurisdiction over the Area of Freedom, Security and Justice. Asylum,

¹⁶⁰ Helfer 2008.

¹⁶¹ Lawson 2006, p. 9, quoting *Blečić v Croatia* (2004) (App. No. 59532/00), para 90.

¹⁶² Keller and Stone Sweet 2008; Spijkerboer 2009.

immigration and civil law matters are for the first time subject to the full preliminary ruling jurisdiction of the CJ. After a transitional period of 5 years, so too will be police and judicial cooperation in criminal matters, subject to the restriction that it has no jurisdiction to review the validity or proportionality of operations carried out by the police or by law enforcement services or the exercise of responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security¹⁶³. However, its jurisdiction over the EU's CFSP remains limited¹⁶⁴. In addition, as explored in section 2.1.3.3 below, standing to challenge EU acts has been modestly expanded.

¹⁶³ Article 276 TFEU.

¹⁶⁴ Article 24 TEU.

TEXTBOX 9**JUDICIAL ENFORCEMENT ROUTES IN THE EU**

	Review of acts of Member States in light of fundamental rights	Review of acts of EU institutions in light of fundamental rights
Direct Review	<p>Infringement Action: Article 258-260 TFEU (ex Article 226-228 EC)</p> <p>Interim Measures: Article 279 TFEU (ex Article 243 EC)</p>	<p>Annulment Action: Article 263 TFEU (ex Article 230 EC)</p> <p>Interim Measures: Article 278 TFEU (ex Article 242 EC)</p> <p>Action for failure to act where required by the EU Treaties: Article 265 TFEU (ex Article 232 EC)</p> <p>Opinion on compatibility with the EU treaties of agreements between the Union and third States or international organisations: Article 218(11) TFEU (ex Article 300 EC)</p>
Indirect Review	<p>Preliminary ruling/reference: Article 267 TFEU (ex Article 234 EC)</p>	<p>Preliminary ruling/reference: Article 267 TFEU (ex Article 234 EC)</p>

2.1.3.1 Review of acts of Member States in light of fundamental rights*The European Commission and Infringement Actions*

Textbox 9 demonstrates that the CJ has jurisdiction directly to review the conformity of Member State acts with Union law under Articles 258–60 TFEU, the infringement action. While Member States may bring these actions against each other, such actions are a rarity in contrast to the Commission’s central role in monitoring and enforcing EU law.

The Commission routinely pursues Member States for breaches of EU law, in particular for their failure to implement EU directives. The Commission has wide discretion whether to pursue Member States, and concerns have repeatedly been expressed about the role of individual complainants to the Commission. While the

Commission has clarified its mode of engagement with complainants¹⁶⁵, the procedure still aims for a negotiated settlement with the Member State, often to the detriment of the individual complainants¹⁶⁶. For example, the Commission may close proceedings for political reasons or following a change in the Member State's law, notwithstanding the possible continuation of de facto rights violations.

The shortcomings of the current approach to infringement proceedings are evident in the Commission's action against Greece for its failure to apply the Dublin Regulation in January 2008. It withdrew the proceedings in September 2008 following the revision of relevant Greek legislation¹⁶⁷. The narrow focus of that particular action meant that wider concerns about the human rights of asylum seekers in Greece were not addressed by the Commission. Consequently, hundreds of applications have been made to the ECtHR for interim measures to prevent mistreatment in Greece or transfer of asylum seekers there from other Member States. Following this, an alliance of NGOs submitted a voluminous complaint to the Commission.¹⁶⁸ Meanwhile as Annex 5 illustrates the ECtHR has been inundated with claims concerning the Dublin Regulation, culminating in the Grand Chamber Ruling in *MSS v Belgium and Greece* in 2011.¹⁶⁹

The Commission's current practice does not provide effective protection of human rights. Procedural reform is needed, and its institutional resources ought to be refocused towards human rights infringements. The authors welcome the Commission's most recent statement on compliance with the Charter, emphasising that it will use its powers to pursue Member States when they violate fundamental rights.¹⁷⁰

¹⁶⁵ Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringement of Community Law COM(2002) 141 final [2002] OJ C244/5; Commission Communication A Europe of Results – Applying Community Law COM(2007)502 final.

¹⁶⁶ Harlow and Rawlings 2006.

¹⁶⁷ Case C-130/08 *Commission v Greece* [2008] (OJ C 128/51).

¹⁶⁸ Dutch Council for Refugees, ProAsyl, Refugee Advice Centre, Refugee and Migrant Justice (endorsed by 19 other NGOs) Complaint to the Commission of the European Communities Concerning Failure to Comply with Community Law Against Greece (Amsterdam, 10 November 2009).

¹⁶⁹ *MSS v Belgium and Greece* (2011) Application No 30696/09.

¹⁷⁰ 'The Commission is determined to use all the means at its disposal to ensure that the Charter is adhered to by the Member States when they implement Union law. Whenever necessary it will start infringement procedures against Member States for non-compliance with the Charter in implementing Union law. Those infringement proceedings which raise issues of principle or which have particularly far-reaching negative impact for citizens will be given priority' (European Commission of 19 October 2010 *Communication on a Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union* COM(2010)573 final, p.10).

There is much scope for using infringement proceedings progressively to develop EU human rights. Such an approach would not be dissimilar to other fields in which the Commission has employed infringement proceedings to develop new principles of EU law. For example, the Commission used an infringement action to develop case law on Member States' positive duties to remove barriers to the internal market¹⁷¹. Infringement actions could additionally be used to clarify the scope of Member States' positive human rights duties. Infringement actions have also clarified Member States' responsibilities for breaches of EU law committed by the national judiciary¹⁷². However, we have yet to see such innovative use of infringement proceedings in human rights cases.

2.1.3.2 Enforcing EU Law in National Courts

In practice, Commission enforcement actions have constituted a secondary means by which Member State compliance with EU norms, including human rights norms, is ensured. Rather, it is in domestic courts that the routine enforcement of EU human rights law takes place, with national judges acting as the first instance judges of EU law, generally with discretion to refer questions to the CJ under the indirect preliminary ruling/reference avenue. The Lisbon Treaty reflects this role of national courts in Article 19(1) TEU.

TEXTBOX 10

ARTICLE 19(1) TEU (POST-LISBON)

The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

Over the years, in dialogue with national courts, the CJ has developed elaborate doctrines on the effectiveness and uniformity of EU law in Member State legal systems. EU law is now directly embedded in domestic systems, in contrast to ECHR law which is diffusely embedded¹⁷³. In effect, this means that litigants often have a

¹⁷¹ Case C-197/96 *Commission v France* [1997] ECR I-1489.

¹⁷² C-154/08 *Commission v Spain* [2009] ECR I-0000, paras 125–36.

¹⁷³ Helfer 2008.

strong incentive to rely on EU rights and that EU law tends to attract stronger remedies in the national system.

2.1.3.3 Review of acts of EU institutions in light of fundamental rights

As with review of Member State acts, both the direct and indirect avenues are available when reviewing the compatibility with fundamental rights of acts of the EU institutions. Thus in addition to the indirect preliminary ruling procedure discussed above with regards the review of Member State acts, Article 263 TFEU confers jurisdiction on the CJ to review the legality of acts of the EU institutions, including the European Parliament, Council and Commission. Privileged applications include the Member States and EU institutions.

In contrast, individuals may only directly challenge EU acts if they fulfil the tight requirement for standing under Article 263(4) TFEU¹⁷⁴. In practice, however, many individuals must use the preliminary rulings procedure to challenge EU legislative acts, as they are unlikely to fulfil these requirements for standing. There are serious doubts about whether the preliminary reference procedure provides effective judicial protection (see section 2.1.3.5 below). The Lisbon reform on 'regulatory acts' does not alleviate these concerns. It removes the restrictive requirement of 'individual concern' for litigants who wish directly to challenge EU 'regulatory acts that do not entail implementing measures'. Much turns on the interpretation of this phrase, but the normal strict standing rules seem to remain in place for challenges to EU legislative acts.

2.1.3.4 The European Parliament as Human Rights Litigant

Since the Treaty of Nice, the European Parliament has been granted general *locus standi* before the CJ, having previously only been allowed to bring actions to protect its own prerogatives. The first, and as yet only, instance of exercising this standing to challenge an EU Directive on human rights grounds was in its challenge to the validity of the Family Reunification Directive (FRD)¹⁷⁵. Its challenge against the

¹⁷⁴ E.g. Joined Cases C-402/05 and C-415/05 *Kadi, Al Barakaat v Council of the European Union and the Commission of the European Communities* [2008] ECR I-6351.

¹⁷⁵ Council Directive 2003/86 of 22 September 2003 on the right to family reunification [2003] OJ L 251/12; Case C-540/03 *Parliament v Council* [2006] ECR I-5769 (*FRD Ruling*).

conclusion of the EU/US passenger name records agreement also raised fundamental rights issues, although the CJ annulled the measure on other grounds¹⁷⁶.

In its *FRD Ruling*, the CJ re-interpreted the FRD in a human rights-compatible manner, emphasizing the human rights obligations of the Member States when they apply the FRD in individual cases. The right to family reunification has thus been strengthened within the EU legal system, in some respects granting higher protection than the ECHR, as is evident in later CJ rulings on the FRD¹⁷⁷.

The European Parliament should develop its role as fundamental rights litigant, as well as an actor in legislating on and monitoring compliance with fundamental rights. The European Parliament's privileged role as a litigant and intervener in cases against the EU institutions should be employed strategically in order to enhance human rights. We note with regret that the EP did not challenge the Procedures Directive¹⁷⁸ (regarding refugee status) on human rights grounds, confining its challenge to institutional issues¹⁷⁹. The decision not to challenge the Procedures Directive seems to have been informed by an assumption that when an EU Directive merely facilitates, rather than embodies, human rights violations, it does not warrant challenge. However, as we emphasise repeatedly, human rights duties are not only negative, but also positive. If the EU legislates in a manner which fails to protect or promote fundamental rights, this is also a ground for questioning the legality of that legislation.

Therefore, in engaging in inter-institutional litigation on human rights, the EP needs to develop a strategy. That strategy can and should draw on the experience in those Member States where rights based abstract legality review at the suit of legislatures as well as inter-institutional actions are well-developed, for instance in Germany¹⁸⁰. The German Constitution and the relevant Procedural Code of the Constitutional Court allow for procedures which are relevant here.

¹⁷⁶ Joined Cases C-317/04 and C-318/04 *European Parliament, supported by European Data Protection Supervisor (EDPS) v Council* [2006] ECR I-4721 (PNR Ruling).

¹⁷⁷ Case C-578/08 *Chakroun v Minister van Buitenlandse Zaken* [2010]; cf. ECtHR in *Haydarie v The Netherlands* (2005) Application No 8876/04; Boeles and Bruins 2006.

¹⁷⁸ Council Directive 2005/85/EC (Procedures Directive) of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.

¹⁷⁹ Case C-133/06 *Parliament v Council* [2008] ECR I-3189.

¹⁸⁰ Kommers 1994.

Firstly, and most importantly, an **abstract legality review** mechanism can be instigated by privileged applicants, such as the European Parliament¹⁸¹. Again, this possibility exists within the current Treaty framework in the action of annulment which allows for the abstract legality review instigated by the EP (as demonstrated in the *FRD* case, but which remains underused). Crucially, a part of the EP (one fourth of its members) have standing to bring such a review action, characterising and emphasising the significance of such review as an instrument of the minority to hold the majority to account.

Secondly, an **inter-institutional litigation** procedure (*Organstreit*, Art 93 (1) no. 1 of the German Constitution) can be used by an institution in order to vindicate its competences against other institutions, for example where the European Parliament was not involved in the adoption of a measure where and as it should have been involved¹⁸². Inter-institutional litigation can be initiated by parts of Parliament in Germany (e.g. parliamentary committees, political parties). The TFEU opens up similar opportunities, at least in principle, through the action for annulment which can be brought by privileged applicants such as the European Parliament, on grounds of violation of competences or of abuse of power. In so far as the German system has a wider scope than the list of privileged applicants for an EU action of annulment, the potential for human rights relevant review through the prism of inter-institutional litigation in the EU is more limited.

The current Treaty framework already allows to a large extent for similar actions of the European Parliament, so that no fundamental changes are required. However, much wider and more strategic use could be made of the existing possibilities under the Treaty, and the benefits of a reform of the opportunities for standing of parts of the European Parliament could be explored further.

Litigation also needs to be used to complement the European Parliament's legislative role. Now that it has wider powers of co-decision, its role as a legislator may dominate certain fields. However, there remain many areas of EU activity where the EP's legislative role is minimal, and yet where EU acts may breach human rights. Priorities for litigation should take into account factors such as whether victims of these violations are unwilling or unable to act; whether the violations of human

¹⁸¹ *Abstrakte Normenkontrolle*, Art 93 (1) no. 2 of the German Constitution.

¹⁸² *Organstreit*, Art 93 (1) no. 1 of the German Constitution.

rights are likely to undermine international human rights guarantees systematically; and whether a novel question of human rights law needs swift resolution.

In addition to acting as a direct litigant, the European Parliament could intervene indirectly to facilitate and ensure that human rights relevant arguments are included and exchanged in specific cases. In addition to litigation in the CJ, the EP could examine whether there are opportunities to intervene at national level, which it could use to support indirect challenges to the validity of EU acts. Strengthening the early exchange of human rights arguments at a national level is particularly important in the light of the limits for standing of individuals in the CJ in actions for annulment. One of the challenges for the EP to get more involved at national level will be at the level of knowledge about relevant actions. A structured mechanism for parties and courts at the national level to notify the European Parliament of ongoing litigation at national level might prove valuable.

Crucially, when acting as a human rights litigant or intervener, the European Parliament should draw on the full panoply of EU human rights, the Charter, general principles and pertinent international standards.

2.1.3.5 Problems with the preliminary ruling procedure

Textbox 9 demonstrates that the preliminary ruling procedure operates as an indirect means by which both EU and Member State acts are reviewed for their compliance with EU human rights law. Indeed, as noted above, this is a key method of enforcing EU law (including EU human rights law).

In practice, recourse to the preliminary rulings procedure means that national law relating to standing, interventions and costs applies, leading to diverse approaches to access to justice. However, as preliminary references may be made by any national court or tribunal, there is no requirement to exhaust domestic remedies before the CJ has jurisdiction. In this respect, there is greater access to the CJ than the ECtHR, which does require exhaustion of domestic remedies.

For many years, case overload leading to delays in the CJ in dealing with preliminary references were a cause of concern. The CJ, like the ECtHR, is characterised as a 'victim of its own success.' In response, various faster procedures have been

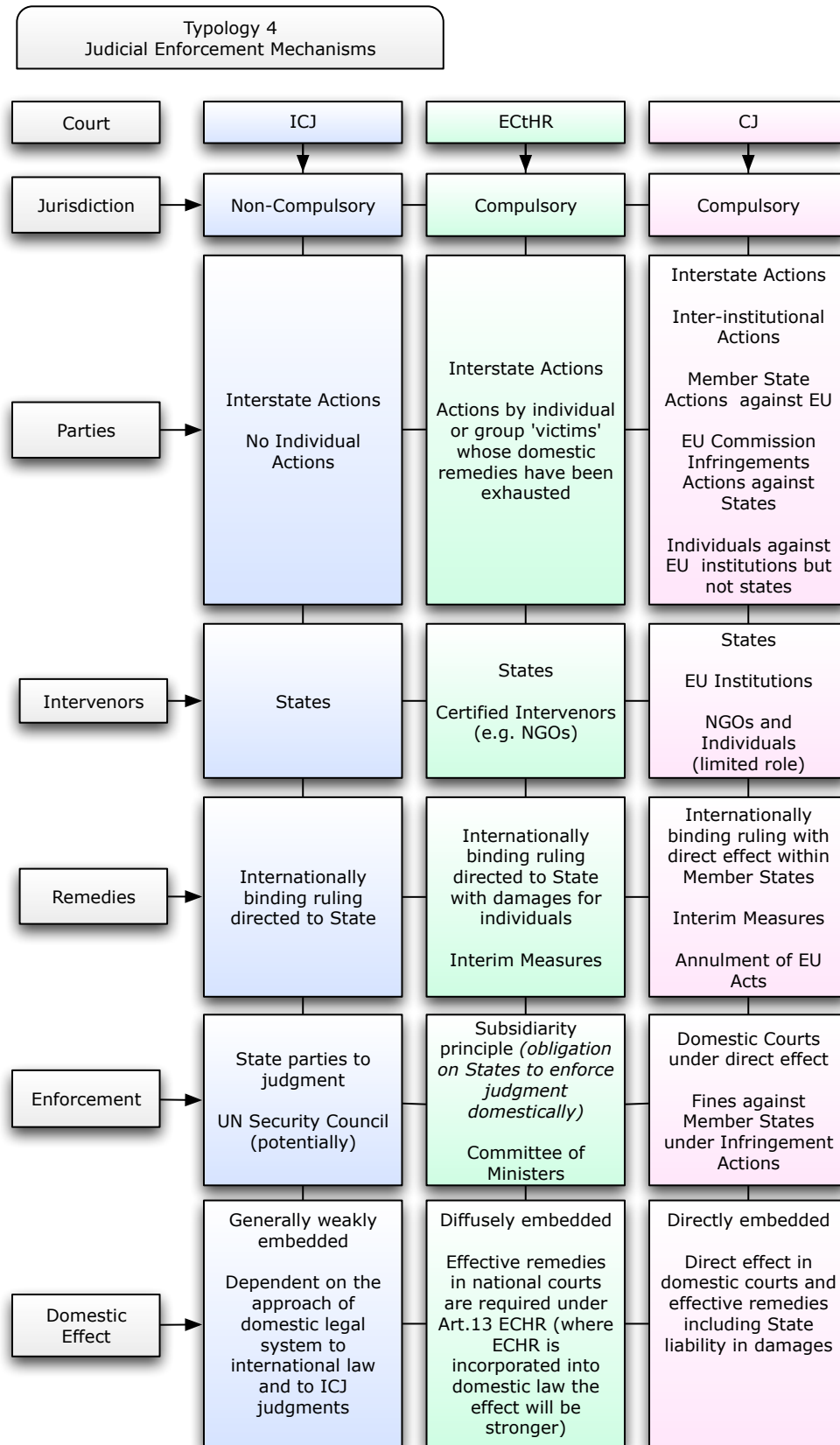
introduced¹⁸³. The use of accelerated procedures in a growing number of cases is noteworthy. For instance, the *Metock* reference was decided in 4 months, bringing an end to legal uncertainty for family members of EU Citizens that are third country nationals (see Textbox 17)¹⁸⁴. Article 267(4) TFEU, added by the Lisbon Treaty, obliges the CJ to act with minimum delay 'when a question arises with regard to a person in custody.' The provision reflects the increasing relevance of EU law to questions of detention (see Annex 6). While the new urgent procedure does allow the Court to resolve questions of law swiftly, it risks allowing an unduly narrow view of the legal issues by the CJ. Judging from the accelerated procedures thus far, the Court has failed to explore questions of fundamental rights fully¹⁸⁵.

¹⁸³ These are: the accelerated or expedited procedure under Article 23a Statute of the CJ and Article 104a Rules of Procedure; the urgent procedure (PPU) under Article 104b Rules of Procedure; the simplified procedure under Article 104(3) of the Rules of Procedure; and ruling by order and the capacity to dispense with the AG's Opinion (Article 20 Statute of the CJ).

¹⁸⁴ Case C-127/08 *Blaise Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241; Paras. 16–17: 'A reply from the Court within a very short period could...bring a swifter end to...uncertainty, which is preventing the persons concerned from leading a normal family life.' Arguments 3 June 2008; Ruling 25 July 2008; No published AG's Opinion.

¹⁸⁵ E.g. as in Case C-357/09 *Kadzoev v Direktsia 'Migratsia' pri Ministerstvo na vatrešnite raboti* [2009].

2.1.4 Typology on judicial enforcement mechanisms



2.2. Non-judicial mechanisms

Non-judicial human rights mechanisms can play a crucial role in the delivery of human rights standards on the ground. Judicial enforcement is indispensable to provide ex post remedies for violations in individual cases. However, securing access to justice places a great burden on victims of human rights violations. Proactive ex ante mechanisms are also crucial. Hence, the following section explores non-judicial mechanisms under the UN-CoE-EU systems. These various bodies can be characterised by reference to their particular powers, or cluster of powers, namely: quasi-judicial, monitoring, co-ordination and advisory (see Typology 5 below). In the case of the EU, we also emphasise that its distinctive power to protect, promote and fulfil human rights is found in its law-making capacity.

2.2.1 Non- Judicial Mechanisms under the UN system

Given that judicial remedies available at the UN level to individuals are limited, the UN human rights system relies heavily on non-judicial institutions. This international human rights protection mechanism stems from the UN Charter-based bodies and Treaty bodies. These distinct arms of the UN human rights enforcement machinery has meant that 'UN human rights law has evolved over the past sixty years along two parallel paths, one based on the UN Charter, the other on the human rights treaties adopted by the Organization'¹⁸⁶. There is some disquiet about the success of the parallel compliance structure within the UN system: '[t]he enforcement of international human rights law has always been seen as the weak link in the international legal system'¹⁸⁷.

Depending on their status as a Charter or Treaty body and their particular mandate, these bodies employ different procedures as set out in Textbox 11:

¹⁸⁶ Buergenthal 2006, p.787.

¹⁸⁷ Cassidy 2008, p.37.

TEXTBOX 11

NON-JUDICIAL PROCEDURES FOR ENFORCING HUMAN RIGHTS IN THE UN SYSTEM

Source: <http://www2.ohchr.org/english/bodies/chr/special/index.htm>

Treaty Bodies

- **State reporting procedure:** receive periodic state reports regarding compliance with the treaty and issue concluding observations on the State reporting process.
- **General Comments:** interpret the provisions of the treaties under which they operate.
- **Individual communications procedure:** receive individual complaints, consider them in a quasi-judicial manner, and issue interim measures and emergency communications. This option is available for various bodies presently (see textbox 12 below), including the UNHRC which considers the greatest number of cases. In 1990 the HRC created the position of a Special Rapporteur for Follow-up on Views. The Special Rapporteur has a two year renewable mandate to monitor state implementation of the Views of the Committee.

Charter Based Bodies

- **Universal Periodic Review (UPR):** a process whereby the human rights records of all 192 State members of the UN are reviewed comprehensively every 4 years by the new Human Rights Council.
- **1235 protection procedure:** Established by UN Economic and Social Council (ECOSOC), resolution 1235 allows the Human Rights Council to carry out a public and thorough study of situations revealing a consistent pattern of human rights violations¹⁸⁸. This procedure was instigated due to a concern with the policy of apartheid in South Africa in 1967.
- **1503 protection procedure:** Established by the UN Economic and Social Council (ECOSOC), the 1503 protection procedure allows for a confidential review of complaints from groups or individuals that revealed 'a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms'¹⁸⁹.
- **Special Procedure Mandates (SPM):** These are mechanisms established under the Human Rights Council to address specific country situations or thematic issues in all parts of the world. They are conducted either by Special Rapporteurs or by working groups. Each special procedure mandate is established and defined by the resolution creating them. The procedures are also governed by Resolution 5/2 of the Human Rights Council which created a Code of Conduct for Special procedures mandates.

¹⁸⁸ ECOSOC Res. 1235 (XLII), para. 3 (June 6, 1967).

¹⁸⁹ ECOSOC Res. 1503 (XLVIII), para. 1 (May 27, 1970).

2.2.1.1 Charter-Based Bodies

The international human rights Charter-based bodies consist primarily of the United Nations Human Rights Council (UNHRC) and the Special Procedures. The UNHRC was set up to replace the former UN Commission on Human Rights in 2006. Notwithstanding the change, two key protection procedures (1235 and 1503 protection procedures) established by the UN Economic and Social Council (ECOSOC) survived the shift from Commission to Council¹⁹⁰. Both procedures enabled the gradual development of 'a growing number of UN Charter-based mechanisms for dealing with large-scale human rights violations'¹⁹¹. Though some welcome developments have taken place with the coming into being of the UNHRC (e.g with regards to membership, meeting time, and a rhetorical focus on resisting the 'politicisation of human rights'), some Commission on Human Rights mechanisms have come to be eroded with its replacement by the UNHRC. Most particularly, the number of country resolutions condemning the human rights record of particular States has reduced dramatically, and there is a tendency to softer actions such as statements by the President of the Human Rights Council or the holding of Special Sessions to discuss situations with violating States. While this can be effective where the state concerned is willing to admit the need for progress, such softer actions are ineffectual in the face of State resistance¹⁹². This, in turn, determines whether the Council acts as 'a protector for victims or a shield for violators'¹⁹³.

Whilst the 1235 and 1503 protection procedures survived the shift from Commission to Council, the major new innovation has been that of Universal Periodic Review (UPR). UPR is a process of State assessment of other States' human rights records, therefore, some consideration of political repercussion is inevitable in the process. There is no binding adjudication of each State's record, but rather a compilation of State recommendations in the outcome document to which the State is answerable in 4 years' time. Though set up in order to advance 'universality and fair scrutiny of state performance in protecting and promoting human rights to the main political human rights body of the United Nations'¹⁹⁴, it is as yet unclear whether the UPR will achieve this.

¹⁹⁰ Ghanea 2006.

¹⁹¹ Buergenthal 2006, p.788.

¹⁹² Alston 2006; Ghanea 2006; Scannella and Splinter 2007; Ghanea and Melchiorre 2005; Ghanea and Rahmani 2005; Ghanea and Rahmani 2002; Ghanea 1998; Ghanea 1997.

¹⁹³ Lauren 2007, p. 343.

¹⁹⁴ Gaer 2007, p.109; see also Ghanea 2006; Alston 2006.

The UPR process was initially greeted with some scepticism. Critics expressed doubts about the extent to which UPR can prove effective in 'scrutinising and correcting gross violations of human rights in a country'¹⁹⁵. In particular, there was a concern that the perceived equality of treatment built within the process 'mask[s], or mute[s] attention to, the worst cases of abuse, or produce[s] moral equivalency of severe violators with those largely in compliance'¹⁹⁶. Put otherwise, '[a] principal issue that is emerging in the discussion of the universal periodic review mechanism is its relationship to other means by which the Council can address the human rights situation in particular countries'¹⁹⁷. These concerns, as well as proposals for having rigorous human rights performance-based criteria for State membership of the Human Rights Council rather than mere reliance on pledges, were put forward by numerous NGOs during the process leading up to the creation of the Council¹⁹⁸, but were not adopted.

The UPR has proceeded with its first round of state reviews to much fanfare¹⁹⁹, with two-thirds of UN member States having submitted themselves to the process. Nevertheless, observers remain vigilant. UPR Watch notes that 'as a global political process, the mechanism has been working; however, this does not mean that it is coherent, effective and satisfactory'²⁰⁰. The shortcomings identified to date by UPR watch include²⁰¹:

- 'no decision or directive delimits the respective role and contributions of the States, the United Nations, and other stakeholders in the production of reports for the UPR's second cycle' regarding implementation of UPR recommendations';
- 'no reliable system that gathers information concerning the implementation of recommendations received by the States has been put in place to allow for a reliable assessment of progress made';

¹⁹⁵ Gaer 2007, p.138.

¹⁹⁶ Gaer 2007, p.137.

¹⁹⁷ Scannella and Splinter 2007, p. 64.

¹⁹⁸ For example see Joint Letter on the UN Human Rights Council, presented to the President of the UN General Assembly by 41 NGOs, 1 November 2005, available at <http://www.globalpolicy.org/component/content/article/228/32469.html>.

¹⁹⁹ OHCHR Report 2009, p. 9 and Part II.

²⁰⁰ UPR Watch 2010, p. 1.

²⁰¹ UPR Watch 2010, p. 5.

- 'no mechanism has been developed to monitor implementation or to analyze the eventual report on implementation produced by governments. No norms have been developed to frame these reports. No new resources have been allocated to help create such a system and norms';
- 'no timeframe has been discussed and accepted for the production of such a report by states. No discussions concerning the nature and scope of the interventions by the Office of the High Commissioner for Human Rights (OHCHR) or civil society representatives have yet taken place'.

As a consequence, UPR Watch has concluded that there 'are significant shortcomings' which will 'have to be addressed urgently to strengthen what will be a very difficult second cycle for the UPR mechanism, and to bring clarity to a mechanism whose finality remains imprecise'²⁰². More recently the Open Society Justice Initiative, The Brookings Institution and UPR Watch have suggested that certain steps might be taken to enhance the implementation of UPR recommendations. These might include: 'the creation of stricter conditions for HRC membership; specific bodies designed to facilitate implementation, as well as the creation of national plans of action, or other institutional roadmaps, to ensure that States fulfil their duty to implement the recommendations contained in the final UPR outcome; and promoting greater institutional cohesion between the UPR, OHCHR, the treaty bodies, and the Special Procedures'²⁰³.

The UPR procedure is yet to prove itself, and it may well be that it is 'the special procedures ... which will ... to a very significant extent, determine the fate of the grand reform which the creation of the Council is supposed to help bring about'²⁰⁴. Set up as independent experts entrusted with the impartial and objective assessment of human rights records with respect to a particular country or human rights theme, the Special Procedure mandate holders either operate as individual mandate holders or constitute Working Groups composed of five members. Much of the effectiveness of the Special Procedures (otherwise known as extra-conventional mechanisms) rests on their ability to receive and act on first-hand information promptly. It is not

²⁰² UPR Watch 2010, p. 5.

²⁰³ Concept Note 2010, p. 3; see also Duggan-Larkin 2010.

²⁰⁴ Alston 2006, p. 215.

surprising, therefore, that many of the most effective mandate holders have engaged successfully with NGOs, so much so that the thematic special procedures have been described as acting as an 'independent intermediary between states and nongovernmental organizations (NGOs) or human rights activists'²⁰⁵.

2.2.1.2 Treaty monitoring bodies

Treaty monitoring bodies ('treaty-based bodies'), which consist of the monitoring bodies envisaged in each of the core international human rights instruments have been recognised, within the UN, as 'cornerstones of the human rights machinery'²⁰⁶. Many critics have deemed these specific monitoring bodies as 'sadly deficient'²⁰⁷, in terms of their ability to ensure enforcement of their respective instruments. Although treaty based bodies operate in a quasi-judicial manner, they often operate on a part-time basis, are not empowered to perform binding adjudications, have modest provisions for enforcement and lack sufficient resources for research and fact-finding.

In short, the lack of effectiveness and efficiency of Treaty Bodies has been due to 'chronic under-resourcing and the related problem of inadequate administrative support as well as political factors'²⁰⁸. These difficulties led some to advocate for the consolidation of treaty body resources in the creation of one full-time unified treaty body²⁰⁹. This suggestion received careful analysis in the Dublin Statement which was launched in 2010²¹⁰.

Notwithstanding these limitations and criticisms, it remains the case that 'treaty-based bodies' remain central to the protection of international human rights law. This is highlighted well by Buergethal:

"Although ... not judicial institutions, they have had to interpret and apply their respective conventions in reviewing and commenting on the periodic reports the states parties must submit to them, and in dealing

²⁰⁵ Rudolf 2000, p. 291.

²⁰⁶ Report of Chairpersons of Human Rights Bodies 2004, para. 38.

²⁰⁷ Robertson and Merrills 1996, p. 279.

²⁰⁸ O'Flaherty and O'Brien 2007, p. 142.

²⁰⁹ O'Flaherty 2006, p. 335.

²¹⁰ Available at :

<http://www.nottingham.ac.uk/hrlc/documents/specialevents/dublinstatement.pdf>. For further information see the common response of 20 NGOs to the Dublin Statement in November 2010: www.ishr.ch/.../1082-response-by-ngos-to-the-dublin-statement-on-the-process-of-strengthening-the-un-treaty-body-system and O'Flaherty 2010, pp. 319-335.

with the individual complaints that some treaty bodies are authorized to receive. This practice has produced a substantial body of international human rights law"²¹¹.

This receipt and issuing of observations on State reports, interpretation of treaties and receipt of individual complaints, together with resort to interim measures and emergency communications, where necessary, are all aimed at advancing human rights protections in the normative sphere covered by the treaties.

Individual communication procedures in particular (outlined in Textbox 12 below) have given individuals 'recourse to international human rights bodies ... [which constitutes] one of the most significant developments in securing respect for and the promotion of universal fundamental rights and freedoms'²¹². This procedure has been commended for three reasons. First, it allows an 'alternative forum' where domestic judicial fora have fallen short. Second, it allows the individual recourse 'as an actor cognisable by international law'. Third, it has facilitated the development of a 'common universal standard of human rights observance'²¹³.

TEXTBOX 12

INDIVIDUAL COMMUNICATION PROCEDURE

The Individual Communication Procedure allows individual victims' recourse to the UNHRC and Treaty bodies (see below). The UNHRC and Treaty bodies are not regarded as Courts. They can issue communications which they have no direct means to enforce. However, where a Country does not respond to a communication, it will be listed in the annual report. The UNHRC can also ask States to provide information about redress for violations in their periodic reports. A member of the UNHRC, the Special Rapporteur for the Follow-up of Views, is charged with maintaining contact with the Parties to observe the manner in which effect is given to the action of the Committee. The Committee also welcomes information from NGOs as to what measures the State Party has taken. The 'Special Rapporteur' recommends appropriate action for victims and communicates directly with the victims and the States. Where a complaint is reviewed the bodies can request that the State take interim measures to safeguard the alleged victim. Such a request has no binding force. Where the Committee is of the view that there has been a violation, it will give suggestions as to how the matter might be rectified. Such suggestions may indicate that compensation be paid to the complainant.

(Source: <http://www.un.org/esa/socdev/enable/comp202.htm>)

²¹¹ Buergenthal (2006) at p. 789.

²¹² Butler 2000, p. 360.

²¹³ Butler 2000, pp. 360–1.

Treaty (ratifications)	Individual Communications (ratifications)
CERD (173)	Article 14 CERD
ICCPR (166)	Optional Protocol 1 to the ICCPR (113)
ICESCR (160)	Optional Protocol to ICESCR (3)
CEDAW (186)	Optional Protocol to CEDAW (99)
CAT (147)	OPCAT (57)
CRPD (95)	Optional Protocol to CRPD (58)
CRC (193)	
CMW (43)	
CPED (19)	
(Source: http://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en)	

2.2.1.3 National Human Rights Institutions

National Human Rights Institutions have received increasing attention as a means by which to attain compliance with international human rights. Some treaty bodies even require and recommend National Human Rights Institutions. Proponents of such complementary compliance mechanisms note that 'subsidiarity necessarily goes beyond the rigid dualism of states on one side and international community on the other, and includes in its ambit a variety of sub- and supra-national levels of association and authority in human rights'²¹⁴.

National Human Rights Institutions have been set up in numerous countries in every continent²¹⁵. Their accreditation status is assessed by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC)²¹⁶, and in accordance with the Paris Principles²¹⁷. These principles specify the role of National Human Rights Institutions as including the following:

²¹⁴ Carozza 2003, p.67.

²¹⁵ <http://www.nhri.net/nationaldatalist.asp>.

²¹⁶ <http://www.nhri.net/default.asp?PID=276&DID=0>.

²¹⁷ <http://www.nhri.net/pdf/ParisPrinciples.english.pdf>.

TEXTBOX 13

PARIS PRINCIPLES PRINCIPLES RELATING TO THE STATUS OF NATIONAL INSTITUTIONS, COMPETENCE AND RESPONSIBILITIES, METHODS OF OPERATION

Within the framework of its operation, the national institution shall:

- (a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;
- (b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;
- (c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;
- (d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;
- (e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;
- (f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions);
- (g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

Source: <http://www.nhri.net/pdf/ParisPrinciples.english.pdf>

As of June 2010, 67 states had been accredited with 'status A', which denotes the strongest level of compliance with the Paris Principles²¹⁸. The UN's list of European countries falling within this category is available in Annex 8.

²¹⁸ <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx>.

2.2.1.4 UN High Commissioner for Human Rights

The above sections describe the proliferation of international and national human rights bodies which form part of the UN human rights compliance network. The creation of the post of the UN High Commissioner for Human Rights was in many respects a response to this proliferation. This post, long-envisioned,²¹⁹ and subsequently recommended by the 1993 World Conference's Vienna Declaration and Programme of Action, was finally brought into being in 1994. It has as one of its responsibilities the coordination of this complex human rights network. This includes responsibilities for rationalizing, adapting, strengthening, streamlining and coordinating, supervising and reporting on the UN human rights machinery.²²⁰ The post holder is appointed by the UN Secretary General and has the rank of UN Under-Secretary-General.²²¹ Echoing many others, the UN High Commissioner has noted that effective co-operation between these institutions will be essential to the delivery of UN human rights compliance. The High Commissioner has emphasised that 'the need to coordinate follow-up to recommendations of all major UN inter-governmental and expert human rights mechanisms should be addressed through closer collaboration amongst States, special procedures, treaty bodies, UN entities, National Human Rights Institutions and NGOs'²²². If the Commissioner is to be proven right that 'new opportunities exist for special procedures mandate-holders to contribute to country-focused implementation and follow-up in the context of the UPR'²²³, the process of interaction between national and international human rights institutions will be central. There can be little doubt too that the regional human rights compliance structures (outlined in the following sections) ought to play a crucial role in this compliance network.

2.2.2 Non-judicial mechanisms under the Council of Europe

For the social, economic and cultural rights contained in the European Social Charter, as well as any rights contained in CoE treaties other than the ECHR, enforcement is wholly through non-judicial channels. A number of bodies exist in this respect, some of which will be studied in more depth in this section below, and others in Part C 2.

²¹⁹ Consultative Council of Jewish Organizations 1950; Clark 1972.

²²⁰ UN Doc A/RES/48/141.

²²¹ UN Doc A/RES/48/141.

²²² OHCHR Report 2009, p. 34.

²²³ OHCHR Report 2009, p. 34.

TEXTBOX 14

PRIMARY NON-JUDICIAL PROTECTION MECHANISMS OF THE CoE

- **European Committee on Social Rights (ECSR)**
 - Set up under the European Social Charter to report on compliance. Receives and decides upon collective complaints regarding breach of the Charter (see section 2.2.2.1 below).
- **The European Commissioner for Human Rights**
 - Elected representative of the CoE Parliamentary Assembly (see section 2.2.2.2 below).
- **The European Committee for the Prevention of Torture (CPT)**
 - Set up under the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment – carries out country visits to member State prisons (see section 2.2.2.3 below).
- **Advisory Committee on the Framework Convention for the Protection of National Minorities (FCNM)**
 - Reports to the Committee of Ministers on compliance with the FCNM (see Part C, section 2.3).
- **Committee of Experts on Regional or Minority Languages (CAHLR)**
 - Set up by Committee of Ministers to monitor compliance with the European Charter for Regional or Minority Languages (ECRML) (see Part C, section 2.4).
- **The European Commission against Racism and Intolerance (ECRI)**
 - Set up by the Committee of Ministers to combat violence, discrimination and prejudice on grounds of race, colour, language, religion, nationality or national or ethnic origin (see Part C, section 2.5).
- **Group of Experts on Action Against Trafficking in Human Beings (GRETA)**
 - Monitors compliance with the Convention on Action against Trafficking in Human Beings (Council of Europe Treaty Series (CETS) no. 197). Empowered to make country visits upon which reports and recommendations for specific measures aimed at protecting against human trafficking are made.
- **Committee of the Parties on the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201)**
 - Monitors implementation of the Convention, including facilitating 'the collection, analysis and exchange of information, experience and good practice between States to improve their capacity to prevent and combat sexual exploitation and sexual abuse of children' (Article 41(2)).
- **The Steering Committee for Human Rights (CDDH)**
 - co-ordinating body overseeing all CoE human rights activity operating under the CoE Committee of Ministers.
- **The Parliamentary Committee on Legal Affairs and Human Rights**
 - Represents the Parliamentary Assembly of the Council of Europe (PACE) on human rights matters and issues reports. Issues legal advice to the Assembly, assists in the appointment of judges to the ECtHR and co-ordinates with other human rights bodies within the CoE. Consists of 84

members from the Assembly representing all member States.

- **The European Commission for Democracy through Law (Venice Commission)**
 - CoE's advisory body on constitutional matters that plays a leading role in the adoption of constitutions within Member States that conform to the standards of Europe's Constitutional Heritage.
- **The European Commission for the Efficiency of Justice (CEPEJ)**
 - Co-ordinatory and advisory body that promotes justice within the judicial systems of Member states works with local NGOs and National Human Rights Instruments to promote standards. Provides benchmarks against which to measure the delivery of different member states' judicial systems.

2.2.2.1 The European Committee on Social Rights (ECSR)

In the case of the European Social Charter (ESC), State parties are required to submit reports to be scrutinised by the European Committee on Social Rights (ECSR), a group of experts charged with monitoring compliance with the Charter. Although reports must be tendered annually, each report only relates to one of four 'thematic groups' of ESC rights and consequently each individual Charter right will only be reported on once during each four-year rotation.

This system, which was the only means of enforcement contained in the original ESC text of 1961, was fortified by the 1995 Additional Protocol to the Charter²²⁴, which supplemented the reporting system with a limited mechanism for collective complaints to the ECSR.

On receipt of a complaint the ECSR will first determine admissibility of a complaint. If the complaint is deemed admissible, the ECSR will commence a written procedure involving exchange of memorials. If deemed appropriate the ECSR may hold a public hearing and in any case will make a ruling on the merits of the complaint. This ruling is forwarded to complainant, member state and the Committee of Ministers and must be made public within four months. Finally the Committee of Ministers may, if deemed appropriate, adopt a resolution recommending specific measures the state should undertake to ensure future compliance.

Consequently, while the ECtHR does not judicially enforce the ESC, a quasi-judicial process involving scrutiny of admissibility of complaints, rulings on merit and the

²²⁴ ETS 158 European Social Charter (Additional Protocol) 9. XI.1995.

development of a significant jurisprudence is still followed in connection with alleged breaches of ESC rights. The borrowing of the ECtHR patterns of reasoning by the ESC, and its development of rights in a similar fashion is also indicative of its quasi-judicial function²²⁵. This allows the ESC to bolster ECtHR rulings in areas of overlap (such as in connection with the right to healthy environment in Greece and equal access to healthcare in France)²²⁶. Overall, the collective complaints procedure has received limited praise from observers. While the work of the ECSR has been praised for its detailed analysis of complaints²²⁷, problems remain with respect to the actions of the Committee of Ministers to whom the ECSR reports and the extent to which States subscribe or respond to ECSR decisions²²⁸. Proposals for a European Social Rights Court with similar powers to the ECtHR have therefore been advanced²²⁹, as well as other structural reforms to enhance State compliance. However, member States have been slow to support such moves. The constraints on the access to this system are detailed below in Part B 3.2.2 below, while the ESCR handling of the collective complaints made with respect to minority rights are outlined in Part C 2.2.

2.2.2.2 The European Commissioner for Human Rights

Possessing a broader monitoring and co-ordinatory remit for pursuing adherence to the Council's rights instruments in general is the CoE Commissioner for Human Rights, an elected representative of the CoE Parliamentary Assembly. Elected for a six year term, the Commissioner is mandated by CoE resolution (99) 50²³⁰ to foster the effective observance of human rights, and assist member states in the implementation of Council of Europe human rights standards; to promote education in and awareness of human rights in Council of Europe member states; to identify possible shortcomings in the law and practice concerning human rights; facilitate the activities of national ombudsperson institutions and other human rights structures; and provide advice and information regarding the protection of human rights across the region.

²²⁵ Cullen 2009.

²²⁶ EUI Social and Labour Law Working Group 2009.

²²⁷ Whelan and Donnelly 2007.

²²⁸ Churchill and Khaliq 2004; Alston 2005; De Schutter 2010b.

²²⁹ Novitz 2002.

²³⁰ Council of Europe Resolution (99) 50 on the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999 at its 104th Session.

In carrying out this mandate the Commissioner is empowered to visit member states to investigate conditions, make enquiries of member state governments and issue reports and recommendations. Under Protocol 14 ECHR he or she may also intervene, by right, as a third party in ECtHR proceedings through the submission of and/or through direct participation in hearings. While not empowered to act on individual complaints, the Commissioner can initiate general enquiries on the basis of human rights breaches suffered by individuals²³¹. The mandate also includes liaising with National Human Rights Institutions, NGOs and 'professional groups such as Ombudsmen, judges and journalists when completing country visits'²³².

An important pressure function is served by the Commissioner, through the issuing of reports and recommendations, and holding of seminars and conferences. An important new program now facilitates closer co-operation between the Commissioner and the EU with the purpose of promoting the development of National Human Rights Institutions²³³.

Overall general assessments of the Commissioner's role and performance are limited. Commentators have noted the involvement of the Commissioner in a number of areas: regarding the treatment of children of asylum seekers²³⁴, the use of Anti-Social Behaviour Orders²³⁵, the promotion of human rights within Eastern Europe²³⁶, the development of human rights in Northern Ireland²³⁷ and the development of police complaints²³⁸.

One specialist suggestion has been to broaden the victim test under the ECHR to allow the Commissioner to bring test cases in the ECtHR²³⁹.

2.2.2.3 The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT)

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment (ECPT), which came into force in February 1989, strengthens and

²³¹ Bond 2010, p. 70.

²³² Benedek et al 2010, p. 60.

²³³ www.coe.int/t/commissioner/Activities/NHRS/nhrspeer topeer_en.asp

²³⁴ Giner 2007.

²³⁵ Johnstone and Macleod 2007; Donoghue 2007; Koemans 2010.

²³⁶ Warbrick 2004.

²³⁷ Ichijo 2008.

²³⁸ Smith 2010.

²³⁹ Greer 2006, p. 191.

complements the existing prohibition on torture and inhuman or degrading treatment under Article 3 of the ECHR. The ECPT sets up the Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) to this end.²⁴⁰ The CPT monitors compliance by making visits to institutions within the territory of Contracting Parties where persons are deprived of their liberty. It reports its findings and makes recommendations to the States concerned as well reporting on its activities annually to the CoE.

As Textbox 14 shows, there are a range of bodies set up to monitor compliance with specific CoE instruments. A number of these will be evaluated with respect to minority rights in Part C 2. Each body has to be evaluated on its own terms, but the CPT is exemplary of these specific monitoring bodies. The CPT shares similar powers to these individual bodies, which rely predominantly on supervisory monitoring through designated, specialist committees whose powers broadly mirror those of the Commissioner for Human Rights. The capacity of the CPT to make country visits and to issue frank and critical reports are seen as two of its most effective powers. The CPT works with local prisons inspectorates to promote CoE prisons standards.²⁴¹

2.2.3 Non-judicial mechanisms within the EU

The EU, unlike the UN and CoE, has extensive legislative and executive powers of its own. It adopts binding EU legislation, monitors the enforcement by the Member States and executes some of it directly. In exercising all its powers, it must not only respect human rights, but also protect and promote them. This section outlines the EU's political engagement with human rights within respect to its internal activities. It does not examine the way in which the EU applies human rights principles in its external relations.

2.2.3.1 EU Lawmaking

The Commission in 2001 committed to scrutinising all its legislative proposals for compatibility with the Charter²⁴². In April 2009, it instigated reform of that

²⁴⁰ Evans and Morgan 2001; Cullen 2003.

²⁴¹ Van Zyl Smit and Snacken 2009.

²⁴² European Commission Communication of 27 April 2005 on- Compliance with the Charter of Fundamental Rights in Commission legislative proposals - Methodology for systematic and rigorous

monitoring procedure²⁴³. As well as this form of monitoring, the Commission also engages in various forms of impact assessment, which include a fundamental rights dimension²⁴⁴. De Schutter has identified many shortcomings in these processes, including their reactive nature and failure to consider the likely implementation of the EU measures at national level²⁴⁵.

The EU's lawmaking processes are complex and variable, and this Report makes no claim to illustrate them all. In some human rights sensitive fields, Commission proposals require adoption by unanimity of Member States in the Council, with little legislative say of the European Parliament. National governments within the Council may sometimes exploit their relative insulation from scrutiny in the EU to attempt to lower human rights standards. For example, the EU Asylum Directives were all adopted by unanimity (see Annex 7 for an illustration), although the Recast Proposals will now, post-Lisbon, involve the European Parliament as a co-legislator. In contrast, revisions to the Race and Framework Directives remain subject to unanimity and mere consultation of the EP²⁴⁶. However, the EP's role as co-legislator of the Return Directive might be seen to illustrate its complicity in the erosion of human rights standards²⁴⁷. The Parliament's Rules of Procedure now provide for additional adherence to the Charter²⁴⁸.

2.2.3.2 EU Administration - The Role of the European Ombudsman

Individuals may complain to the European Ombudsman concerning maladministration by the EU institutions. The Ombudsman may also report on its own initiative on matters of concern. Despite its narrow remit, the European Ombudsman has highlighted shortcomings in EU institutional practice that have a bearing on fundamental rights. The aforementioned report into the Commission's

monitoring COM(2005) 172 final; European Commission Communication of 13 January 2001 on application of the Charter of Fundamental Rights of the European Union SEC(2001)380/3.

²⁴³ 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.

²⁴⁴ European Commission Impact Assessment Guidelines, 15 January 2009, SEC(2009)92.

²⁴⁵ De Schutter 2010a, p. 15-16.

²⁴⁶ Council Directive 2000/43/EC (Race Directive) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22; Council Directive 2000/78/EC (Framework Directive) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

²⁴⁷ Directive 2008/115 (Return Directive) of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98; See Acosta 2009.

²⁴⁸ Article 36 EP Rules of Procedure.

approach to complainants in infringement proceedings stands out in this respect²⁴⁹. However, in practice, few complaints to the European Ombudsman deal with fundamental rights beyond fair procedures. It is national authorities who generally implement EU law and so it is through them that the coercive impact of EU law is felt. The European Ombudsman has emphasised the key role of national institutions and the European Network of Ombudsmen to prevent the abuse of fundamental rights²⁵⁰.

2.3.2.3 EU Monitoring of Member State Acts

The Commission has a general remit to monitor the implementation of EU law by the Member States, an integral aspect of its role as guardian of the EU Treaties and instigator of infringement actions. However, as noted above, the Commission's engagement with complainants and its administrative practice do not provide effective protection of human rights. A further, recent institutional practice is the establishment of committees of experts to monitor transposition of human rights-sensitive directives, including the Return Directive and the Framework Decision on Combating Terrorism²⁵¹.

Beyond the implementation of specific EU measures, the role of the EU in monitoring human rights in the Member States is more contentious. The Charter only purports to bind the Member States when they implement EU law²⁵². However, Article 7 TEU presupposes that the general human rights situation in the Member States may in extremis lead to sanctions. This tension is manifest in the way in which different EU institutions view their purview with respect to human rights monitoring.

Notwithstanding, the European Parliament has taken positive initiatives with respect to monitoring human rights compliance. Even before the Treaty of Nice had entered into force, the European Parliament took the initiative to formalise annual human rights reporting on the situation in the EU, prompted by the Charter and Article 7 TEU, using the Charter as the benchmark for both the EU and the Member States. In 2002, the European Parliament established an EU Network of Experts on

²⁴⁹ European Ombudsman 2007.

²⁵⁰ Speech by the European Ombudsman, P Nikiforos Diamandouros, *The Ombudsmen as Human Rights Protection Mechanisms* (Vienna, 7 May 2010).

²⁵¹ European Commission Communication of 19 October 2010 on a Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union COM(2010)573 final, p. 9.

²⁵² Article 51 Charter.

Fundamental Rights to feed into the monitoring process. Later, the Commission endorsed the work of the Network and suggested that it also engage with national human rights bodies in order to strengthen the monitoring of Member States²⁵³. However, the Network ceased operations in 2006, with some of its functions being subsumed into the Fundamental Rights Agency (FRA). However, the Network took a broader view of its purview over Member State action than the FRA. The Network was an expert review body, with no explicit role in engaging with stakeholders²⁵⁴.

Moreover, the European Parliament's Voggenhuber Report provides many valuable recommendations on monitoring human rights compliance within the EU. In particular, it calls on the Commission to use not only the Charter as a benchmark, but also 'all European and international instruments regarding fundamental rights and with the rights derived from the constitutional traditions common to the Member States, as general principles of European law'²⁵⁵.

2.2.3.4 The Fundamental Rights Agency

The Fundamental Rights Agency (FRA) operates alongside the EU's judicial enforcement mechanisms discussed above in section 2.1.3. It does not enforce fundamental rights in any sense, but rather collects evidence about the situation of fundamental rights across the European Union and provides advice and information about how to improve the situation.

The road to the establishment of the FRA was incremental. The Charter, together with Article 7 TEU, prompted moves towards monitoring human rights within the EU. With the entry into force of the Treaty of Amsterdam in 1999, the new Article 7 TEU allowed the adoption of sanctions against Member States for committing 'persistent and serious' breaches of fundamental rights²⁵⁶. The Treaty of Nice went further, providing for preventive action in cases of 'clear risk of a serious breach' of fundamental rights.

²⁵³ Commission Communication of 15 October 2003 to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final.

²⁵⁴ Smith 2009, p. 571.

²⁵⁵ Voggenhuber Report of the European Parliament of 12 February 2007 on compliance with the Charter of Fundamental Rights in the Commission's legislative proposals, A6-0034/2007 para. 6.

²⁵⁶ Happold 2000.

The Brussels European Council of December 2003 decided that the EU should establish a Human Rights Agency, by extending the mandate of the EU Monitoring Centre on Racism and Xenophobia. The Commission's proposal reflected three models, two of which were inspired by NHRI structures, while the third was modelled on other EU agencies²⁵⁷. The idea of a human rights agency that operated as either like a NHRI for the EU or as a forum for National Human Rights Institutions was not adopted due to the perceived specificities of the EU institutional structure, in particular its limited competence over human rights. The FRA was eventually established in February 2007 by EC Council Regulation No 168/07 (15 February 2007).

There are a number of notable shortcomings in the FRA's mandate²⁵⁸. In particular, it does not play the role of monitoring compliance with fundamental rights but rather it is to act as a source of expertise. The Paris Principles' conception of independence allows the NHRI to choose on which issues to focus. In contrast, the FRA's programme is set by the Council on a proposal from the Commission. The FRA's capacity to intervene in the legislative process is limited to cases where an EU institution requests its opinion.

In May 2010, the FRA reported on national human rights bodies, broadly defined²⁵⁹. The reports identify these bodies as part of the 'overarching architecture of fundamental rights protection in the EU', comprising equality bodies, data protection authorities and National Human Rights Institutions. The FRA is specifically mandated to cooperate with such institutions.

2.2.3.5 Open Method of Coordination (OMC)

The Charter collapses the distinction between civil and political rights, on the one hand, and economic, social and cultural rights on the other. While the EU is not

²⁵⁷ De Schutter and Van Goethem 2009, p. 93.

²⁵⁸ De Schutter and Van Goethem 2009.

²⁵⁹ Fundamental Rights Agency (2010b) National Human Rights Institutions in the EU Member States (Strengthening the fundamental rights architecture in the EU I) (FRA: Vienna); Fundamental Rights Agency (2010c) Data Protection in the European Union: the role of National Data Protection Authorities (Strengthening the fundamental rights architecture in the EU II) (FRA: Vienna); Fundamental Rights Agency (2010d) Rights Awareness and Equality Bodies (Strengthening the fundamental rights architecture in the EU III) (FRA: Vienna); Fundamental Rights Agency (2010e) The Impact of the Racial Equality Directive Views of Trade Unions and Employers in the European Union (Strengthening the fundamental rights architecture in the EU IV) (FRA: Vienna).

competent to adopt hard law in all the fields required to protect, promote and fulfill the social rights under the Charter, it increasingly uses new governance methods, in particular the Open Method of Coordination (OMC) as a framework for action in social fields. Under an OMC, non-binding EU guidelines and targets set the agenda. These guidelines are then translated into National Action Plans. In turn, these are subject to EU scrutiny rather than enforcement, followed by a process of revision of the Guidelines and mutual learning. There is usually no judicial and little parliamentary oversight. There are several OMCs, each differing in its institutional features. They include the European Employment Strategy (EES), Social Inclusion OMC, Pensions OMC, Healthcare OMC and Occupational Health & Safety OMC.

The EES aims to increase employment and thereby reduce social exclusion. It has an equality ethos and aims to increase labour market participation in particular of women, older people and certain minority groups²⁶⁰, although its gender equality content is in decline²⁶¹. The Social Inclusion OMC uses the right to protection against poverty and social exclusion (as alluded to in Article 34(3) Charter)) as a leitmotif²⁶², while the healthcare OMC describes its aim in terms of Article 33 Charter on the right to healthcare²⁶³. These processes do bring about policy changes, although it is difficult to trace a causal connection between the OMC and domestic policy change. There is much debate about whether OMCs provide a truly experimentalist framework for sharing and comparing practices²⁶⁴, or whether they entail a 'hidden curriculum' for 'policy unlearning'²⁶⁵, leading to the dismantling of the features of the traditional welfare state. In the context of fundamental rights, it is doubtful whether such 'openness' to diverse approaches is at all appropriate.

In terms of protecting fundamental rights, the dangers of overreliance on government-dominated soft mechanisms and political will are all too apparent: they may lead to dilution of human rights, rather than transformation²⁶⁶. Yet, soft mechanisms may be useful as a complement to hard law²⁶⁷. The notion of an 'integrated regime' of EES, hard law and the European Social Fund (ESF) may be

²⁶⁰ Ashiagbor 2005.

²⁶¹ Smith and Villa 2010.

²⁶² Armstrong 2010.

²⁶³ Hervey 2008.

²⁶⁴ Zeitlin 2005; Sabel and Zeitlin 2008.

²⁶⁵ Offe 2003.

²⁶⁶ Fredman 2006.

²⁶⁷ De Búrca 2005.

used to capture the productive interactions in this field²⁶⁸. It has been suggested that new governance tools are needed to deal with complex challenges such as multiple discrimination²⁶⁹. In contrast, the Occupational Health & Safety OMC seems to subsume EU hard-lawmaking. While the OMC's claim to legitimacy rests on openness, transparency and participation, in practice it seems that it lacks these qualities when contrasted with the processes of making, implementing and monitoring EU hard law in this field²⁷⁰.

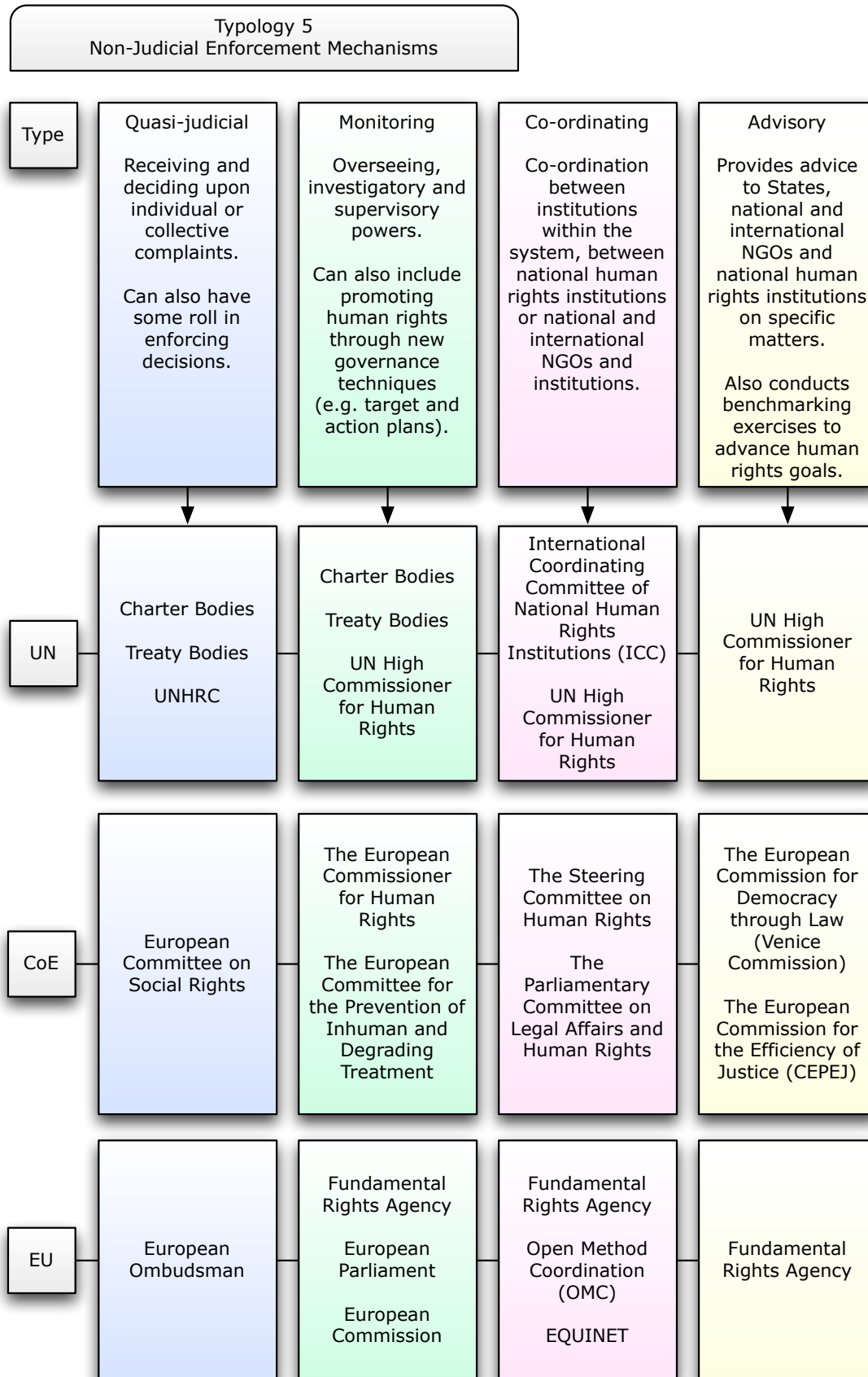
2.2.4 Typology on non-judicial protection mechanisms

Below is a typology with exemplary non-judicial bodies from the UN-CoE-EU systems demonstrating how non-judicial mechanisms and institutions operate by reference to their respective powers. Many of the institutions described above operate with a cluster of these powers and cannot be neatly defined. The typology is useful, however, to the extent that it demonstrates the types of powers that a non-judicial enforcement institution might hold.

²⁶⁸ Kilpatrick 2006.

²⁶⁹ Ashiagbor 2008.

²⁷⁰ Smismans 2008.



3. Modes of Engagement with human rights bodies

This section explores the way in which civil society actors engage with institutions of the UN-CoE-EU.

3.1 Civil society engagement with UN bodies

All UN human rights enforcement mechanisms have benefitted from civil society engagement on a number of levels. This has resulted in relationships described as 'dynamic and diverse in nature ... [and constitutive of] widespread, complicated new forms of global governance'²⁷¹.

At the international level, civil society actors are involved in lobbying for new normative standards and human rights mechanisms, contributing to the development of soft law in a large variety of UN fora. This includes: World Conferences and external fora (see Part D 1.1 below on the Limburg and Yogyakarta Principles, both of which emerged from external expert meetings); assisting in the drafting and interpretation of new standards and lobbying for their adoption and wider ratification; preventing human rights violations through early warning and other activities; reporting on State compliance; and supporting individual communications in all UN fora. At the domestic level, civil society actors are involved in promoting human rights education, lobbying for better compliance at the local and national level in laws and policies, highlighting cases of violations, submitting amicus briefs and supporting cases. Human rights NGOs are distinguished from sectional groups such as trade unions or lobbies as they do not aim to protect the interests of their members but rather campaign to secure rights for all members of society.²⁷² Their authority is moral rather than legal.

Regarding standard setting, NGOs have proven critical 'because as practitioners of human rights they are closer to victims than States and are better able to identify gaps in standards, as well as the weaknesses in implementation'²⁷³. One may go so far as to refer to NGOs as 'the engines that drive the standard-setting processes

²⁷¹ Alger 2002, pp.114–5; see also Otto 2010 and Willetts 2000.

²⁷² Wiseberg 1991; Brett 1995.

²⁷³ Matua 2007, p. 602.

within IGOs (inter-governmental organizations)²⁷⁴, even though their role is limited to influence and persuasion and they cannot in the last resort adopt such instruments themselves²⁷⁵.

Soft law instruments such as the 1992 UN Minorities Declaration and mechanisms such as the Optional Protocol to CAT²⁷⁶ would not have been adopted without NGO input, nor would most of the strides in women's rights²⁷⁷. Hard law instruments have been more difficult for NGOs to instigate in recent decades, though a notable example of such a success is the adoption of the Rome Statute of the International Criminal Court in 1998²⁷⁸. Numerous mechanisms owe their conception and genesis to NGO engagement, often through coalition building. In many instances, though NGOs have formed the 'nucleus' of campaigns for such developments, they have benefitted from 'important allies and catalysts' amongst states and UN agencies²⁷⁹.

NGOs have similarly played significant roles in reporting, monitoring and fact finding; without them treaty body consideration of state reporting would be far less informed, charter body reviews impoverished²⁸⁰, and special procedures mechanisms weakened²⁸¹.

There is the concern, however, that NGO engagement with UN human rights procedures requires a considerable investment from them that may not be worthwhile. This is particularly the case for NGOs from the South²⁸². With the expansion in the meeting time of the UN Human Rights Council, and generally the sporadic timetabling of UN human rights sessions, even arranging for attendance is challenging for the vast majority of NGOs which do not have Geneva or New York offices²⁸³. Better procedures, and appropriate training and funding, could lend impetus to expanding the engagement of diverse NGOs with UN human rights procedures, making that interaction more meaningful²⁸⁴. On the other hand, it has been suggested that engaging with the treaty state reporting process through

²⁷⁴ Matua 2007, p. 629.

²⁷⁵ Brett 1995, p. 104.

²⁷⁶ Matua 2007, p. 603.

²⁷⁷ Mutua 2007, p. 602.

²⁷⁸ Mutua 2007, p. 604.

²⁷⁹ Mutua 2007, p. 630.

²⁸⁰ Scannella and Splinter 2007; Charnovitz 2006; Brett 1995.

²⁸¹ Otto 1996.

²⁸² Clapham 2000.

²⁸³ Scannella and Splinter 2007; Clapham 2000.

²⁸⁴ Clapham 2000.

providing shadow reports or other information to treaty bodies provides 'an excellent way to form links between national and international NGOs and to strengthen civil society in developing countries where its development often is in its early stages'²⁸⁵.

Additionally, there is criticism of this almost exclusive focus on NGO engagement to the exclusion of other national structures, national partners and human rights practitioners²⁸⁶. The need both for increasingly detailed expert analysis, and to influence human rights at the national level²⁸⁷, calls for engagement with a wider range of actors, especially those with local presence and first-hand knowledge²⁸⁸. This would also lessen the UN's extensive dependence on such NGOs for expertise in many areas²⁸⁹. Many international NGOs, for example the International Federation of Human Rights, have, however, developed elaborate local partnerships around the world to address this need and continue to provide the 'vital link between the global and the local'²⁹⁰.

TEXTBOX 15

UN CONVENTION ON THE PROTECTION OF MIGRANT WORKERS (ICRMW)

THE ROLE OF NGOs IN ENCOURAGING RATIFICATION

The Convention on the Protection of the Rights of Migrant Workers and members of their Families 1990 (ICRMW) has 43 accessions/ratifications and 31 signatories (as of 18 October 2010) from among mainly developing States. None of the State Parties are major migrant-receiving States. The main obstacles to ratification appear to concern governments' political perceptions that migrants' rights are already protected; their reluctance to be the first to ratify in their region and their fears of strain on welfare systems and restriction of migration control policies²⁹¹. While the European Parliament has consistently encouraged Member State ratification of the ICRMW, governmental opposition in the EU Council has been decisive, and has also dictated Commission policy shifts on this question²⁹². EU competence to accede to the ICRMW itself is also contested, although the shared EU/ Member State competence over migration and migrant rights suggests that joint EU and Member State ratification would be both legally possible and appropriate.

NGOs have for many years campaigned to increase ratification of the ICRMW. For example, the work of NGOs December 18 and the European Platform for Migrant Workers' Rights (EPMWR) stands out in coordinating various campaigns, including an on-going petition in

²⁸⁵ Niemi and Scheinin 2002, p. 69.

²⁸⁶ Gallagher 2000, p. 226.

²⁸⁷ Gallagher 2000, p. 226.

²⁸⁸ See also Brett 1995, p. 105.

²⁸⁹ Otto 1996, p. 115.

²⁹⁰ Otto 1996, p. 137.

²⁹¹ Pécoud and Guchteneire 2004.

²⁹² December 18, 2011, pp. 9-20.

support of ratification in Europe. A total of 71 MEPs from 25 EU Member States and six different parliamentary groups signed the petition, as well as many European civil society networks and trade unions. A recent report sets out the position of key stakeholders in all 27 EU member states (governments; political parties; National Human Rights Institutions: parliamentarians and civil society organisations) and the EU institutions²⁹³, in order to assist in campaigning.

As many migrant workers live in labour receiving States, there are many who do not enjoy the protection of the ICRMW directly. In these States, the work of NGOs, who focus on the promotion and protection of the rights of migrant workers both domestically and internationally, is very important in advancing the basic principles of the ICRMW, and for countering those organisations, companies and institutions opposed to its ratification. Amnesty International highlights the following eight key priority areas in this regard:

- Focus on those most at risk
- Call for ratification and implementation of core human rights and labour rights instruments
- Demand greater accountability
- Call for migration policies that protect human rights
- Call for more research and better data
- Place migrants at the centre of debates on migration
- Protect human rights defenders
- Increase public awareness of migrants' rights and contributions to society.

(Source: Amnesty International 2006)

3.2 Civil Society engagement with Council of Europe institutions

3.2.1 Engagement with the European Court of Human Rights

Civil society actors can be crucial in shaping the nature of claims which are brought to the ECtHR and ultimately the way in which Strasbourg jurisprudence is shaped. This is done in two ways: first, in the support of individual applicants bringing cases to the ECtHR; second, through third party interventions during proceedings.

3.2.1.1 Individual and NGO complainants

Individuals and NGOs may bring direct actions before the ECtHR under Article 34 ECHR:

The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.

²⁹³ December 18, 2011.

An NGO must be able to claim to be the 'victim of a violation' of a Convention right. There are numerous examples of NGOs being applicants to the ECtHR, including the case of *Vgt Verein gegen Tierfabriken v Switzerland*²⁹⁴, in which an anti-vivisectionist NGO challenged a ban on television advertisements, invoking Arts 10, 13 and 14 ECHR²⁹⁵. However, '[a]lthough the jurisprudence of this court is not lacking in cases submitted by NGOs, there are also examples of NGOs which were refused standing on account of a restrictive interpretation of the victim requirement'²⁹⁶. For example, in *Ćonka v Belgium*²⁹⁷, the Ligue des Droits de L'homme could not claim to be the victim of violations experienced by the applicant family²⁹⁸.

While NGOs may benefit from bringing actions directly to the Court where they fulfil the 'victim' criteria of Article 34 of the ECHR, their role and influence is particularly important in their strategic support of individual applications. For individuals, the process of bringing complaints before the ECtHR is cumbersome and complex. While State (or potentially EU) petitions are rare and automatically considered by the Court, individual petitions are subject to a rigorous, and largely opaque, screening process. Admissibility is dependent upon filing within six months of the alleged breach, that the applicant is declared a victim, the exhaustion of domestic remedies and relevance to the Convention. The filing may also be rejected if it is 'manifestly ill-founded', it represents 'an abuse of the right to petition' or if the case has already been examined by the Court or by another international tribunal.

In addition to the significant chance of an application being amongst the 85% of applications excluded without a full hearing, the backlog of cases is in excess of 125.000 applications pending. This means that cases can be expected to take several years before a decision on their merits or a remedy is ordered. These barriers to entry are exacerbated by the extremely limited nature of the legal aid provided by the ECtHR which covers only basic living expenses while in Strasbourg and does not extend to covering the costs of representation attendant upon making an appeal before the ECtHR.

²⁹⁴ *Vgt Verein gegen Tierfabriken v Switzerland* (2001) Application No 24699/94.

²⁹⁵ See also *Christians Against Racism and Fascism v UK* (1980) 21 DR 138; Leach 2005, p. 117.

²⁹⁶ Treves et al 2008, p. 158; see also Leach 2005, pp. 114-5.

²⁹⁷ *Ćonka v Belgium* (2001) Application no. 51564/99.

²⁹⁸ Leach 2005, p. 115.

The requirement to pursue and exhaust all national remedies further adds to this considerable financial burden, meaning that the pursuit of a challenge relies heavily upon personal financial capacity, charitable interest or pro bono legal representation. Without the support of NGOs and special interest groups, particularly those who are focused on strategic litigation, many of the individual applications brought to the Court would not be possible.

3.2.1.2 Third party interventions

Third party interventions before the ECtHR are provided for in Article 36 ECHR. Article 36(1) of the Convention gives the right for 'High Contracting Parties' (governments party to the ECHR) to intervene in those cases before the ECtHR which concern their own nationals.

Moreover, Article 36(2) ECHR allows the President of the Court to invite any High Contracting Party or person other than the applicant to submit written comments on the application. In practice, NGOs and civil society actors request permission to submit third party interventions on the basis of Article 36(2). Rule 44(3)(b) of the Rules of Court of the ECtHR requires third parties to request leave to intervene from 12 weeks of the date of communication of the application to the respondent government.

NGOs and UN actors (e.g. the UN High Commissioner for Refugees) regularly intervene before the ECtHR and assist the Court in identifying what may be a widespread issue across the Contracting States of the Council of Europe. Given the difficulties involved in bringing applications directly to the Court, third party interventions are particularly important before the ECtHR. Examples of important third party interventions by NGOs can be found in *MC v Bulgaria* by Interights²⁹⁹, and in *Goodwin v UK, I v UK* by Liberty³⁰⁰; in *MSS v Belgium and Greece* by a range of human rights NGOs and UNHCR³⁰¹; in *Saadi v Italy*³⁰² and by minority rights groups in *DH v Czech Republic* and other ground-breaking cases involving Roma rights³⁰³.

²⁹⁹ *MC v Bulgaria* (39272/98) [2003] ECHR 646.

³⁰⁰ *Goodwin v United Kingdom* (2002) 35 EHRR 447; *I v UK* (2002) Application no. 25680/94; Leach 2005, pp. 55-8.

³⁰¹ *MSS v Belgium and Greece* (2011) Application No 30696/09.

³⁰² *Saadi v Italy* (2008) App. No. 37201/06 222.

³⁰³ *DH and others v Czech Republic* [2007] ECHR 922.

Since the entry into force of Protocol 14 on 1 June 2010, the CoE Commissioner for Human Rights has the right to intervene in proceedings before the ECtHR (Article 36(3)), and this right was exercised for the first time in 2011 in the case of *MSS v Belgium & Greece* concerning transfers of asylum seekers to Greece under the Dublin II Regulation³⁰⁴.

3.2.2 Engagement with the European Committee for Social Rights (ECSR)

While collective complaints have been mooted as a potential future direction to render the ECtHR's task more manageable this has yet to become a reality. On the other hand, the ESC collective complaints system represents the only means for NGOs to raise concerns outside of shadow reporting alongside the annual rounds of ECSR scrutiny.

The ability to render such complaints, however, is restricted to institutions falling within three narrow categories identified in Article 1 of the Additional Protocol to the Social Charter. These are:

- the European Trade Union Confederation (ETUC), BusinessEurope (formerly UNICE) and the International Organisation of Employers (IOE);
- NGOs benefiting from 'participative status' with the Council (as determined by the Governmental Committee);
- international organisations of employers and trade unions;
- representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint;
- other national NGOs where the state involved gives permission for the complaint to be made against it.

The practical impact of the collective complaints procedure for the protection of minority rights is explored in Part C 2.2.

³⁰⁴ *MSS v Belgium and Greece* (2011) Application No 30696/09.

3.2.3 Engagement with other CoE institutions

While no specific mechanism exists for the submission of complaints in relation to the Council's other treaties, civil society's involvement in the relevant areas is reflected in relationships with the relevant non-judicial institutions under the CoE. This may occur both through informal channels such as shadow reporting and through officially mandated interactions (such as ECRI's interaction with NGOs to assist in communicating anti-racist messages back to the general public). The work of the Venice Commission and CEPEJ is particularly bound up with co-ordinating with domestic and international NGOs, networks of legal professionals and other research institutes or interest groups.

The Parliamentary Committee on Legal Affairs and Human Rights (PACE) conducts enquiries and hears from a range of civil society actors in its work, and importantly liaises with parallel parliamentary institutions within Member States (e.g. the UK Joint Committee on Human Rights). This is also the result of a general approach by the Parliamentary Assembly to work with a range of different national actors, which includes inter-parliamentary co-operation (including other international parliamentary institutions such as the EU parliament), as well as co-operation with political groups and other international inter-governmental organizations³⁰⁵.

3.3 Civil Society Engagement with EU institutions

3.3.1 Individual litigation

Individuals may bring challenges against EU acts directly before the CJ under Article 263 TFEU. However, this direct action is subject to a narrow standing requirement of 'direct and individual concern'³⁰⁶. Although the Treaty of Lisbon brings about reform with regard to one type of EU act (a 'regulatory act', assumed to mean a non-legislative act), individuals must generally use the indirect route via national courts if they wish to challenge EU legislation.

When individuals wish to challenge the consistency with human rights norms of national acts within the scope of EU law they may do so in national courts. Alternatively, individuals may complain to the European Commission, who may bring

³⁰⁵ See: http://assembly.coe.int/Main.asp?Link=/AboutUs/APCE_structures.htm#11.

³⁰⁶ Article 263(4) TFEU.

infringement actions against a Member State. However, as explained above, the complainant in such a case is not a party to the proceedings, and thus the Commission may decide not to proceed for political reasons.

Overall, individual litigation in national courts emerges as the primary means of enforcing EU fundamental rights.

3.3.2 The European Parliament

Part B 2.1.3.4 above examined the role of the European Parliament as a potential human rights litigant, through its general *locus standi* before the CJ. In particular, the European Parliament may initiate legality review in an inter-institutional litigation (actions against the Council and possibly the Commission) in order to enforce human rights within the EU. The possibility for democratic engagement with legal enforcement mechanisms of human rights within the EU is considerably enhanced by this power. As section 2.1.3.4 notes the European Parliament has made limited use of this power.

3.3.3 Third Party Interventions

The rules on third party interventions before the CJ differ considerably to those of the ECtHR³⁰⁷.

Third parties interventions by individuals or groups of individuals before the CJ are only permissible in actions initiated by private parties against the EU, and not in actions between Member States, EU institutions or EU institutions and Member States³⁰⁸. In contrast, national governments and EU institutions may intervene as of right in all proceedings. Intervention is limited to 'supporting the form of order sought by one of the parties'³⁰⁹. Thus, arguments that a different outcome might be preferable in the public interest are potentially excluded³¹⁰.

Furthermore, natural or legal persons need to "establish an interest in the result of a case"³¹¹. Similarly to the restrictive interpretation of standing in the context of direct

³⁰⁷ See Shelton 2009.

³⁰⁸ Art 40 (2) of the Statute of the CJ.

³⁰⁹ Art 40 (4) of the Statute of the CJ.

³¹⁰ Justice (2009), para 48.

³¹¹ Art 40 (2) of the Statute of the CJ.

legality review of EU actions, the interest for intervention is interpreted narrowly. It requires the intervener to be 'directly affected by the contested decision' and to establish 'his interest in the result of the case'³¹². The right to intervene before the CJ in preliminary references is available only to those natural and legal persons whose intervention was admitted in the national court proceedings³¹³.

As a result, governmental and EU institutional interventions are commonplace, while NGO and civil society interventions are relatively rare³¹⁴. This may distort the range of argumentation before the CJ in cases engaging human rights, as governmental voices are not balanced by authoritative defenders of those rights. Certainly this situation contrasts sharply with the frequency of third party interventions by NGO and civil society actors under the ECHR system.

The EU Equality Directives not only create strongly judicially enforceable rights for individuals but they also recognise the shortcomings of relying on ex post individual judicial remedies to achieve equality. To this end, they require Member States to support social dialogue and dialogue with NGOs on equality issues. In addition, Member States are required to create bodies for the promotion of equal treatment on grounds both of race and sex in order to provide independent assistance to victims of discrimination in pursuing their complaints, conduct independent surveys concerning discrimination, and publish independent reports and recommendations³¹⁵.

These national Equality Bodies have in turn formed the EQUINET network. Some Member States' Equality Bodies cover all grounds of discrimination and may even have a general human rights remit, forming part of the National Human Rights Instruments, as in the UK with its Equality and Human Rights Commission. The contribution of Equality Bodies to the development of equality law by supporting strategic litigation is noteworthy³¹⁶. The FRA has identified much room for

³¹² Case T-191/96 *CAS Succhi di Frutta SpA v European Commission* [1998] ECR II-573.

³¹³ Broberg and Fenger 2010, p. 344.

³¹⁴ For a rare example of a case before the CJ in which a human rights NGO has intervened, see C 162/09 *Lassal v Secretary of State for Work & Pensions* [2009] where the Child Poverty Action Group intervened.

³¹⁵ e.g. Council Directive 2000/43/EC (Race Directive) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22 Article 13; De Búrca 2006.

³¹⁶ EQUINET 2010.

improvement to support the crucial work of national Equality Bodies and National Human Rights Institutions³¹⁷.

3.3.4 Engagement with EU non-judicial processes

The EU engages in several non-judicial processes which aim to protect fundamental rights.

In the EU legislative process, as examined above, there is a legal and institutional commitment to mainstream fundamental rights, requiring engagement in early impact assessment. However, these processes largely concern consultation within and across EU institutions, rather than wider engagement with NGOs and civil society. Indeed, the Commission's latest statement on compliance with the Charter treats the information needs of the public as largely concerning information regarding means of redress, rather than means of engagement in the pre-legislative and legislative processes³¹⁸.

The Council, still the EU's main legislative body, comprises national governments, who are in turn accountable to domestic parliaments. The Lisbon Treaty enhances the role of National Parliaments in EU affairs³¹⁹, and consequently advance domestic political scrutiny of EU matters may thereby be strengthened. Some Member States have strong human rights and EU committees in domestic parliaments which routinely engage with human rights stakeholders.

Complaints to the Ombudsman about EU maladministration also provide a means of highlighting some human rights problems, particularly when the complaints concern the Commission's powers to bring infringement actions.

While the advisory and expert remit of the FRA suggests a rather technocratic conception of human rights law, it has created a Fundamental Rights Platform (FRP),

³¹⁷ Fundamental Rights Agency (2010b) National Human Rights Institutions in the EU Member States (Strengthening the fundamental rights architecture in the EU I) (FRA: Vienna); Fundamental Rights Agency (2010d) Rights Awareness and Equality Bodies (Strengthening the fundamental rights architecture in the EU III) (FRA: Vienna).

³¹⁸ European Commission (2010) Communication on a Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union COM(2010)573 final, 19 October 2010, pp.10–11.

³¹⁹ See Protocols 1 and 2 to the Treaty of Lisbon.

described as 'a network for cooperation and information exchange, set to act as the main channel for the FRA to engage civil society and to ensure a close cooperation between the Agency and relevant stakeholders.' In addition, it has created formal links with National Human Rights Institutions, EQUINET and other human rights systems, in particular the CoE. Its capacity to develop further into a network agency is noted.

The European Parliament is of course an open legislative body with an institutional history of promoting human rights in EU policies, in particular externally.

4. Dynamic interaction between the UN-CoE-EU systems

Sections 1 to 3 of Part B describe each of the three UN-CoE-EU systems in turn. In this section we highlight the dynamic interaction between these three overlapping systems, evident in the many divergences, convergences and specific interactions between them. These phenomena are evident at different levels: in rights enumerated in the various instruments, and in their judicial interpretation and legislative elaboration. Dynamic interaction can lead to progressive development of human rights standards, but may also dilute or undermine human rights protections. This section explores the opportunities and threats presented.

4.1 Enumerated rights

Part B 1 details the rights under each of the UN-CoE-EU systems, which is to be expected as the regional instruments are rooted in the International Bill of Rights. While we noted that many of the same rights are protected under each system, it was also evident that there are divergences in the express rights enumerated. These differences are set out in the two Tables in Annex 1. Table 1 illustrates that the UN system has the most extensive express rights, with the CoE system coming close behind.

While the Charter is a strong advance in combining political, civil, economic, social and cultural rights in one instrument, table 2 in Annex 1 identifies some gaps in the Charter when compared with the key UN and CoE instruments. The omissions from the Charter include the right to housing, the right to adequate standard of living (which includes housing, food, etc), right to protection from poverty, the right to fair remuneration for work, and the right to democratic governance. We also note that the protection of minorities as such is not extensively elaborated in the Charter, which speaks only of cultural, religious and linguistic diversity³²⁰, and the prohibition of discrimination on the grounds of language and national minority status³²¹.

Although not expressly covered by the Charter, some of these omitted rights may nonetheless be recognised as part of EU law, either by interpreting Charter

³²⁰ Article 22 Charter.

³²¹ Article 21 Charter.

provisions broadly or by recognising rights in question as general principles. Any gaps in enumerated rights would also be assisted by EU ratification of the relevant international human rights law instruments. An additional supplement is to be found in the ECtHR's substantive integrative approach to European Social Charter rights which indirectly secures their influence in the interpretation of the Charter, in accordance with Article 52(3) Charter. Furthermore, Article 53 supports the use of international human rights law in interpreting the Charter. The ECHR, and international human rights law more generally, should provide a pan-European floor of rights, with the EU being encouraged to develop more extensive rights protections in specific areas³²².

4.2 Judicial interpretation

4.2.1 Institutional differences

Dynamic judicial interpretation may be shaped by many factors. The three systems differ significantly in terms of the extent of judicialisation. While actions may be brought only indirectly with respect to human rights in the ICJ, the UN system depends mainly on non-judicial enforcement measures for the enforcement or implementation of the extensive rights protections and indirect enforcement at national level, for example, through the interpretation of national law in conformity with international human rights law. Interpretative principles emerge (in the absence of a supranational court with compulsory jurisdiction) through monitoring bodies and expert processes such as the Limburg Principles (for interpreting the International Covenant on Economic, Social and Cultural Rights) and the Yogyakarta Principles (on international human rights law on sexual orientation and gender identity)³²³, as explored in Part D below. In contrast, both the ECHR and EU systems provide for extensive direct judicial protection of human rights. While all systems allow significant room for judicial creativity, it has been used more in the ECHR and EU contexts.

Part B 2 nevertheless demonstrates that the ECtHR offers the broadest supranational judicial protection of human rights, as the CJ's fundamental rights jurisdiction depends on a link with EU competence. In this respect, the CJ's human rights role is

³²² Article 52(3) Charter.

³²³ www.yogyakartaprinciples.org.

limited in scope compared with that of the ECtHR. However, EU law is directly embedded within domestic systems in that it has direct effect in domestic courts and applicants can receive remedies for breach directly. This is to be contrasted with the ECHR which, unless directly incorporated into domestic law, is diffusely embedded in that the CoE must rely on Member States to implement the remedies awarded by the ECtHR³²⁴. Hence, often EU law thereby attracts stronger remedies than those that arise for breaches of the ECHR. When this is so, litigants have a strong incentive to rely on EU rights.

Furthermore, the institutional positions of the ECtHR and CJ also differ. The two courts operate under different institutional constraints, with the result that they enjoy different degrees of decisional autonomy and different modes of engagement with stakeholders. In two respects, the ECtHR is in a weaker position than the CJ. First, the ECtHR lacks the direct line of communication with national judges of the preliminary reference procedure, so must secure the compliance of States, rather than simply domestic judges. Secondly, the ECtHR has a wider and more diverse pool of Contracting States to keep in check. The institutional position of the ECtHR has led to the development of various 'accommodation strategies'³²⁵, in particular the margin of appreciation and European consensus. In some fields, such as migrants' rights, the result is that EU law offers some stronger protections than the ECHR (see Textbox 17 on Family Migration below). This is in part explained by the different institutional positions of the CJ and ECtHR:

"We have a bold [CJ] and a tamer ECHR. One is a separation-of-powers court with many potential allies (the Commission, economic interest groups, varying member-states, courts asking for preliminary rulings) whose decisions have direct effect [sic.]. The second is a human rights court that can only rule after all national means of appeal have been exhausted We can therefore expect that the [CJ] will have less fear of increasing its competence and to issue controversial rulings, while the ECHR will adopt a self-limiting approach to slowly gain legitimacy and avoid provoking nation-states"³²⁶.

³²⁴ Helfer 2008.

³²⁵ Krisch 2008.

³²⁶ Guiraudon 2000, 1094.

Developments in Strasbourg are often prompted by lines of dissenting judgments. In contrast, Luxembourg gives a single collegiate judgment, but receives the Opinions of its Advocates-General which often urge jurisprudential changes. This institutional difference also explains some of the difference in the case law.

4.2.2 Techniques of dynamic judicial interpretation

Reference to meta-rights or values such as a right to dignity may facilitate judicial creativity. For example, the interpretation of Art 3 ECHR has been animated by the underlying value of human dignity, prompting the recognition of severe mistreatment inflicted by states, non-state actors and even some apparently circumstantial suffering as a violation of Article 3 ECHR³²⁷. The right to dignity has been codified in Art 1 Charter and has been recognised as a general principle of EU law³²⁸. This may prompt creative interpretation of the Charter.

The right to private life under Article 8 ECHR has been interpreted to protect sexual autonomy³²⁹. The court has also developed prohibitions on parental chastisement³³⁰, where this falls within the minimum level of severity of Article 3 ECHR. The ECtHR has also used Article 8 to develop a more general right to health and a clean environment in cases concerning exposure to noise³³¹, toxic fumes or radiation³³².

A further key source of dynamic judicial interpretation is the reception of other sources of human rights within a system of protection. We have identified several jurisprudential innovations where outside sources have been influential. In the ECHR context, we have identified the incorporation of a concept of indirect discrimination from international human rights law and EU law in *DH v Czech Republic*³³³. Moreover, the development of the right to strike has been based on ILO, ESC and EU sources. This is but one example of the substantive integration of ESC law into the ECHR³³⁴. Dialogues and interactions across systems thus contribute to the evolution of human rights systems³³⁵.

³²⁷ *Soering v United Kingdom* (1989) 11 EHRR 439; *D v UK* (1997) 24 EHRR 423; cf. *N v UK* (2008) Application no. 2656/05.

³²⁸ Case C-36/02 *Omega Spielhallen v Bonn* [2004] ECR I-09609.

³²⁹ *MC v Bulgaria* (39272/98) [2003] EHRR 646.

³³⁰ *A v UK* (1998) 27 EHRR 611.

³³¹ *Powell v United Kingdom* (2000) 30 EHRR 15; *Hatton v UK* (2003) 37 EHRR 28.

³³² e.g. *Guerra v Italy* (1998) 26 EHRR 357; *Taskin v Turkey* (2006) 42 EHRR 50.

³³³ *DH v Czech Republic* [2007] ECHR 922.

³³⁴ Montavalou 2006, 2005.

³³⁵ McCrudden 2000; McCrudden 2007; Douglas-Scott 2006.

4.3 Opportunities of overlapping human rights protections

4.3.1 Convergence at the ECHR minimum

Despite many divergences, we note a strong interaction leading to convergence between the ECtHR and the CJ. In the absence of a formal legal relationship between the two systems, the two courts have developed an approach of extensive mutual citation and borrowing, leading to a gradual convergence in many areas.

An example of such convergence is the interpretation of the right to privacy in relation to business premises.

TEXTBOX 16

CONVERGENCE: PRIVACY AND BUSINESS PREMISES

The CJ held in *Hoechst*, a case concerning the legality of a search of company premises by the Commission in competition proceedings, that business premises were not protected by the privacy of the home under Art 8 ECHR. Although the CJ considered the ECtHR case-law, it found it to be indeterminate on the specific issue of business premises and privacy under Article 8 ECHR.³³⁶ The ECtHR a few years later in *Niemitz* 1992 clarified that business premises were indeed protected under Article 8 ECHR; the CJ expressly aligned its case-law with the Strasbourg Court in *Roquette Frères* 2000.³³⁷ This line of cases shows clearly that the CJ has aligned itself with the ECHR position.

A further prominent example of interactions tending towards some convergence is seen in the interactions between ECHR and CJ case law on non-discrimination on grounds of sexual orientation (see Annex 4 on Sexual Orientation).

³³⁶ Joined Cases 46/87 & 227/88 *Hoechst v Commission* [1989] ECR 2859, para 19.

³³⁷ C-94/00 *Roquette Frères SA v Commission* [2002] ECR I-9011, paras 23, 29.

4.3.2 Regional raising of standards

Legally, the ECHR sets the pan-European minimum standard, so if EU standards fall short of this, this is problematic. In line with the fact that the ECHR provides a minimum standard, EU law may and should offer a higher degree of rights protection than the ECHR rights in some areas (see Article 52(3) Charter). Hence, positive divergence can arise, resulting chiefly from the different functions the protection mechanisms are designed to fulfil: the ECHR may present an international minimum standard as opposed to the quasi-constitutional standard of the EU. Hence, EU law today provides a higher standard of protection for some family migrants than the ECHR.

TEXTBOX 17

FAMILY MIGRATION: EU LAW PROVIDES (SOME) HIGHER PROTECTION

The ECtHR's interpretation of Art 8 ECHR allows states an extremely wide margin of appreciation to control entry of migrants. There is rarely a right to entry for family members, unless there are extreme circumstances such that family life cannot be restored elsewhere³³⁸. While the case law has changed significantly over the years, the rights of family migrants under the ECHR are unstable³³⁹.

In contrast, EU law affords some family migrants stronger protection, namely family members of migrant EU Citizens and those covered by the FRD. In *Carpenter* (2002) and *Metock* (2008) it was confirmed that third-country national family members of EU Citizens enjoyed strong rights of entry and residence in the EU, once the EU Citizens fell within the scope of EU law³⁴⁰. The EU's FRD also provides a stronger right of entry and residence for family members of settled third country nationals than the Article 8 ECHR case law³⁴¹. Not all family migrants will fall under these EU law provisions, but when they do, they derive stronger protection than under the ECHR.

In contrast, in many other fields strong cross-fertilisation and cross-references between the EU and international protection standards occurs. This interaction is ambivalent in that it may lead to progressive or retrogressive outcomes and opportunities (see Annex 6 on Detention of Migrants and Annex 7 on Refugee Protection).

³³⁸ *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 741, paras 60, 64-67; *Gül v Switzerland* (1996) 22 EHRR 93; *Sen v Netherlands* 21 December (2003) 36 EHRR 7.

³³⁹ Harris et al 2009, pp 395-6, 418-21; van Dijk et al 2006, pp 705-9; Spijkerboer 2009; de Hart 2009.

³⁴⁰ Costello 2009.

³⁴¹ Case C-540/03 *Parliament v Council* [2006] ECR I-5769 (FRD Ruling); Case C-578/08 *Chakroun v Minister van Buitenlandse Zaken* [2010].

4.4 The threats of overlapping human rights protections

While overlapping human rights protection may lead to fruitful mutual interaction, leading to the progressive development of human rights, it also presents three threats: (1) excessive deference between systems; (2) pressure to converge on the lowest standards; and (3) fragmentation.

4.4.1. Excessive deference and other self-imposed restrictions of human rights scrutiny

Pending EU accession to the ECHR, the ECtHR exercises indirect jurisdiction over the EU, via its jurisdiction over EU Member States when Member States implement EU law. However, its stance has become highly deferential, both to the EU and the UN, suggesting a deficit of protection.

In *Matthews v UK*³⁴², the ECtHR held the UK accountable for a violation of ECHR rights based in the EU Treaties, where there was no redress within the EU system for that violation. In contrast in *Bosphorus v Ireland*³⁴³, the ECtHR reduced the intensity of review of acts of the EU and those of its Member States (where the EU acts left the Member States no discretion, as confirmed in *MSS v Belgium and Greece*.³⁴⁴ The ECtHR reasoned that the EU would be presumed to provide 'equivalent protection', unless an applicant could demonstrate a 'manifest deficiency' in the particular case³⁴⁵. In its subsequent caselaw, the ECtHR has extended and bolstered the presumption of equivalent protection, further deferring to the authority of the EU and indeed the UN³⁴⁶. In *Behrami v France*³⁴⁷, the ECtHR held that impugned activities in Kosovo were not attributable to the respondent states, but rather to the UN, as they were authorised by UN Security Council Resolution 1244 (1999).

These developments suggest that the overlapping authority of ECHR/EU and ECHR/UN has prompted excessive deference on the part of the ECtHR. Such excessive deference may fail to protect human rights effectively. Once the EU has acceded to the ECHR, it seems inappropriate for the ECtHR to maintain the 'equivalent protection' doctrine.

³⁴² *Matthews v United Kingdom* (1999) 28 EHRR 361.

³⁴³ *Bosphorus v Ireland* (2006) 42 EHRR 1.

³⁴⁴ *MSS v Belgium and Greece* (2011) Application No 30696/09.

³⁴⁵ Costello 2006.

³⁴⁶ Lock 2010.

³⁴⁷ *Behrami and Saramati v France* (2007) 45 EHRR SE10.

4.4.2 Lowering the standard of protection

In many fields, strong interaction between EU and international human rights law is evident, with frequent cross-fertilisation and cross-references between the three systems. However, often this interaction produces ambivalent outcomes, which are in some respects progressive, in other respects retrogressive for human rights (see Annex 6 on Detention of Migrants; Textbox 6 on the Right to Strike).

A negative feature of overlapping human rights systems is that they may afford governments added opportunity structures to dilute protections and degrade human rights protection. This is evident in the attempts of some EU governments to roll back international law, as Annex 7 on Refugee Protection illustrates.

4.4.3 Fragmentation of international human rights standards

Where regional actors are assertive in applying their own human rights standards, there is a risk of fragmentation of international law, including international human rights law. This is illustrated by the CJ's review of UN Security Council Resolutions against the standards of (only) EU human rights in *Kadi and Al Barakaat*³⁴⁸. Here, the CJ annulled an EU Regulation implementing anti-terrorist sanctions required by UN Security Council Resolutions, on the grounds that it violated EU human rights, rather than using international human rights law as a ground for review. This potentially creates antagonism between the EU and UN systems³⁴⁹. To avoid fragmentation, regional actors ought to identify commonalities and shared values in order to avoid conflict as far as is appropriate, i.e. interact across systems³⁵⁰. Vigilance needs to be exercised and appropriate safeguards developed to prevent downgrading protection.

4.5 Conclusion

There is significant convergence and harmony between the UN, CoE and EU systems in practice. In general, these interactions are seen in a positive light, in particular as

³⁴⁸ Joined Cases C-402/05 and C-415/05 *Kadi, Al Barakaat v Council of the European Union and the Commission of the European Communities* [2008] ECR I-6351.

³⁴⁹ Ziegler 2008.

³⁵⁰ Ziegler 2011.

between the EU and ECHR³⁵¹. However, the various interactions across systems may be regressive rather than progressive. The multiplicity of sources of human rights is a source of complexity. Often the engagement across systems lacks transparency and may simply amount to superficial cross-citation rather than genuine engagement. Moreover, as attempts to undermine the absolute nature of Article 3 ECHR illustrate, governments are key actors in all three systems and may exploit their position to undermine protections.

The proliferation of rights instruments gives the appearance of a rights surfeit. However, without effective protection, human rights violations persist. The range of instruments in the three systems may contribute to a dangerous complacency about human rights. A further example of such complacency may emerge if one system becomes too deferential to another. As the case of *Bosphorus* shows³⁵², the overlapping authority of human rights systems leads to potential clashes in the interpretation of rights. In order to avoid such clashes, systems develop accommodation strategies, which may be too deferential.

³⁵¹ Krisch 2008; Costello 2006.

³⁵² *Bosphorus v Ireland* (2006) 42 EHRR 1.

Part C. Human rights, 'Minority rights' and 'Identity claims'

This Part explores the interrelationship between human rights, minority rights and identity claims. For purposes of exposition, we give the term 'minority rights' a broad meaning. It will be used to refer to groups defined by any of the grounds enumerated under Article 22 Charter (sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, nationality, membership of a national minority, property, birth, disability, age or sexual orientation). We are therefore dealing more generally with 'equality, justice, respect, and dignity within and between the various segments of society'³⁵³; and rights whether claimed by the individual or collective³⁵⁴. We are conscious that 'minority' in this sense may not connote numerical minority (for instance in the case of women) and that these features intersect in various important ways³⁵⁵. This is emphasised by the EU in its equality acquis.

The notion of special rights for racial, religious or linguistic minorities predates the post-WWII instruments dealing with universal human rights. In 1935, reflecting general trends in international law at the time, the Permanent Court of International Justice (PCIJ) opined that such minorities were entitled to 'perfect equality with the other nationals of the State' and require 'suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics'³⁵⁶. Nowadays, claims by persons belonging to minorities sometimes seek recognition of distinct identity, frequently embodying identity politics and multiculturalism³⁵⁷.

In the systems examined here, we see that human rights systems protect minorities and provide a venue for identity claims in three principal contexts: 1) substantive human rights; 2) non-discrimination and equality rights; and 3) express group

³⁵³ Zook 2006, p. 122.

³⁵⁴ Jones 1999.

³⁵⁵ Ghanea 2004, Mullally 2007, Hainsfurther 2008, Bantekas 2010, Malik 2010.

³⁵⁶ Permanent Court of International Justice, *Minority Schools in Albania*, Advisory Opinion of 6 April 1935, Series A/B, Judgments, Orders and Advisory Opinions, No. 64, 1935.

³⁵⁷ Xanthaki 2010.

rights³⁵⁸. We find examples of each form of minority rights claim under each of the three regimes under examination.

Substantive human rights

There has been a gradual but general trend towards greater recognition of the need to accommodate diverse minorities under general human rights law within both the UN and the CoE. While the International Covenant on Civil and Political Rights (ICCPR) contains an express clause (Article 27) on ethnic, religious or linguistic minorities³⁵⁹, the ECtHR, even in the absence of such express provision in the ECHR, has increasingly recognised various forms of minority claims. Religious minorities, for example, frequently invoke guarantees of freedom of religion or belief to contest repressive or discriminatory treatment (Article 9 and Protocol 12 ECHR). The collective complaints mechanism under the European Social Charter lends a group dimension to that instrument, and both disability and Roma groups have infused its protections with a minority protection ethos.

Non-discrimination and equality rights

All human rights instruments contain non-discrimination and equality guarantees, which are often invoked by minorities. As well as general non-discrimination and equality provisions in all the core UN human rights treaties, there are specific UN instruments that address discrimination on racial grounds (International Convention on the Elimination of All Forms of Racial Discrimination - ICERD) and against women (Convention for the Elimination of Discrimination Against Women - CEDAW). The CEDAW Convention intends to 'achieve not only de jure equality but de facto equality not only between men and women but also between women. The goal is social transformation, social change that goes far beyond legislative change, though including it'³⁶⁰. EU law contains particularly strong anti-discrimination norms, but they apply in limited fields. The Race Directive has the broadest sphere of application, applying not only to employment, but also to the provision of goods and services by the State and private actors³⁶¹. The Sex Discrimination Directives apply

³⁵⁸ Henrard 2004.

³⁵⁹ Ghanea 2008.

³⁶⁰ Facio and Morgan, p. 1144; see also Mullally 2007, Rebouché 2008.

³⁶¹ Council Directive 2000/43/EC (Race Directive) implementing the principle of equal treatment between

mainly to employment and the provision of goods and services³⁶². The Framework Directive³⁶³, which prohibits discrimination on grounds of religion or belief, disability, age and sexual orientation, only applies in employment³⁶⁴.

Express group rights

Despite ongoing definitional debates on collective rights, group rights and peoples' rights³⁶⁵, express group rights are provided in a number of international and regional instruments. The CoE also has two specific minority rights instruments, namely the Framework Convention on National Minorities (FCNM) and the European Charter for Regional or Minority Languages (ECRML). In contrast, while there is much potential for minority rights as group rights in EU law, it has yet to be fully exploited. The language of Article 27 of the ICCPR as well as the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities is that of protection for 'persons belonging to' national or ethnic, religious and linguistic minorities and not minorities as such.

1. United Nations Human Rights Instruments

The key UN human rights treaties contain non-discrimination clauses. For example, Article 2.1 of the International Covenant on Civil and Political Rights (ICCPR) states that 'each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Similarly, Article 2.2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that 'the State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex,

persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

³⁶² Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

³⁶³ Council Directive 2000/78/EC (Framework Directive) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

³⁶⁴ Vickers 2008.

³⁶⁵³⁶⁵ Narveson 1991, Freeman 1995, Kymlicka 1996, Jones 1999, Jovanović 2005.

language, religion, political or other opinion, national or social origin, property, birth or other status’.

The ICCPR also contains in Article 27 a particular provision catering for ethnic, religious and linguistic minorities:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

1.1 Human Rights Committee Communications

The United Nations Human Rights Committee (UNHRC) commonly protects minority rights under non-discrimination and general human rights guarantees more frequently than under the specific minority rights provision of Article 27 ICCPR. For example, in *Ignatane v Latvia*³⁶⁶, the rights of a Latvian citizen of Russian origin of participation in public life under Article 25 ICCPR was interpreted so as to include the right and opportunity to be elected without ‘distinction of any kind’ (Article 2(1) ICCPR), including that of language. The UNHRC found that Latvia had violated Ignatane’s rights under Article 25, in striking her off the list of candidates on the basis of insufficient proficiency in the official language. In *Diergaardt v Namibia*³⁶⁷, Article 26 ICCPR (equality before the law and equal protection of the law) was interpreted in light of the linguistic needs and concern of the Afrikaans speaking minority in Namibia to use their mother tongue in administration, justice, education and public life in order not to suffer indirect discrimination on the ground of language. Similarly, in *Waldman v Canada*³⁶⁸, the UNHRC held that the difference in public funding between Roman Catholic schools and other religious minority schools constituted a violation of Article 26 ICCPR. If a State party chose to provide public funding to religious schools it should make such funding available without discrimination.

³⁶⁶ *Ignatane v Latvia* (Communication No. 884/1999).

³⁶⁷ *Diergaardt et al v Namibia* (Communication No 760/1997).

³⁶⁸ *Waldman v Canada* (Communication No 694/1996).

Article 27 International Covenant on Civil and Political Rights (ICCPR)

UNHRC Communications on Article 27 have focused principally on the rights of indigenous peoples. For example, the UNHRC found violations of Article 27 in the following key cases: *Lovelace v Canada*³⁶⁹, which addressed the case of a Maliseet Indian who had lost her status according to domestic law on marriage to a non-Indian; *Lubicon Lake Band v Canada*³⁷⁰, which addressed the Lubicon Lake Band's right to self-determination and particularly their right freely to determine their political status and economic development. However, the UNHRC did not uphold the claim in *Kitok v Sweden Communication*³⁷¹, which dealt with the appeal of a Sami who had lost his right to exercise reindeer herding after engaging in other professions for some years. Nor did it uphold the claim in *Mahuika v New Zealand*³⁷², which addressed the rights of the Maori people of New Zealand to self-determination and particularly their right to control tribal fisheries. With respect to linguistic minorities, the UNHRC adopted a more restrictive approach to the notion of minority in *Ballantyne, Davidson and McIntyre v Canada*³⁷³, a case concerning the English-speaking minority in Quebec. The UNHRC rejected the complaint as inadmissible, for, although the applicants were members of a linguistic minority in that province, they were not in a 'minority' in the State Party of Canada.

Overall, the jurisprudence of the UNHRC under Article 27 has been criticised for requiring exhaustion of domestic remedies even when they have been difficult to undertake, for deferring to declarations that reject the application of Article 27 within its jurisdiction (e.g. France), for setting too high a threshold for finding a violation of Article 27, and for taking too strict a view of what constitutes a minority within a State³⁷⁴.

³⁶⁹ *Lovelace v Canada* (Communication No 24/1977).

³⁷⁰ *Lubicon Lake Band v Canada* (Communication No 167/1984).

³⁷¹ *Kitok v Sweden* (Communication No. 197/1985).

³⁷² *Mahuika et al v New Zealand* (Communication No. 547/1993).

³⁷³ *Ballantyne, Davidson and McIntyre v. Canada* (Communications Nos. 359/1989 and 385/1989).

³⁷⁴ Shelton 2005; Scheinin 2008.

1.2 Soft Law and Institutional Developments

The UN approach to minority protection has also been advanced by soft law measures, in particular the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities which declares that 'States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity' (Article 1.1). The office of the UN Independent Expert on Minority Issues³⁷⁵, established in 2005, complements the work of the UN on minority rights³⁷⁶. It promotes the implementation of the Declaration, for example through other treaty bodies or the two day annual 'Forum on Minority Issues' meeting. Moreover, it identifies best practices in this area and works directly with governments and NGOs in order to facilitate constructive engagement in country situations.

2. Council of Europe

The CoE has made a concerted effort to bring together a number of different institutions and instruments in order to strengthen minority rights protection. Originally, the Parliamentary Assembly of the CoE recommended the inclusion of an article in a second additional protocol to guarantee specific rights to national minorities³⁷⁷, or a specific protocol to the ECHR on National Minorities³⁷⁸. However, these proposals were not acted upon. Instead, the CoE created the Framework Convention on National Minorities (FCNM) and the European Charter for Regional and Minority Languages (ECRML). These are much looser arrangement than the ECHR, as is outlined in sections 2.3 and 2.4 below. However, both the ECtHR and European Committee of Social Rights have developed a minority rights case law, drawing at times on the FCNM and ECRML, as well as other UN and EU law provisions³⁷⁹.

The CoE continues to develop initiatives and build institutions aimed at the strengthening of minority rights and equality in general. The European Commission

³⁷⁵ Meijknecht 2010.

³⁷⁶ Baldwin 2007; Hilpold 2007.

³⁷⁷ Recommendation 285 (1961).

³⁷⁸ Recommendation 1134 (1990).

³⁷⁹ Aukerman 2000.

Against Racism and Intolerance, established in 1995, is an important body in this regard (see section 2.5 below). It is important to see how all of these CoE treaties, instruments and bodies work together in this respect. This is evident in the most recent initiative aimed at 'Strengthening Roma Rights', which was launched in October 2010 to 'review Council of Europe and European Union standards and to begin the process of joint action'³⁸⁰. The Initiative has been able to draw upon a range of ECtHR decisions on minority rights, and Roma in particular, as well as decisions of the European Committee of Social Rights, handed down under the Collective Complaints Procedure. Similarly, the CoE has drawn upon special protections for Roma people under the FCNM and ECRML. Importantly, the initiative builds upon the Recommendation of the Committee of Ministers to Member States on Better Access to Health Care for Roma and Travellers in Europe (2006) and is guided by the work of the Committee of Experts on Roma and Travellers.

The sections below will explore CoE minority rights protection in general, with an occasional emphasis on CoE institutional protection of Roma people as a case example specific to Europe. It will become evident that CoE institutions co-operate well, as each institution is able to cite others in its work. It is also evident that the work of UN bodies and other international organisations and NGOs are influential in the work of all the CoE institutions³⁸¹.

2.1. The European Court of Human Rights (ECtHR)

While the ECHR contains no specific reference to minority rights, multicultural questions fall to be addressed under Articles 8 (right to private life), 9 (freedom of religion), 10 (freedom of expression), and Articles 2 (right to education) and 14 (prohibition of discrimination) of Protocol 1. The Strasbourg case law amply illustrates that national minorities gain important protections under the ECHR³⁸², and that its individual rights provisions can serve multicultural ends³⁸³.

Article 14 ECHR contains an equality guarantee which is an accessory to the other rights under the Convention. Failure to treat those who are equal equally, and those

³⁸⁰ www.coe.int/t/dc/files/themes/roma/default_EN.asp.

³⁸¹ Furtado 2003.

³⁸² Hillgruber and Jestaed 1994.

³⁸³ Ringelheim 2006.

who are different differently, may be a breach of the equality guarantee under the ECHR³⁸⁴. In addition, Protocol 12 contains a stand-alone guarantee of equality before and in the law. In *Sejdic and Finci v Bosnia and Herzegovina*³⁸⁵, the first and to date only case under Protocol 12, the ECtHR found that the voting system instituted by the Dayton Agreements violated Articles 14 and 3 of Protocol No 1 (right to free elections) as well as Article 1 of Protocol 12. The voting system meant that the applicants, respectively Roma and Jewish in ethnicity, were prevented from standing for election, since these positions are reserved for members of the so-called 'constituent' peoples, i.e. Bosniaks, Serbs, and Croats. The overt nature of the racial and ethnic discrimination in the case meant that it was legally straightforward. Minority Rights Group International has welcomed the decision noting that the Court 'set a high benchmark with regard to racial discrimination', describing it as a 'particularly egregious kind of discrimination' which also requires 'special vigilance and vigorous treatment'³⁸⁶.

Concerning the educational rights of linguistic minorities, the jurisprudence has built upon the *Belgian Linguistics Case* in 1968 and culminated in *Cyprus v Turkey* in 2001³⁸⁷. In the former case, no violation of Article 2, Protocol 1 was found in Belgium's strict implementation of linguistic territoriality. In contrast in *Cyprus v Turkey*, the ECtHR held that 'education [in Northern Cypriot schools did] not correspond to the needs of the persons concerned who have the legitimate wish to preserve their own ethnic and cultural identity'³⁸⁸.

A further series of cases concern States' positive duties to investigate racially motivated crimes and condemning State failures to investigate crimes against ethnic minorities, including Roma. A number of cases have followed on from the seminal decision in *Nachova v Bulgaria* in 2005³⁸⁹. *Nachova*, which dealt with the deaths of two Bulgarian Roma at the hands of the Bulgarian military police, was influenced in its own reasoning by international and comparative law sources, and reports of international organisations regarding allegations of discrimination against Roma.

³⁸⁴ *Thlimmenos v Greece* (2001) 31 EHRR 15.

³⁸⁵ *Sejdic and Finci v Bosnia and Herzegovina* (2009) (App. Nos. 27996/06 and 34836/06)

³⁸⁶ Claridge 2010, para 42.

³⁸⁷ *The Belgian Linguistic case* (No 2) (1968) 1 EHRR 252; *Cyprus v. Turkey* (2002) 35 EHRR 30.

³⁸⁸ *Cyprus v. Turkey* (2002) 35 EHRR 30, para 478.

³⁸⁹ *Nachova v Bulgaria* (2005) (Application Nos 43577/98 and 43579/98); *Cobzaru v Romania* (2007) 23 BHRC 526; *Angelova and Iliev v Bulgaria* (2008) 47 EHRR 7; *Secic v Croatia* (2007) 23 BHRC 36; *Bekos and Koutropoulos v Greece* [2005] ECHR 840; *Petropoulou-Tsakiris v Greece* (2009) 48 EHRR 47.

Importantly, the ECtHR cited the provisions of ICERD which it noted had been ratified by Bulgaria in 1966, and the EU Race and Framework Directives³⁹⁰. The Court was also able to rely on other institutions of the CoE, citing the European Commission against Racism and Intolerance (ECRI), showing 'concerns regarding racially motivated police violence, particularly against Roma, in a number of European Countries'³⁹¹. Similarly to a number of cases flowing on from *Nachova*, it was also evident that the interveners in this case (The European Roma Rights Centre; Interights; Open Society Justice Initiative) were important in defining the court's decision.

While the Grand Chamber in *Nachova* could not find evidence beyond a reasonable doubt in establishing that the use of force was motivated by racist attitudes, it did however find a strong investigatory duty arising from Article 2 (right to life) in conjunction with Article 14 (prohibition of discrimination). This duty was imposed upon States not only to conduct a meaningful investigation into the deaths of victims at the hands of State agents, but also separately to investigate 'a possible causal link between alleged racist attitudes and the killing' involved in the case³⁹². The Grand Chamber endorsed the reasoning of the then Commission on the question of investigation into racist killings. In particular it noted that:

"when investigating violent incidents and, in particular, deaths at the hands of State agents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention... In order to maintain public confidence in the investigation of incidents

³⁹⁰ Council Directive 2000/43/EC (Race Directive) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22; Council Directive 2000/78/EC (Framework Directive) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

³⁹¹ *Nachova v Bulgaria* (2005) (Application Nos 43577/98 and 43579/98), para 55.

³⁹² *Nachova v Bulgaria* (2005) (Application Nos 43577/98 and 43579/98), para 162.

involving the use of force a distinction is made both in their legal systems and in practice between cases of excessive force and of racist killing. The authorities must do what is reasonable in all circumstances to collect and secure evidence, explore all practical means of discovering the truth and deliver fully reasoned and impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence"³⁹³.

As regards the Roma and European Travellers, the ECtHR has examined many cases concerning evictions³⁹⁴. While there is no specific right to housing under Article 8 ECHR (contrast the ESC; see Section 2.2 below), States are obliged to justify the interference with home life that evictions entail, in particular by respecting procedural rights. Article 8 ECHR has also been interpreted to protect aspects of traditional ways of life, including nomadism.

Moreover, in *DH and others v Czech Republic* the Grand Chamber of the ECtHR held that the Czech practice (prevalent also in other Central and Eastern European countries) of segregating Roma students into special schools was unlawful discrimination in breach of Article 14, together with Article 2 of Protocol No 1 (the right to education)³⁹⁵. The applicants were Roma children who sought legal redress for the practice of placing Roma students into 'special' schools for children with learning disabilities, irrespective of their intellectual abilities. Various NGOs intervened in the action, providing crucial empirical evidence of the systematic nature of the segregation. In addition, the Court drew on the reports on the Czech Republic under the Framework Convention on National Minorities and work by the European Commission against Racism and Intolerance, illustrating the interactions between the various CoE regimes. For the first time, the ECtHR acknowledged that such systemic practices violated Article 14 ECHR and that segregation was a discriminatory wrong. In so doing, it took into account the conceptions of discrimination under various UN and EU instruments. The Court recognised too the particular vulnerability of the Roma.

³⁹³ *Nachova v Bulgaria* (2005) (Application Nos 43577/98 and 43579/98), para 160 of the Grand Chamber quoting Para 156-159 of the Commission Decision.

³⁹⁴ *Buckley v United Kingdom* (1996) 23 EHRR 101; *Chapman v United Kingdom* (2001) 33 EHRR 399; *Connors v United Kingdom* (2004) 40 EHRR 189; two pending cases *Winterstein v France* and *Yordanova v Bulgaria*.

³⁹⁵ *DH v Czech Republic* [2007] ECHR 922.

A similar factual scenario gave rise to a breach of Article 14 in conjunction with Article 2 Protocol 1 in *Orsus v Croatia*³⁹⁶. Here again the Grand Chamber was able to draw upon existing CoE instruments such as the Recommendation of the Committee of Ministers to Member States on Better Access to health Care for Roma and Travellers in Europe (2006). The Court drew additional support from the UN human rights system, quoting the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Rights of the Child, the 1992 UN Minorities Declaration and the UNESCO Convention against Discrimination in Education (1960)³⁹⁷.

Finally, the ECtHR found that Spain had violated Article 1, Protocol 1 (right to property) with Article 14 ECHR, in refusing to treat as a lawful spouse a widow who had married in a Roma ceremony³⁹⁸. Importantly, the ECtHR was able to draw Articles 1, 4 and 5 of the Framework Convention on National Minorities in support of its general arguments.

A final set of cases relate to the protection of religious minorities, specifically the freedom to manifest one's religious beliefs in public institutions. Two key ECtHR cases in this regard are *Dahlab v Switzerland* and *Leyla Sahin v Turkey*³⁹⁹. Each concerned a female Muslim that was banned from wearing a headscarf in a state education institution, the former concerning a public school teacher, the latter a university student. In both cases the Court found in favour of the State, holding that while these bans interfered with the claimants' right to freedom of religion under Article 9(1) ECHR, this was justified under the limitation clause in Article 9(2) ECHR. In *Dahlab* the ECtHR held that the ban was a necessary means of protecting the rights and freedoms of others, in particular expressing concern that a teacher of 4–8 year olds wearing a headscarf would have a proselytising effect on her pupils. In *Sahin* the ECtHR similarly based its finding on the need to protect the rights and freedoms of others, but in this case placed particular emphasis on the importance of protecting secularism and gender equality in Turkey, with which it considered the headscarf to be antithetical. In her dissent, Judge Tulkens in *Sahin* noted the

³⁹⁶ *Orsus v Croatia* [2010] ECHR 337.

³⁹⁷ See also the pending decision of *Horvath v Hungary*.

³⁹⁸ *Munoz Diaz v Spain* (2009) Application No 49151/07.

³⁹⁹ *Dahlab v Switzerland* (2001) Application No. 42393/98; *Leyla Sahin v Turkey* (2005) Application No. 44774/98.

majority's limited appreciation of the headscarf, arguing that it has many meanings, not simply the oppression of women. She also expressed concern that the ECtHR's judgment was a paternalistic prescription of acceptable religious practice and would result in the exclusion of many Muslim women from university. Human Rights Watch has criticised the Sahin decision heavily, arguing that it lacked empathy for those with faith⁴⁰⁰. Academic commentary, however, is varied on this line of cases. Some commentators advocate for such bans in order to protect gender equality⁴⁰¹, while others argue against them by virtue of the Court's reliance on margin of appreciation and its failure to consider the possibility that they represent governmental repression of particular religious practices for political ends⁴⁰².

2.2 The European Committee of Social Rights (ECSR)

The ESC indirectly promotes minority rights through the protection of social and economic rights without discrimination by the European Committee of Social Rights. This has been strongly reinforced by Article E of the revised ESC which states that: 'The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status'.

The protection of minority rights is also strongly assisted by the collective complaints procedure instituted under the ECSR as groups and representative organisations are able to bring crucial test complaints to the ECSR. The rights of persons with disabilities have been advanced by Article 15 of the revised European Charter and the ECSR has made significant decisions in this respect, while the collective complaints brought with respect to the protection of the right to housing have been particularly important in the struggle for the protection of Roma rights across Europe.

As regards disabilities, the seminal decision of *Autism-Europe v France* has proved important with respect to the general principles on State obligations to eliminate

⁴⁰⁰ Bennoune 2006.

⁴⁰¹ McColgan 2009; Bennoune 2006.

⁴⁰² Evans 2006; Rebouche 2009.

direct and indirect discrimination generally⁴⁰³. Autism-Europe argued that the lack of provision of special educational facilities in France for children with autism constituted a breach of the following articles of the revised ESC: Article 15 (right of persons with disabilities to independence, social integration and participation in the life of the community), Article 17 (the right of children and young persons to social, legal and economic protections), and Article E (non-discrimination). The ECSR was clear that Article 15 of the Revised ESC reflected and advanced 'a profound shift of values in all European countries over the past decade away from treating them [persons with disabilities] as objects of pity and towards respecting them as equal citizens'⁴⁰⁴. The ECSR also considered that 'the insertion of Article E into a separate Article in the Revised Charter indicates the heightened importance the drafters paid to the principle of non-discrimination with respect to the achievement of the various substantive rights contained therein'⁴⁰⁵. It took the view that 'other status' enumerated under Article E, covered the question of discrimination on the grounds of disability. Interestingly, the ECSR connected the equality guarantee in Article E to that contained under Article 14 of the ECHR. It called upon the ECtHR's interpretation of State obligations regarding direct and indirect discrimination in *Thlimmenos*⁴⁰⁶.

Importantly, the ECSR elaborated on the extent of the State's obligation as regards ensuring equality of minorities, such as those with disabilities. It noted that:

'The Charter requires the State Parties to take not merely legal action but also practical action to give full effect to the rights recognised in the Charter. When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. State parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for the other persons

⁴⁰³ *Autism-Europe v France* 13/2002.

⁴⁰⁴ *Autism-Europe v France* 13/2002, para 48.

⁴⁰⁵ *Autism-Europe v France* 13/2002, para 51.

⁴⁰⁶ *Autism-Europe v France* 13/2002, para 52; *Thlimmenos v Greece* (2001) 31 EHRR 15.

affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings⁴⁰⁷.

The positive obligations of States with regards to the enjoyment of rights by persons with disabilities without direct or indirect discrimination have been echoed in the principles underpinning the CoE Disability Action Plan 2006-2015⁴⁰⁸. More generally, however, the principles developed in this case as regards unequal impact of State policies arising in indirect discrimination in the enjoyment of rights has been applied in numerous other cases dealing with the enjoyment of ESC rights by other minority groups.

A group of collective complaints regarding the ESC rights of Roma peoples have been decided by the ECSR since 2003⁴⁰⁹. These have elaborated on the positive duties regarding indirect discriminatory impact of State policies developed in the Autism-Europe case. In most of these cases, policies with respect to housing and accommodation were held to infringe Article 16 ESC on the right to family housing and Article 31 on the right to housing in conjunction with Article E (non-discrimination) due to the insufficient number of dwellings of an acceptable quality to meet the needs of settled Roma; the insufficient number of stopping places or unacceptable quality of campsites for Roma who choose to follow an itinerant lifestyle or who are forced to do so; and the systematic eviction of Roma from sites or dwellings unlawfully occupied by them⁴¹⁰. In another collective complaints action, the effect of Bulgaria's policies on the Roma were found in breach of Article 13(1) (the adequate financial assistance and care in the case of sickness) and Article 11 (positive obligations with respect to the effective exercise of the right to health) in conjunction with Article E (non-discrimination)⁴¹¹. The impact of Bulgaria's social assistance benefits scheme on the Roma was also found to be in breach of Article 13(1) (right to adequate resources and social assistance) in conjunction with Article E in *ERCC v Bulgaria*⁴¹².

⁴⁰⁷ *Autism-Europe v France* 13/2002, para 53, own emphasis.

⁴⁰⁸ See further Afflerbach and Garabagiu 2007.

⁴⁰⁹ *Centre on Housing and Evictions (COHRE) v Italy* 58/2009.

⁴¹⁰ *European Roma Rights Centre (ERRC) v Greece* 15/2003; *European Roma Rights Centre (ERRC) v Bulgaria* 31/2005; *European Roma Rights Centre (ERRC) v Bulgaria* 46/2007; *European Roma Rights Centre (ERRC) v Bulgaria* 48/2008; *European Roma Rights Centre (ERRC) v France* 51/2008; *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v Greece* 49/2008.

⁴¹¹ *European Roma Rights Centre (ERRC) v Bulgaria* 46/2007.

⁴¹² *European Roma Rights Centre (ERRC) v Bulgaria* 48/2008.

In the most recent complaint of *COHRE v Italy* decided in June 2010⁴¹³, the ECSR found the effect of Italy's policies on the Roma and Sinti to constitute a violation of Article E in conjunction with Articles 19(1), 19(4)(c), and 19(8) (rights of migrant workers and their families to protection and assistance), as well as Articles 30 (right to protection against poverty and social exclusion) and 31 (the right to housing). The ECSR found racial discrimination not only as regards enjoyment of rights, but also racial discrimination and xenophobic and racist propaganda which aggravated social exclusion. In this decision the extent of references to ECHR case law, as well as decisions by the CJ and UN sources such as the CERD, was particularly striking. The decision was exemplary of the growing interrelationship between the UN-ECHR and EU systems of human rights protection.

2.3 Framework Convention for the Protection of National Minorities (FCNM)

The FCNM is the only human rights treaty dealing exclusively with rights of national minorities and is deemed 'the most important international instrument to date on minority protection'⁴¹⁴. The FCNM entered into force on 1 February 1998. As of November 2009, 39 of the 47 CoE States had ratified the Treaty, four further States had signed it, with 10 of them issuing reservations or declarations. The Convention has not been signed or ratified by Andorra, France, Monaco and Turkey.

The FCNM is formally supervised by the Committee of Ministers, although in reality an Advisory Committee (ACFC) on the FCNM 'plays a major role in the evaluation of the periodic reports that States must submit on the measures they have taken to give effect to the Convention'⁴¹⁵. The ACFC's role has been crucial in meeting initial criticisms of the non-justiciability of the FCNM⁴¹⁶. The ACFC views its 'primary role ... as a facilitator in a constructive dialogue between the State authorities and members of national minorities'⁴¹⁷. It contributes to the creation of a body of law for the protection of minorities in Europe and has 'helped establish that there are many ways in which States do not adhere to the internationally accepted norm of the self-identification of minorities'⁴¹⁸. As is also evident from section 2.1 above, the FCNM

⁴¹³ *Centre on Housing and Evictions (COHRE) v Italy* 58/2009.

⁴¹⁴ Ringelheim 2010, p. 101; see also Eide 2006.

⁴¹⁵ Ringelheim, 2010, p. 101.

⁴¹⁶ Alfredsson 2000.

⁴¹⁷ Fleiner 2006.

⁴¹⁸ Dimitras 2004, p. 8.

and ACFC guidance play an important role in guiding the ECtHR's interpretation of the ECHR towards the protection of minority rights. Hence, while not formally justiciable, the FCNM guides CoE judicial and other institutions in their activities.

The FCNM does not define 'national minority'. However, constitutive elements of a national minority are stipulated, with ethnic, cultural, linguistic and religious identity as the central criteria. Many States parties (e.g. Germany, Austria, Estonia, Latvia, Switzerland, Netherlands and Sweden) have restricted its application to 'autochthonous groups' or national minorities whose languages are also protected under the European Charter for Regional or Minority Languages, that is to 'groups with traditional or long-standing links to the territory ... or to specified named groups'⁴¹⁹. Such States have therefore introduced a citizenship condition or requirement of 'longstanding, firm and lasting ties with the country'⁴²⁰ to their understanding of national minority, hence attempting to narrow the scope of application of the FCNM, though this has been subject to review by its Advisory Committee.

The FCNM guarantees 'persons belonging to national minorities' a range of generally applicable rights such as: equality before the law and of equal protection of the law, as well as the freedoms of assembly, expression and thought, conscience and religion. Furthermore, the FCNM upholds non-discrimination and equality for national minorities by guaranteeing persons belonging to national minorities: the conditions necessary to maintain and develop their culture, to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage; protection from assimilation; protection from acts of discrimination, hostility or violence as a result of their identity; and linguistic, educational and other rights. Importantly, 'Art. 15 of the FCNM lays down obligations of State Parties in effectuating participation rights of persons belonging to national minorities, which goes much further than Article 27 of the UN Covenant on Civil and Political Rights'. The ACFC has 'endorsed the foundational nature and transversal scope of participation rights and interpreted participation as an inclusive, critical standard for democratic governance'⁴²¹.

⁴¹⁹ Craig 2010, p. 311.

⁴²⁰ Ringelheim 2010, p. 101.

⁴²¹ Fleiner 2006, p. 3.

The FCNM sets out programme type objectives which States undertake to pursue, but which are not directly applicable and allow States considerable leeway. This pragmatic approach by the FCNM, along with the fact that States restrict its application, is indicative of the hostility of a number of European States to national minorities. One way in which States limit their obligations is to choose whether they regard particular groups as 'national minorities' and thereby receiving protection under the FCNM. Minority groups who wish to resist this designation have little recourse in this instance, other than to rely on the reports of the ACFC⁴²².

2.4 European Charter for Regional or Minority Languages (ECRML)

The European Charter for Regional or Minority Languages (ECRML) is the world's only convention focused solely on the protection and promotion of languages used by national or ethnic minorities. The ECRML grew out of a sustained concern with the protection of minority and regional languages within the CoE, which began the process of drafting an instrument in 1998⁴²³. Opened in 1992 by the Committee of Ministers, the Convention has been ratified by 25 CoE Member States. The Charter does not establish an exhaustive list of regional or minority languages, but defines these in Article 1 as 'languages traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population'. These languages must be different from the official languages of the State and do not include dialects of the official language or languages of migrants. The purposes of the Charter are 'primarily cultural – the protection of cultural diversity is the fundamental aim'⁴²⁴.

Importantly, the Charter does not explicitly acknowledge language rights as individual or collective minority rights, but rather aims at setting out concrete aims of members States. However, the ECRML is also viewed as a complement to other CoE rights instruments. As noted in the explanatory report, 'the protection afforded by the Charter is additional to the rights and guarantees granted by other instruments'⁴²⁵. There is a particularly close relationship between the ECRML and the Framework

⁴²² Dimitras 2004, p. 4-6.

⁴²³ Thornberry and Estebanez 2002, 137.

⁴²⁴ Thornberry and Estebanez 2002, 158.

⁴²⁵ ECRML Explanatory Report, para 53.

Convention on National Minorities (FCNM). These two instruments are viewed as complementary to the extent that States, in achieving the objectives of the ECRML, will fulfil the rights in the FCNM in the linguistic sphere. The difference between the ECRML and FCNM has been explained as 'juridico-cultural' on the one hand, and 'juridico-political' on the other. This explains the differences between them in terms of 'protection methods', 'the substance of protection measures' and 'the machinery for monitoring compliance'⁴²⁶.

The ECRML aims to protect eight fundamental principles and objectives (Article 7): the recognition of regional or minority languages as an expression of cultural wealth; respect for the geographical area of each regional or minority language; the need for resolute action to promote such languages; the facilitation and/or encouragement of the use of such languages, in speech and writing, in public and private life; the provision of appropriate forms and means for the teaching and study of such languages at all appropriate stages; the promotion of relevant transnational exchanges; the prohibition of all forms of unjustified distinction, exclusion, restriction or preference relating to the use of a regional or minority language and intended to discourage or endanger its maintenance or development; and the promotion by States of mutual understanding between all the country's linguistic groups⁴²⁷. These principles are then pursued by 68 concrete undertakings taken from spheres of public life including education (Article 8), the administration of judicial (Article 9) and public services (Article 10); media (Article 11); cultural activities (Article 12) and economic and social life generally (Article 13).

The Charter is monitored by the Committee of Experts on Regional or Minority Languages (CAHLR) whose members are appointed from each Member State, must act independently and be persons of the 'highest integrity and have recognised competence' in the field covered by the Charter. There is a three stage compliance process: States must internally establish a system of compliance with their obligations under the ECRML and report to the CAHLR which then evaluates these reports, reporting in turn to the Committee of Ministers. The Committee of Ministers may then make recommendations to the individual State parties. Like the ESC, the Charter has a menu system which means that no language can be covered by the whole Charter. To bigger language groups States apply Part II of the Convention and,

⁴²⁶ Albanese 1999, p. 26.

⁴²⁷ ECRML Part II Article 7.

in addition, a selection of provisions from Part III of the Charter depending on the conditions of the language.

The Committee of Experts has issued 10 language guides to complement the Charter. These are meant to inform and enrich dialogue between citizens, NGOs and the State by highlighting the provisions of the Charter which apply to particular languages.

2.5 European Commission Against Racism and Intolerance (ECRI)

The European Commission Against Racism and Intolerance (ECRI) was set up by the CoE Committee of Ministers in 2002⁴²⁸. It has a specific mandate to monitor racism, xenophobia, anti-Semitism and intolerance. It examines State practice in relation to combating violence, discrimination and prejudice on the grounds of race, colour, language, religion, nationality or national and ethnic origin, and is empowered to propose further action at a local, national and European level, to formulate general policy recommendations to Member States, and to study international legal instruments applicable in the matter with a view to their reinforcement where appropriate.⁴²⁹ Members of ECRI are appointed from each Member State, are to have 'high moral authority and recognised expertise', and act independently of their national (Member) State⁴³⁰. ECRI's statutory activities are: country-by-country monitoring, general policy recommendations, and information and communication activities with civil society.⁴³¹ The reporting process for ECRI follows a country-by-country approach⁴³², and all Member States of the CoE are monitored, with nine or 10 States each year monitored on a five-year cycle⁴³³.

ECRI has described its overall task as 'to combat racism, xenophobia, anti-Semitism and intolerance at the level of greater Europe and from the perspective of the protection of human rights ... ECRI's action covers all necessary measures to combat violence, discrimination and prejudice faced by persons or groups of persons notably on grounds of race, colour, language, religion, nationality and national or ethnic

⁴²⁸ Resolution Res (2002) 8 on the statute of the European Commission against Racism and Intolerance.

⁴²⁹ Article 1 Res 2002 8.

⁴³⁰ Article 2 Res 2002 8.

⁴³¹ ECRI 2009.

⁴³² Article 11 Res 2002 8.

⁴³³ ECRI 2009.

origin⁴³⁴. The reference to 'discrimination based on religion' is seen to extend ECRI's remit beyond that of the UN Committee on CERD for example. Importantly, this has allowed ECRI to issue recommendations on Islamophobia. Moreover, ECRI's definitions of racism and of direct and indirect discrimination in General Policy Recommendation No 7 are viewed as making a 'distinctive contribution to the understanding of the international normative framework' on discrimination and racism⁴³⁵. Apart from its contributions to the clarification of key concepts in this area, ECRI's treatment of minority rights, Roma issues and Islamophobia in the elaboration of its mandate means that it has been able to contribute to the 'development of discourse' central to the international protection of minority rights and discrimination⁴³⁶.

ECRI has made a number of General Policy Recommendations (GPR) on: racism, xenophobia, anti-semitism and intolerance⁴³⁷; specialised bodies to combat these factors at the national level⁴³⁸; combating racism and intolerance against Roma/Gypsies⁴³⁹; national surveys on victims' perceptions of discrimination and racism⁴⁴⁰; combating intolerance and discrimination against Muslims⁴⁴¹; the dissemination of racist, xenophobic and anti-semitic material on the internet⁴⁴²; national legislation to combat racism and racial discrimination⁴⁴³; combating racism while fighting terrorism⁴⁴⁴; school education⁴⁴⁵; policing⁴⁴⁶; and in the field of sport⁴⁴⁷. These recommendations, and ECRI's country reports, have been praised by observers who regard the body 'as one of the stronger bodies in the fight against racism and intolerance' internationally⁴⁴⁸. The body has been congratulated for exploiting the considerable 'potential consciousness-raising and galvanising effect of recommendations in the cases of Roma/Gypsies and Muslims'⁴⁴⁹. The effectiveness of ECRI's work has been evidenced in the voracity of Government responses to its

⁴³⁴ www.coe.int/ecri.

⁴³⁵ Thornberry and Estebanez 2002, 592.

⁴³⁶ Thornberry and Estebanez 2002, 592.

⁴³⁷ ECRI GPR No 1.

⁴³⁸ ECRI GPR No 2.

⁴³⁹ ECRI GPR No 3.

⁴⁴⁰ ECRI GPR No 4.

⁴⁴¹ ECRI GPR No 5.

⁴⁴² ECRI GPR No 6.

⁴⁴³ ECRI GPR No 7.

⁴⁴⁴ ECRI GPR No 8.

⁴⁴⁵ ECRI GPR No 9.

⁴⁴⁶ ECRI GPR No 10.

⁴⁴⁷ ECRI GPR No 12.

⁴⁴⁸ Thornberry and Estebanez 2002, 591.

⁴⁴⁹ Thornberry and Estebanez 2002, 591.

'sustained critique of principle as well as practice of the States examined'⁴⁵⁰. A particular strength of ECRI has also been the even-handedness with which ECRI has treated Member States in the East and West of Europe.

3. European Union

Toggenburg identifies four phases in EU activity on minorities⁴⁵¹. During the first phase, until the beginning of the 1990s, the main EU activity on minority protection was non-binding European Parliament resolutions. During the second phase, the main locus of activity concerned the accession process of Central and Eastern European countries. The third EU phase concerned the Stabilisation and Association Process for the Western Balkan States. The fourth EU phase is internalization, where EU actors increasingly urge the integration of minority protection into existing EU areas of activity, as exemplified in the 2005 EP Resolution on the Protection of Minorities and Anti-Discrimination Policies in an Enlarged EU⁴⁵².

The role of minority protection was greatest in the accession process. The political criteria for accession, the Copenhagen Criteria, put human rights centre stage, with a strong emphasis on the protection of national minorities⁴⁵³. The contradiction inherent in the EU position on minority rights has long been noted⁴⁵⁴. Candidate countries are required to protect minorities, with the Framework Convention on National Minorities (FCNM) increasingly used as the benchmark in the accession process⁴⁵⁵. However, minority protection is not an express part of EU internal fundamental rights law. Even within the accession process, inconsistent application of the minority rights elements is also well-established⁴⁵⁶.

EU accession to the FCNM has been discussed, as a mode of bringing consistency and coherency⁴⁵⁷, although it has pitfalls too⁴⁵⁸.

⁴⁵⁰ Thornberry and Estebanez 2002, 592.

⁴⁵¹ Toggenburg 2008.

⁴⁵² P6_TA(2005)0228 European Parliament Resolution on the Protection of Minorities and Anti-Discrimination Policies in an Enlarged Europe (2005/2008(INI)).

⁴⁵³ Copenhagen European Council 1993, 21-22 June 1993, SN 180/93.

⁴⁵⁴ Toggenburg 2004, 2006.

⁴⁵⁵ Hillion 2008.

⁴⁵⁶ Kochenov 2008.

⁴⁵⁷ Guliyeva 2010, p. 294-298.

⁴⁵⁸ De Schutter 2008.

3.1 The EU Constitutional Framework

The Lisbon Treaty contains novel references to minorities. Art 1 TEU now refers to minorities, stating that:

'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail' (emphasis added).

Art 2(3) TEU states that the EU:

'shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.'

The Lisbon Treaty expands the duty to mainstream equality, stating in Art 10 TFEU that:

'In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

The Charter prohibits discrimination on the grounds of language and/or being a Member of a national minority⁴⁵⁹, and requires the Union to respect cultural, religious and linguistic diversity⁴⁶⁰.

Commenting on the analogous provisions of the draft Constitutional Treaty, Toggenburg argued that:

'From a minority perspective one can conclude that the [draft Constitutional Treaty] is characterized by a contradiction. The constitution astonishes in its strong symbolic pro-minority message but disappoints in its rather weak policy relevance. On the one hand [it] represents a historic step which

⁴⁵⁹ Article 21 Charter.

⁴⁶⁰ Article 22 Charter.

introduces for the first time the term of minorities in EU constitutional law, establishes the respect for “rights of persons belonging to minorities” as a founding value of the European Union and prohibits any discrimination on the basis of “membership of a national minority”. On the other hand these developments merely confirm a growing legal reality without adding any self standing policy instruments or clarifications in order to put these legal principles into daily practice⁴⁶¹.

3.2 EU Citizenship & Non-Discrimination on Grounds of Nationality

EU Citizenship and free movement provisions (Articles 18 and 21 TFEU) protect EU citizens from discrimination on grounds of nationality in host States. The non-discrimination rule has allowed EU citizens living in another Member State to claim equal treatment with nationals and local minorities in education⁴⁶², and before courts⁴⁶³. Equal treatment requires some accommodation of their distinct linguistic and cultural position. So, for example, the CJ has required accurate transliteration of EU Citizens’ names in their host countries in order to facilitate their economic freedom⁴⁶⁴, and the adaptation of the law of names to accommodate dual national heritage⁴⁶⁵. However, these protections are limited in scope, principally available for EU Citizens residing outside of their home Member States. Third country nationals are not currently protected by Article 18 TFEU. An EU Directive does provide an equal treatment guarantee for long-term resident third country nationals⁴⁶⁶.

3.3 EU Equality Law & Minority Protection

EU equality legislation requires some accommodation of group diversity⁴⁶⁷. The Framework Directive prohibits discrimination on various grounds in the workplace⁴⁶⁸, arguably requiring some accommodation of religious diversity in order to avoid

⁴⁶¹ Toggenburg 2006, p. 10.

⁴⁶² Case C-9/74 *Casagrande* [1974] ECR 773.

⁴⁶³ Case C-274/96 *Bickel & Franz* [1998] ECR I-7637.

⁴⁶⁴ Case C-169/91 *Konstantinidis v Stadt Altensteig* [1993] ECR I-1191.

⁴⁶⁵ Case C-148/02 *Garcia Avello v État belge* [2003] ECR I-11613.

⁴⁶⁶ Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who are Long-Term Residents [2004] OJ L16/44.

⁴⁶⁷ Henrard 2010.

⁴⁶⁸ Council Directive 2000/78/EC (Framework Directive) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

findings of indirect discrimination. It also contains an express requirement of 'reasonable accommodation' for disabled workers. The instrument with a stronger (albeit implicit) minority rights emphasis is the Race Directive. Although an instrument of anti-discrimination law, several features lend it a hybrid character, such that it has the capacity to prompt claims for minority accommodation. It does not define 'racial or ethnic origin', and applies not only in the workplace but to a range of other public and private areas. In addition, the notion of indirect discrimination means that failure to accommodate ethnic diversity may be impugned under the Directive. Moreover, it requires Member States to establish Race Equality Bodies and other institutional and participatory structures, lending it a hybrid character⁴⁶⁹. These structures suggest a strong group rights ethos, with attendant potential to lead to the Race Directive as a catalyst for minority accommodation claims⁴⁷⁰.

The first case under the Race Directive, *Firma Feryn*⁴⁷¹, was instigated by the Belgian Equality Body. While it concerned direct discrimination, it highlights the Directive's role as a measure of immigrant integration. The impugned conduct was xenophobic in character, but was assumed to amount to discrimination on grounds of race or ethnicity, notwithstanding the Directive's exclusion of national discrimination from its scope.

However, that potential has yet to be exploited, and the position of vulnerable minorities remains. The EU Network of Experts on Fundamental Rights urged the EU in 2005 to adopt a Roma Integration Directive on the basis of (then) Article 13 EC⁴⁷². That proposal has never been acted upon. The recent targeted expulsions of Roma EU citizens from France highlight the need for coordinated EU wide action to protect and integrate Roma. However, contemporary EU policy documents, although acknowledging that Roma face 'discrimination, social exclusion and segregation' which are 'mutually reinforcing', take the view that no further EU legislative action is required, and focus rather on targeted spending on Roma inclusion⁴⁷³. The Fundamental Rights Agency has recently conducted an extensive survey, the European Union Minorities and Discrimination Survey (EU-MIDIS), which highlights

⁴⁶⁹ De Búrca 2006.

⁴⁷⁰ Chalmers 2001; Council Directive 2000/43/EC (Race Directive) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

⁴⁷¹ Case C-54/07 *Centrum v Firma Feryn* [2008] ECR I-5187.

⁴⁷² EU Network of Experts on Fundamental Rights 2005.

⁴⁷³ e.g. Commission Communication on the Social and Economic Integration of the Roma in Europe COM (2010) 133 final, 7 April 2010, p. 1.

persistent, blatant racism and xenophobia, as experienced by the 23.500 persons from selected immigrant and ethnic minority groups in all 27 Member States of the European Union. Its contents serve as a reminder that protection of rights and remedies for violations are often lacking.

3.4 EU New Governance and Minority Protection

The EU has no express legislative competence on minority rights *stricto sensu*. However, it does use other tools to promote minority rights⁴⁷⁴, including its new governance tools. For example, it takes action to increase employment in the EU under the European Employment Strategy (EES) and to increase the integration of immigrant communities. The EES Employment Guidelines refer to better integration of 'legal migrants' and refer to 'minorities including the Roma' amongst the groups most at risk of social exclusion⁴⁷⁵.

The EU has also adopted various non-binding measures on immigrant integration with a minority rights tenor⁴⁷⁶, including the Common Basic Principles on Integration⁴⁷⁷. The eighth of these non-binding Common Basic Principles states that 'the practice of diverse cultures and religions is guaranteed under the Charter of Fundamental Rights and must be safeguarded, unless practices conflict with other inviolable European rights or with national law.' The Common Basic Principles have been followed by various political initiatives, including three editions of the 'Handbook on integration for policy-makers and practitioners' (2004, 2007 and 2010)⁴⁷⁸. An increasing tendency within the practice of the Member States, which has been reflected in EU measures such as the Family Reunification Directive⁴⁷⁹, is the imposition of 'integration conditions' to restrict entry and residence. These practices have been criticised as exclusionary or even worse veiled racism⁴⁸⁰. The soft EU processes, which treat integration as a mode of inclusion, have been undermined by hard law developments at national and EU level.

⁴⁷⁴ Ahmed 2011.

⁴⁷⁵ Council Decision of 21 October 2010 on Guidelines for the Employment Policies of the Member States [2010] OJ L308/46.

⁴⁷⁶ Cholewinski 2005.

⁴⁷⁷ Conclusions of the JHA Council of the European Union, 19 November 2004, 14615/04.

⁴⁷⁸ European Commission (2010) Handbook on Integration for policy-makers and practitioners (European Commission: Brussels 3rd edition).

⁴⁷⁹ Council Directive 2003/86 of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

⁴⁸⁰ HRW 2008; Kostakopoulou 2009.

The non-binding character of both the EES and integration processes makes their contribution to the development and enforcement of rights unclear at best. The EU is not the protector of minority rights but may contribute to the fulfilment of minority rights in discrete fields. However, as Ahmed points out, 'under most EU new governance measures, minorities stand to benefit not usually through their identities as minorities, but ... as the unemployed, the socially excluded, the free mover or the student'⁴⁸¹.

4. Conclusion

Minority protection across the UN-CoE-EU system is uneven. This raises the importance of interaction within and between each system. UN protection of minorities tends to focus on protecting discrete indigenous groups rather than minorities in general. Recent immigrants in particular have found it difficult to access relevant protections. The scope of protection and beneficiaries of minority rights standards and mechanisms need to be widened. Furthermore, the increasing number and range of identity rights' claimants calls for more consideration to be given to effective access and redress for both individuals and groups in relation to calls for equality and non-discrimination, especially considering its express requirements to accommodate diversity. In contrast, EU law protects EU Citizens living in another Member State in particular, and third country nationals who are long-term residents. The equal treatment approach remains the dominant paradigm in EU law, and it is unclear that soft law protections are effective at protecting minority rights. The CoE system is the most extensive with the special instruments directed at minority rights radiating through to other general protection mechanisms and institutions within the CoE and other rights protection systems more generally.

⁴⁸¹ Ahmed 2010, p. 282; Ahmed 2011.

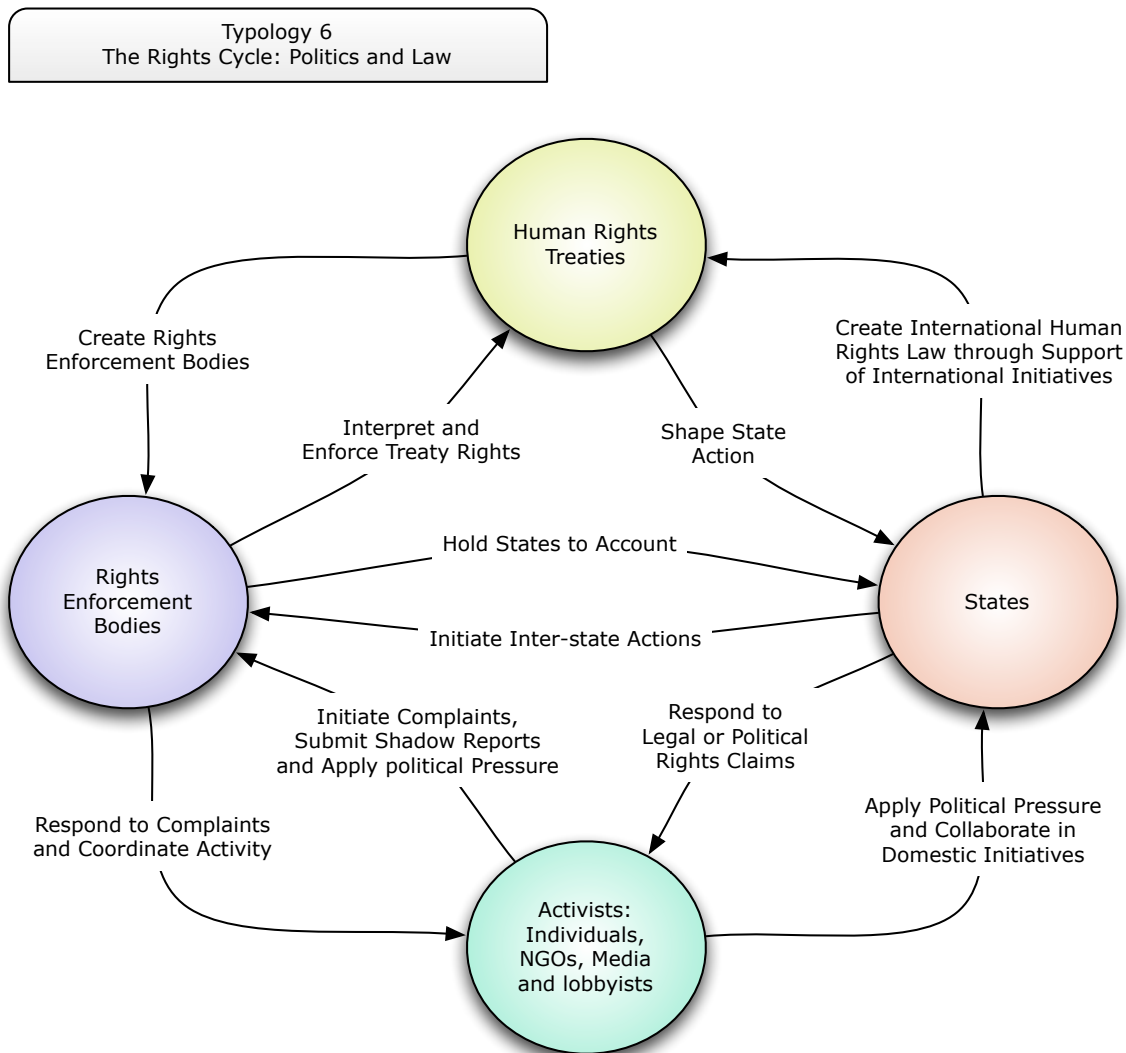
Part D. Human Rights and domestic, transnational and international politics

Human rights instruments, mechanisms and case law evolve in a complex relationship with domestic, transnational and international politics. In this Part, we draw on our previous accounts of the three systems of the UN-CoE-EU to illustrate that they offer different legal and political opportunity structures for domestic, transnational and international political actors. Aside from key individual actors, the influential political actors in this regard are primarily human rights NGOs but also include other civil society actors, for example, social movements, unions, the media, the business sector, and political actors including parliamentary groupings or political parties. The three human rights systems offer different, but sometimes complementary, opportunities to these actors to ensure that States' duties to 'respect, promote, protect and fulfill' rights are realised. They do so by challenging human rights violations, developing a progressive understanding of human rights, and monitoring compliance with human rights. These actors therefore initiate, co-ordinate and support political initiatives and democratic participation towards these ends.

Domestic, transnational and political actors have proven critical to the work of a range of human rights mechanisms, such as the UN Special Procedures and the UN Treaty Bodies. Section 1 below outlines the political processes of enacting and elaborating human rights standards in the UN and CoE, while Section 2 contrasts the very different EU structures. These two sections outline the role of such actors in mirroring States' duties to promote human rights. Section 3 then draws together various examples to illustrate how engagement with human rights mechanisms prompts legal change, lending force to the protection of rights, while Section 4 illustrates the process of embedding human rights norms domestically in furtherance of States' duties to fulfil human rights.

1. Enacting and Elaborating Human Rights Standards in the UN and CoE

Much of international human rights law is generated by political actors and at the prompting of political initiatives. Such actions often rest on transparent democratic processes for the advancement of human rights, but at times they are instigated by States or other actors aiming at the thwarting of the human rights agenda.



1.1 Advancing human rights

A defining feature of the UN and CoE systems is the proliferation of human rights treaties. As discussed in Part B, section 1.1, some of these treaties seek to ensure effective protection of existing rights as posited in the founding human rights treaties of international law. These are complemented by more specialised human rights treaties such as the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment (CAT) and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which both aim to protect against torture, inhuman and degrading treatment by focusing on monitoring and enforcement.⁴⁸²

States dominate the processes of drafting, adopting and ratifying new international human rights law. However, transnational NGOs are often influential in pointing to the need for a new instrument or mechanism. For example, Amnesty International was prominent in initiating and drafting CAT.⁴⁸³ Similarly, the Association for the Prevention of Torture was instrumental in ensuring the adoption of the Optional Protocol to CAT, which allows for visits by a committee of experts known as the Subcommittee on Prevention of Torture to places of detention. It also made recommendations to improve the treatment of detainees. Other instruments focus on particularly vulnerable groups, such as children (Convention on the Rights of the Child) and the disabled (Convention on the Rights of Persons with Disabilities). Both these Treaties integrate civil and political and social, cultural and economic rights, reflecting the growing consensus on the indivisibility of these rights, which in turn owed a lot to domestic and transnational activism.

The CoE system, like the UN, is characterised by a proliferation of separate instruments. In addition, the ECHR has evolved through the mechanism of amending protocols and case law. The adoption of the Framework Convention on National Minorities was a response to states' reluctance to the proposal for additional ECHR protocols to protect minority rights and was also recognition of the need for a human rights framework to complement the political work in the Organization for Security

⁴⁸² Burgers and Danelius 1988; Evans and Morgan 1998.

⁴⁸³ Burgers and Danelius 1988.

and Co-operation in Europe (OSCE). The European Social Charter (ESC) too has been through a process of amendment and reform, partly due to NGO activism.

The EU as an international actor may drive, support or thwart the process of elaborating new human rights instruments at the UN level. While we have seen that it was a driving force behind the Convention on the Rights of Persons with Disabilities (CRPD) and continues to support its implementation, it has thwarted ratification of the UN Convention on the Protection of Migrant Workers. One of our key recommendations, in keeping with previous reports on fundamental rights in the EU, is that the EU should ratify more key international human rights law instruments. This move would not only enhance external scrutiny of EU actions, but also bolster those external systems of protection. Influence resulting from participation of the EU in these instruments would also reduce fragmentation.

International human rights law instruments also develop in light of political resolutions within UN fora. Sometimes they will be initiated within those fora, at other times through the incorporation of outside initiatives. Various UN Resolutions have informed the development of UN instruments and case law. For instance, the Limburg Principles on the International Covenant on Economic, Social and Cultural Rights explain the nature of the obligations under that instrument. The principles have gradually achieved official recognition; having been drafted by a body of experts outside official fora in 1986, they were appended as an annex to an official UN Document in 1987⁴⁸⁴ and cited by the UN Commission on Human Rights in 1993. This soft law instrument has proven influential in developing understanding about both the nature of economic, social and cultural rights and the duties required to realise them, both for the relevant UN treaty body and the international community at large. A further noteworthy initiative is the Yogyakarta Principles, adopted by distinguished international human rights lawyers and experts. Although adopted outside official fora, the process has set out precepts which are characterized as 'a set of principles on the application of international human rights law in relation to sexual orientation and gender identity'. They purport to 'affirm' binding international legal standards, seeking to identify and systematise all states' obligations under international human rights law as regards sexual orientation and gender identity⁴⁸⁵.

⁴⁸⁴ Economic and Social Council 1987.

⁴⁸⁵ O'Flaherty & Fisher 2008.

1.2 Challenging human rights

In contrast, as Textbox 18 below illustrates, political developments within UN fora may also introduce contested, regressive notions into the human rights system.

TEXTBOX 18

THE 'DEFAMATION OF RELIGION' RESOLUTIONS

Contentious political debates within UN Charter-based mechanisms often spill over into UN human rights fora. While non-binding resolutions in these fora often contribute to progressive human rights developments, they may also undermine protections. The 'defamation of religion' resolutions are illustrative. The first such resolution was passed in 1999.⁴⁸⁶ Since then, various resolutions have been passed annually by the Commission on Human Rights, Human Rights Council and General Assembly.⁴⁸⁷ The resolutions highlight important human rights issues concerning prejudice against migrants and religious groups. However, framing such issues by aiming to protect 'religion' per se gives rise to numerous human rights concerns, undermining human rights in demanding extensive limitations on freedom of speech in order to protect religion. They also reflect a move away from addressing discrimination against persons belonging to religious minorities or persons on grounds of religion to framing the debates in terms of particular 'phobias' against religion.⁴⁸⁸

Opposition to these defamation resolutions took some time to emerge, but is now widely expressed by a broad array of human rights NGOs.⁴⁸⁹ These groups reassert human rights protections, in particular freedom of expression, minority rights, freedom of association and freedom of religion or belief, highlighting the dangers of endorsing a broad concept of 'defamation of religion'. As a result of these NGO interventions, support for the resolution is diminishing.⁴⁹⁰

2. Enacting and Elaborating Human Rights Standards in the EU

EU human rights were initially the creation of the CJ. These general principles remain a vital part of the EU human rights system. The CJ, in dialogue with national courts and various interlocutors, has been a key player, and the preliminary reference procedure has provided the key institutional linkage between domestic courts and the CJ. The resultant judicial dialogue has provided both catalyst and context for the development of human rights law generally.

⁴⁸⁶ Commission on Human Rights 1999.

⁴⁸⁷ Blitt 2010, see Annex 2.

⁴⁸⁸ Ghanea 2007.

⁴⁸⁹ E.g. Human Rights First 2009; Article 19 and IFEX 2010; International Federation of Human Rights (FIDH) 2009; Freedom House 2010.

⁴⁹⁰ Blitt 2010.

The drafting of the Charter itself marked a politicisation of what had been a predominantly judicial process of development of EU fundamental rights. Particularly noteworthy in the Charter process was the open drafting forum in which various official actors (not just governments) engaged with stakeholders in setting out the Charter's provisions⁴⁹¹. As Textbox 6, demonstrates, the Charter already had an influence on CJ case law on the general principles, prompting the recognition of the right to strike as fundamental in EU law, which in turn has influenced developments in the ECtHR. The further sources of EU human rights are international agreements to which the EU is party, such as the CRPD.

The EU Treaties themselves have also been amended over time to give greater prominence to human rights, reflecting and building on the CJ's case law and creating new competences of the EU in human rights sensitive fields. The EU, in contrast to the UN and CoE, has extensive autonomous lawmaking power. If the UN or CoE wants to adopt a new human rights instrument, it must do so by drafting a new Treaty and seeking state support for its ratification. In contrast, the EU institutions can do so in their areas of competence without having to resort to treaty amendments. EU legislation and soft law inform the development of fundamental rights in those fields where the EU has clear legislative competence. EU lawmaking processes, therefore, offer actors different opportunity structures to the UN and CoE.

The far-reaching benefits which these instruments available in the EU may have can be demonstrated by the development of the equality legislation in the EU. Starting from rudimentary beginnings in 1957, transnational activists have engaged with EU law, accessing the CJ via national courts in order to embed and develop EU gender equality law⁴⁹². EU equality directives require the creation of domestic equality bodies to support both legal and political mobilisation. In some fields the development of the law is largely attributable to the engagement of transnational policy networks with EU political opportunity structures rather than to the CJ. This is the case with regard to the inclusion of harassment in the EU definition of discrimination⁴⁹³. Scholarship on the development of the Race Directive credits the Startling Line Group with great initial impact⁴⁹⁴.

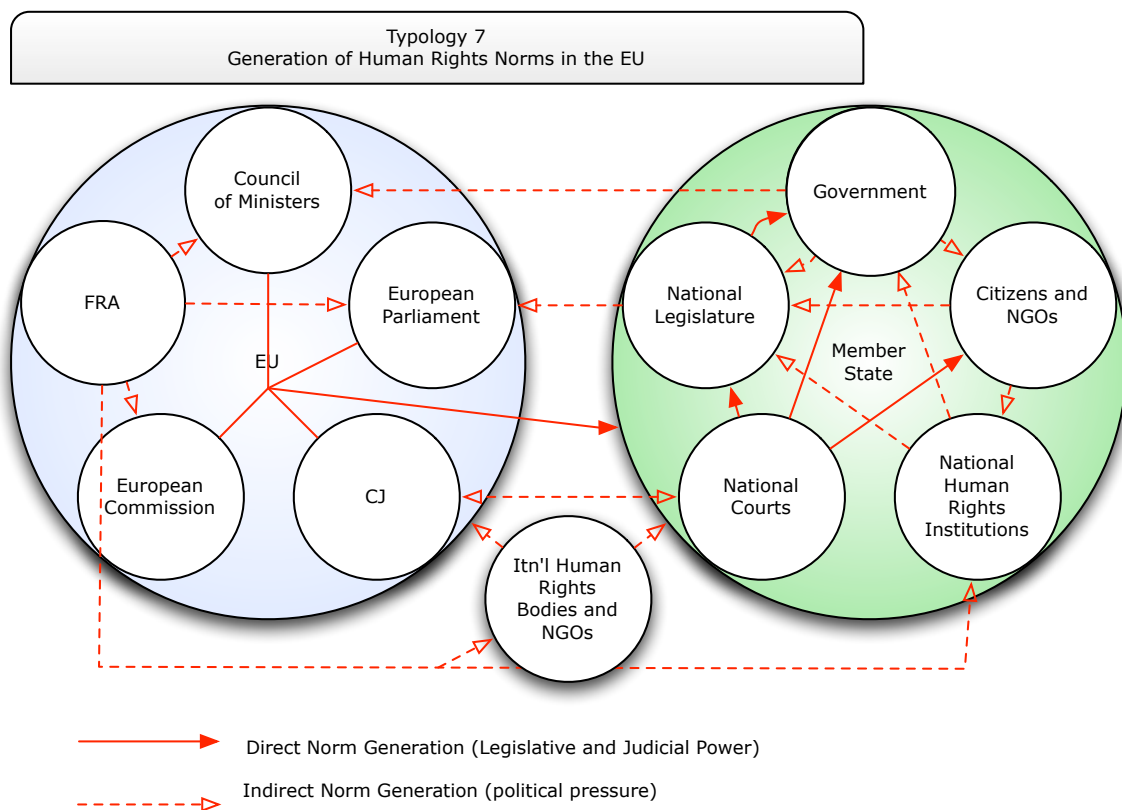
⁴⁹¹ De Búrca 2001.

⁴⁹² Hoskyns 1996; Kilpatrick 1998, 2001a, 2001b.

⁴⁹³ Zippel 2004.

⁴⁹⁴ The Startling Line Group is a broad coalition of NGOs focusing on race equality and immigrant integration. Evans Case, C and Givens, T (2010) 'Re-engineering Legal Opportunity Structures in the

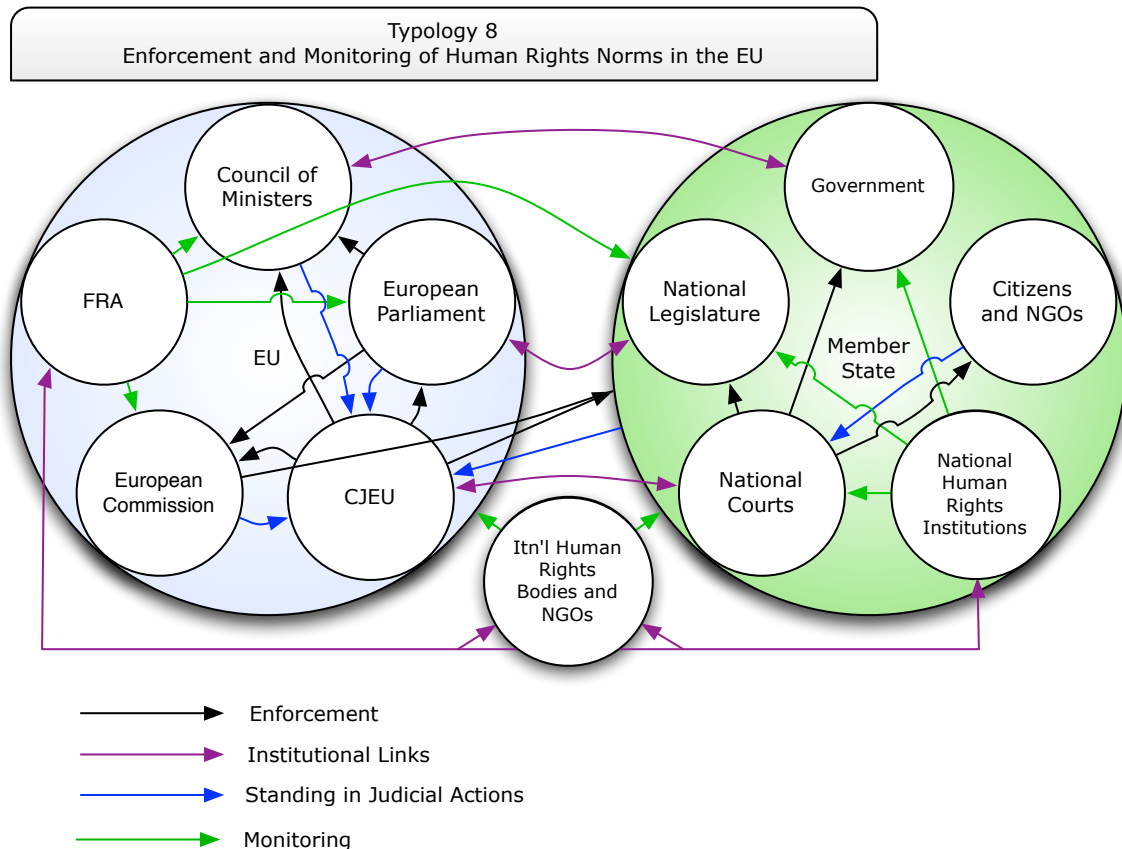
The EU's capacity-building activities have created and engaged with transnational networks in order to protect and promote certain rights, beyond areas of express EU legislative competence⁴⁹⁵. As Part C outlines, the role of the EU in minority rights protection emerged mainly through the application of the political criteria for EU accession. While the EU still lacks clear legislative competence over minority rights, so does not 'protect' minority rights by enacting comprehensive minority rights law, it still has an important role in 'promoting' these rights using means other than hard law⁴⁹⁶.



European Union? The Starting Line Group and the Politics of the Racial Equality Directive' 48(2) Journal of Common Market Studies 221.

⁴⁹⁵ See for example Montoya 2008, 2009 on domestic violence.

⁴⁹⁶ Ahmed 2011.



3. Engagement with Human Rights Mechanisms

Each international human rights law instrument brings its own enforcement and implementation mechanisms. The process of engaging with these mechanisms is both legal and political: bringing claims about human rights violations to courts and committees, supporting victims, intervening in cases, and shadowing monitoring mechanisms. As we identify throughout the report, these processes may prompt legal change, as human rights are invoked in novel contexts and against various duty bearers. An important role is therefore played by these actors with regards to human rights protection.

Most human rights mechanisms accept individual and collective complaints and cases. In so doing, the crucial voice of victims of human rights violations is heard. However, individual victims often require support to bring claims. The roles of NGO interveners in the ECtHR and CJ differ considerably, and we suggest that a liberalisation of EU rules would be appropriate. Other mechanisms provide different opportunity structures: the European Social Charter Collective Complaints

mechanism has provided the context for important rulings on Roma Rights. Of the 62 complaints brought to date, 10 have concerned Roma and Travellers' rights. A range of NGOs have set up in Geneva mirroring the scope of particular UN treaty bodies, promoting their work and facilitating shadow reports from around the world. Examples include the Centre for Civil and Political Rights⁴⁹⁷, who monitor the UN Human Rights Committee, and the International Movement Against All Forms of Discrimination and Racism⁴⁹⁸, who focus on the UN Committee on the Elimination of Racial Discrimination. These NGOs scrutinise and critique human rights mechanisms and jurisprudence, and may thereby contribute to the development of the law.

Governments are ubiquitous in human rights mechanisms. They may use their privileged position before human rights courts to attempt to undermine protection or resist progressive change. In this example, governments intervened in cases before the ECtHR, attempting to roll back legal protections, just as the EU Council (including the self-same governments) was engaged in legislative activity on the same theme.

Protection mechanisms differ in their creative scope; courts evidently have a creative, oracular, law-developing function, as our account of the ICJ, ECtHR and CJ amply demonstrates. The creative scope and decisional autonomy of the different courts varies too: the ECtHR's doctrine of European consensus expressly mandates the Court to look at domestic political and legal developments. For instance, as Annex 4 illustrates, as more European countries introduce a legal status for same-sex partners, an evolving European consensus emerges which in turn informs ECtHR caselaw and then CJ developments. In some fields in contrast, the CJ has greater decisional autonomy and may be at the vanguard of protection. Other monitoring bodies such as the United Nations Human Rights Council or the European Committee on Social Rights clearly generate jurisprudence of a sort, even if their decisions are not as judicialised as those of courts.

⁴⁹⁷ <http://www.ccprcentre.org>

⁴⁹⁸ <http://www.imadr.org>

4. Embedding human rights protections

As Part B explains, crucial to the effectiveness of human rights systems is the extent to which they are embedded within domestic systems⁴⁹⁹. The process of embedding UN, CoE and EU standards in domestic systems is itself a political one, in that it involves individuals and groups invoking norms from those systems in domestic legal proceedings and political fora. This, in turn, is of significance with regards to the fulfilment of human rights.

UN standards are often only weakly embedded in domestic legal systems. However, scholars nonetheless identify their impact on State behaviour, particularly when they serve as a focus for political mobilisation domestically and transnationally⁵⁰⁰. Studies have shown that 'global rights conventions can alter the domestic political opportunity for advocacy, strengthen rights-based claims and bring about changes on the ground'⁵⁰¹. Various external and internal factors exert pressure for ratification and compliance with UN standards⁵⁰².

In Europe, we find that both CoE (mainly ECHR) and EU human rights norms are embedded domestically, with national courts having an important role to play. The CoE and EU standards intersect and interact with domestic constitutional standards in diverse and often productive ways. In Part B, we explain that while the ECHR is diffusely and diversely embedded in national systems, EU law is directly embedded. The processes of embedding are primarily political and in turn unleash further domestic political and legal developments. For example, the UK's late incorporation of the ECHR by the Human Rights Act 1988 brought with it both judicial and political enforcement of human rights, prompting greater legal and political engagement with human rights and the development of an incipient human rights culture⁵⁰³.

⁴⁹⁹ Helfer 2008.

⁵⁰⁰ Melish 2007; Engle Merry 2003, 2006; Simmons 2009; Sikkink 1998.

⁵⁰¹ Grugel and Peruzzotti 2010, p. 29.

⁵⁰² Guzman 2007; Geisinger and Stein 2008; Cortell and Davis 2000; Acharya 2004.

⁵⁰³ Hunt 1999; Hunt 2010.

5. Conclusion

This report illustrates that '[t]he international human-rights regime is a political as well as a legal institution'⁵⁰⁴. This is not to suggest an acceptance of the politicisation of human rights 'which simply appropriates and co-opts human rights to sectional agendas, most damagingly those of the powerful'⁵⁰⁵. Rather we have illustrated the different legal and political opportunity structures for domestic, transnational and international political actors.

The European Parliament is uniquely placed as a human rights actor. It has a decisive role in most EU law- and policy-making. Moreover, it is a privileged litigant before the CJ. In addition, it has the opportunity to support other actors in the protection of human rights, support the work of challenging human rights violations, enforce human rights duties and develop a progressive understanding of human rights.

The above has shown that activism regarding the need to 'respect, promote, protect and fulfil' human rights can be supportive of political initiatives by domestic, transnational and international actors. This can serve as the basis for stronger democratic participation in transnational politics. However, it has also been suggested that not all such activism has the advancement of human rights as its objective and that a critical outlook is required.

⁵⁰⁴ Freeman 2002, p. 147.

⁵⁰⁵ Gready 2003, p. 752.

Part E: Conclusions and Recommendations

This section concludes the report. It draws together various insights and identifies areas of improvement for the EU. While a report of this scale inevitably simplifies, it does not idealise. It recognises the complexity and opacity of the multiplicity of instruments and mechanisms in the United Nations, Council of Europe and EU systems, and identifies both opportunities and threats inherent in the multiplicity of overlapping protections.

Where glaring shortcomings are evident in the UN and CoE systems they are pointed out in the report, and where the European Parliament could help alleviate these problems, the report makes recommendations for courses of action. However, most of the recommendations focus on the protection of human rights within the EU, rather than in the UN and CoE systems. All in all, this section makes 22 recommendations. Given the breadth of this report, the recommendations are of necessity quite general and may require further specification and elaboration.

This report takes the basic constitutional specificities of the EU as given. The EU has no general human rights competence, yet has extensive legislative powers in human rights-sensitive fields. EU human rights standards bind the EU institutions and the Member States only within the scope of EU law. However, the interaction between internal market freedoms, EU Citizenship and human rights means the scope of EU law is broad. Most EU acts are implemented and executed within domestic systems, so Member States are frequently 'implementing EU law'. EU human rights law benefits from EU law's direct embeddedness in domestic systems, lending it comparative enforcement advantages over other international human rights law sources, if national courts are adept at providing effective judicial protection. However, courts alone are not enough. They tend to react to human rights violations ex post. Further institutional mechanisms at EU and national level are required to 'protect, promote and fulfil' human rights in a proactive sense.

The report mainly focuses on the EU's internal activities. The authors acknowledge the importance of the external dimension and the crucial need to ensure consistency

in EU practice internally and externally, as highlighted in the Report 'Leading by Example: A Human Rights Agenda for the European Union for the Year 2000'⁵⁰⁶. As Part C identifies, the inconsistency in the position of minority rights in the external and internal policies of the EU remains problematic.

Recommendation 1: Integrate duties to respect, protect, promote and fulfil human rights into all areas of EU activity.

1. The Content of EU Human Rights Standards

The three binding sources of EU human rights law are general principles of EU law, the Charter, and international human rights law, particularly those human rights treaties ratified by the EU. The CJ's development of fundamental rights as general principles draws on two main sources: the common constitutional traditions of the Member States and international human rights law, in particular the ECHR. The CJ purports to draw inspiration from the 'guidelines' provided by international human rights treaties 'on which the Member States have collaborated or to which they are signatories.' This formulation allows the CJ some leeway as to which international human rights law it draws from. In practice, the ECHR dominates, sidelining other international human rights law instruments. We note also the CJ's lack of engagement with the jurisprudence of quasi-judicial bodies. The EP should aim to address these shortcomings by making sound legal arguments before the Court drawing on international human rights law.

Recommendation 2: Support the development of general principles of EU law in light of the full range of appropriate 'common constitutional traditions' and in particular international human rights law, including the jurisprudence of quasi-judicial UN and CoE bodies.

Equally, the authors stress the indivisibility of all human rights. Overcoming the artificial divide between civil and political rights on the one hand, and economic, social and cultural rights on the other is one of the main developments within the UN in the post-Cold War era, as reflected in the 1993 Vienna World Conference, Limburg

⁵⁰⁶ 'Leading by Example: A Human Rights Agenda for the European Union for the Year 2000'. Agenda of the Comité des Sages and Final Project Report (1998).

Principles, Maastricht Guidelines and the inclusion of all types of rights and duties in more recent UN Treaties, in particular the Convention of the Rights of the Child and the Convention on the Rights of Persons with Disabilities. Within the CoE, the revisions to the ESC and the growing ECtHR case law on social rights reflect this trend. The Charter successfully overcomes the false dichotomy between civil and political rights on the one hand, and economic, social and cultural rights on the other. Its Preamble, structure and text all support this view. The rights/ principles dichotomy in Article 52(5) of the Charter does not revive the divide between types of rights, but rather demands provision-by-provision examination of the Charter's guarantees. While they do enshrine different sorts of obligations, there is no category of rights which ipso facto may be deemed a 'principle'.

Recommendation 3: **Support the indivisibility of human rights, in particular by ensuring that the general principles and Charter are interpreted to reflect the successful integration civil and political rights on the one hand, and economic, social and cultural rights on the other.**

The Charter does not encompass all the rights covered in the UN and CoE instruments, as Annex 1, Table 2, illustrates. At this point, it would seem inopportune to reopen the content of the Charter. Suffice to note that dynamic interpretation of specific Charter provisions, use of the general principles and further EU engagement with international human rights law may close these gaps. The Charter sets out interpretative obligations in its Final Provisions seeking to ensure its consistency and development in line with other sources, which provide an opportunity in this respect. While the Charter is the obvious starting point in determining the content of EU human rights standards, general principles of EU law and international human rights obligations should not be sidelined. By drawing on international human rights law to a greater degree in interpreting the Charter and developing the general principles of EU law, the links between the European Union and international human rights law will be reinforced.

Recommendation 4: **Embrace the three sources of EU human rights standards, the Charter, general principles of EU law and international human rights law.**

With the EU's ratification of the Convention on the Rights of Persons with Disabilities on 23 December 2010, and envisaged ratification of the ECHR, a crucial degree of external scrutiny will be brought to EU actions. Ratification of other international human rights law instruments would bring coherence between UN, CoE and EU law, and is a key recommendation (Recommendation 5) of this report. Systematic analysis of the EU's external competences is required in order to identify which Treaties the EU is competent to ratify, but acceding to the Convention on the Elimination of All Forms of Discrimination Against Women , to the International Convention on the Elimination of Racial Discrimination and to the Refugee Convention seems uncontroversially to fall within EU competence. We welcome the undertaking in the Stockholm Programme that '[s]ubject to a report from the Commission on the legal and practical consequences, the Union should seek accession to the [Refugee Convention]⁵⁰⁷. Ratification of the CoE's Revised European Social Charter is also recommended⁵⁰⁸.

The authors acknowledge that accession to UN and CoE human rights instruments (other than the ECHR) is a long term aim. Given the EU's non-state character, reform of those instruments will be required to allow the accession of the EU. In the meantime, we draw on previous proposals and recommend that the EU devise practical devices to subject itself to UN and CoE human rights mechanisms, even in the absence of formal accession⁵⁰⁹.

In Part B 4, we identify excessive deference between human rights systems as a potential threat of overlapping authority. Formal accession of the EU to the ECHR may alleviate this specific concern in the CoE-EU context because complaints about the violation of the ECHR by EU acts can be brought directly in the ECtHR against the EU and need not be raised indirectly in complaints against Member States. We stress that reduced scrutiny (or deference) in the review of EU acts by the ECtHR would defeat the purpose of the ECHR as an external minimum guarantee and, therefore, would be inappropriate in this situation. In addition, more general proposals are contained in recommendation 5 below.

⁵⁰⁷ European Council (2010) The Stockholm Programme – An Open & Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, p. 32.

⁵⁰⁸ De Schutter 2005b.

⁵⁰⁹ Butler and De Schutter 2008.

Recommendation 5: Establish stronger external human rights scrutiny of EU activities by acceding to international human rights law instruments and, pending accession, creating practical devices to subject the EU to the full rigor of UN and CoE human rights mechanisms.

The report identifies a worrying tendency to treat international human rights law as a ceiling standard to which the EU should aspire. However, as emphasised throughout this report, UN and CoE standards generally set a global or pan-European minimum. EU protections, therefore, can and should be higher in many fields. The EU in turn should engage with UN and CoE processes in order to ensure the progressive development of human rights protections and protection mechanisms within the UN and CoE.

Recommendation 6: Support the effective and progressive development of human rights protections in the UN and CoE.

Recommendation 7: Support activities within the UN which aim to avoid fragmentation within the UN human rights system, including the call for a unified standing treaty body.

The authors note patchy ratification of some UN instruments by EU Member States. For example, only Spain has ratified the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and many Member States have yet to ratify the Convention on the Rights of Persons with Disabilities. No EU Member State has ratified the Convention on the Protection of the Rights of Migrant Workers. The CJ in turn should develop the EU general principles in light of The CJ in turn should develop the EU general principles in light of these ratified instruments.

Recommendation 8: Support the ratification of UN instruments by EU Member States.

2. Judicial Protection of Human Rights

Part B 2, contrasts the degrees of judicialisation of human rights protection in the UN, CoE and EU. Both the CJ and ECtHR are overburdened, 'victims of their own

success'. While institutional reforms have been undertaken in both systems, we note the importance of ensuring effective protection before national courts in order to relieve strain on both supranational courts. Embedding human rights protections domestically is crucial.

Recommendation 9: Promote effective judicial protection of human rights in national courts.

The dual function of the CJ is described in Part B 2.1.3, explaining its role in ensuring Member State compliance with EU norms, whilst also reviewing acts of the EU's own institutions. The authors welcome the significant changes brought about by the Lisbon Treaty which extends the CJ's role in the Area of Freedom, Security and Justice. However, there is a continuing lack of jurisdiction over Common Foreign and Security Policy, which may imperil human rights protection. The authors also note that concerns remain about individual standing to challenge EU acts, notwithstanding the Lisbon reform concerning 'regulatory acts'⁵¹⁰. The availability of preliminary references to challenge EU acts remains crucial for effective judicial protection.

Recommendation 10: Amend the EU Treaties to ensure full CJ jurisdiction over all areas of EU activity, including Common Foreign and Security Policy .

Recommendation 11: Amend the EU Treaties to widen standing for individuals to challenge EU acts directly before the CJ.

Within the existing framework, the authors suggest that the Commission ought to use infringement proceedings more aggressively as a tool to ensure the protection of human rights. The Commission's current practices under infringement actions do not provide effective protection of human rights. The authors welcome the Commission's most recent statement on compliance with the Charter, emphasising that it will use its powers to pursue Member States when they violate fundamental rights⁵¹¹. The authors urge the European Parliament to demand improvements in the Commission's practices. We also suggest that the EP could use its legal standing better to protect fundamental rights in EU activities.

⁵¹⁰ Article 263(4) TEU.

⁵¹¹ Commission 2010b, p.10.

Recommendation 12: The European Commission should develop a strategy to ensure that infringement proceedings secure effective protection of human rights when Member States act within the scope of EU law.

Recommendation 13: The European Parliament should develop a strategy to use its powers to act as a human rights litigant, in particular to ensure that EU legislative and executive acts respect, protect, promote and fulfil human rights.

In comparing the ECtHR and CJ, we note the comparative rarity of human rights interventions before the CJ. We note that EU Equality law requires the creation of national equality bodies to support victims in seeking effective protection of their rights. This example should be generalised in other EU human rights legislation, and National Human Rights Institutions should further be supported in their litigant role by EU legislation and financing.

Recommendation 14: The procedural rules of the CJ and General Court should be revised to facilitate third-party interventions, by human rights NGOs in particular.

Recommendation 15: Consideration should be given to developing the capacity of Equality Bodies, National Human Rights Institutions and the Fundamental Rights Agency as human rights litigants.

3. EU Legislation to Respect, Protect, Promote and Fulfil Human Rights

The authors emphasise the importance of EU legislation in order to 'respect, protect, promote and fulfil' human rights. We welcome in particular the Commission's renewed commitment to promote a 'fundamental rights culture' within the EU and the EP's strong institutional commitment to fundamental rights. However, shortcomings have been identified in these processes, including their reactive nature

and failure to consider the likely implementation of the EU measures at national level⁵¹².

Recommendation 16: Strengthen proactive institutional engagement with human rights within EU legislative processes.

In the Report, the authors identify instances where EU legislation enhances fundamental rights, and, regrettably, where it detracts from them. EU legislation in certain human rights-sensitive fields has had an ambivalent impact on human rights, in some measure enhancing protection, while in some discrete ways lowering human rights protection (see Annex 6 on Migrant Detention and Annex 7 on Refugee Protection). We also highlight the complex variety of EU lawmaking procedures.

All areas of EU activity require an underpinning in human rights. The specificity of Recommendations 17 and 18 should not convey a suggestion that we have exhaustively examined all areas of actual or potential EU legislation. Rather, these substantive legislative recommendations reflect some of the selective illustrations used in this Report.

In particular, we note that this is a crucial time of EU lawmaking in the area of asylum and immigration, as the European Parliament exercises its new co-decision powers. The Return Directive is a reminder that co-decision cannot be assumed to lead to better human rights protection (see Annex 6 on Migrant Detention)⁵¹³. The EU Asylum Directives are currently being recast, and that reform process should not only ensure compliance with international human rights law but also contribute to its progressive development.

Recommendation 17: EU asylum legislation should be amended to ensure compliance with international human rights law and also contribute to its progressive development.

Beyond the grounds of gender and race, EU Equality Directives do not apply outside the employment sphere. We urge the extension of EU equality legislation beyond the workplace and support the on-going efforts to agree a new directive to supplement

⁵¹² De Schutter 2010c, p. 15-16.

⁵¹³ Directive 2008/115 (Return Directive) of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

the Framework Directive beyond the sphere of employment⁵¹⁴. We support the Commission's suggestion of a European Accessibility Act to give effect to the EU's obligations under the Convention on the Rights of Persons with Disabilities. We urge reconsideration of the proposal for a Roma Integration Directive on the basis of Article 19 TFEU⁵¹⁵.

Recommendation 18: EU equality legislation should be further expanded beyond the workplace, and that further specific legislation be adopted, in particular, on disabled access and Roma integration, in order to give effect to international human rights law and contribute to its progressive development.

4. Non-judicial Protection of Human Rights

The Fundamental Rights Agency (FRA)

This report draws on the valuable work of the FRA, highlighting its principal function of providing expert advice on fundamental rights (Part B 2.2.3.4). However, the report identifies some institutional shortcomings in the FRA's mandate, including concerns about its independence from the EU institutions. The authors urge that the Paris Principles on National Human Rights Institutions be used as a model for future FRA reforms.

Recommendation 19: The Paris Principles on National Human Rights Institutions should be used as a model for future FRA reforms, with the FRA serving as a National Human Right Institution for the EU (given the EU's own extensive legislative and executive powers) and as a Network Agency to coordinate and support the work of National Human Rights Institutions.

⁵¹⁴ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM(2008) 426 final, 2 July 2008.

⁵¹⁵ EU Network of Experts on Fundamental Rights 2005.

The remit of the FRA with regard to the Member States is limited to the situation where Member States implement EU law. While this reflects the legal position under the Charter, we urge that advising and even monitoring of fundamental rights in the Member States not be so confined, as it leads to artificial segmentation of human rights. While the Commission monitors Member State implementation of EU law, the authors urge more systematic monitoring of Member State activities in light of EU human rights. The authors recall the practice of the now disbanded Network of Experts on Fundamental Rights in examining all Member State activities. However, in taking on this monitoring role, the EU must avoid duplication of activities within the UN and CoE, but rather cooperate with those other systems.

Recommendation 20: The remit of the FRA should be extended to ensure that it covers all EU and Member State activities. However, any extension of the FRA's remit should be undertaken with care to avoid duplication of UN and CoE activities. Institutional co-operation across the three systems UN-CoE-EU is vital.

National Human Rights Institutions

We note the FRA's studies on and engagement with National Human Rights Institutions, Equality Bodies and Data Protection Bodies⁵¹⁶. These domestic institutions are crucial for human rights protection. Not all EU Member States have appropriate National Human Rights Institutions (see Annex 8). The importance of facilitating networking of these bodies across EU Member States in order to share experience and good practice is highlighted. The FRA's development into a hub, or 'network agency' is a positive model for future developments.

Recommendation 21: The EU should support the development and networking of National Human Rights Institutions, Equality Bodies and other national institutions for the protection of human rights.

⁵¹⁶ Fundamental Rights Agency (2010) National Human Rights Institutions in the EU Member States (Strengthening the fundamental rights architecture in the EU I) (FRA: Vienna); Fundamental Rights Agency (2010) Data Protection in the European Union: the role of National Data Protection Authorities (Strengthening the fundamental rights architecture in the EU II) (FRA: Vienna); Fundamental Rights Agency (2010) Rights Awareness and Equality Bodies (Strengthening the fundamental rights architecture in the EU III) (FRA: Vienna).

National Parliaments

The Lisbon Treaty enhances the position of national parliaments in EU law- and policy-making. We urge that national parliaments engage with the human rights aspects of EU legislation. Within the Council of Europe, the Interlaken Declaration also highlights the importance of national parliaments for human rights protection. Most EU acts are implemented and executed within domestic systems, so national parliaments should ensure that this process does not undermine human rights.

Recommendation 22: National parliaments' role in human rights scrutiny of EU activities and national implementation of EU acts should be supported and enhanced.

Annexes

Annex 1: Comparison of Provisions between EU UN and CoE Instruments

Part 1: Comparison of the Protections under the EU Charter of Fundamental Rights with those under UN and CoE systems

Key to table:
Better defined or more extensive protection
Similar coverage
Lesser protection or substantially less specificity
No equivalent protection or negligible coverage
* = provision not accepted by all EU member states (not ratified or reservations entered)

Human Right Defined	Charter	United Nations	Council of Europe
Dignity			
Dignity	1	UDHR Art.1 / ICCPR Art.1 / ICESCR Art.1	
Life	2(1)	UDHR Art.3 / ICCPR Art.6(1)+	ECHR Art.2
No Death Penalty	2(2)	ICCPR Art.6(2-6)+	ECHR Protocol 13 Art.1
Physical/Mental Integrity	3(1)	ICCPR Art.7	Biomedical Convention Art.1*
Informed Consent	3(2)		Biomedical Convention Arts.5-9*
Anti-Eugenics	3(2)	UDHR Art.16	Biomedical Convention Arts.11-14*
Profit from Body	3(2)		Biomedical Convention Art.21
Anti-Cloning	3(2)	Declaration on Human Cloning	Biomedical Convention Protocol on Cloning
Torture	4	UDHR Art.5 / ICCPR Art.7 / CAT	ECHR Art.3
Slavery	5(1)	UDHR Art.4 / ICCPR Art.8	ECHR Art.4(1)
Forced Labour	5(2)	ICCPR Art.8(3)	ECHR Art.4(2-3)

Human Right Defined	Charter	United Nations	Council of Europe
Human Trafficking	5(3)	ICCPR Art.8(1-2)	Convention on Action against Trafficking in Human Beings
Freedom			
Liberty and Security	6	UDHR Arts.3+9 / ICCPR Arts.9-10	ECHR Art.5 / Protocol 4 Art.1*
Private and Family	7	UDHR Art.12	ECHR Art.8+
Personal Data	8		Convention ... with regard to Automatic Processing of Personal Data*
Marriage and form family	9	UDHR Art.16 / ICCPR Art.23(2-4)	ECHR Art.12
Thought+Conscience	10(1)	UDHR Art.18 / ICCPR Art.18+	ECHR Art.9
Conscient' Objection	10(2)	UDHR Art.18 / ICCPR Art.18+ (see Commission on Human Rights resolution 1998/77)	ECHR Art.9
Expression	11(1)	UDHR Art.19 / ICCPR Art.19+(inc.20)	ECHR Art.10+
Media	11(2)	UDHR Art.19 / ICCPR Art.19+(inc.20)	ECHR Art.10+
Assembly+Association	12	UDHR Arts.20+23(4) / ICCPR Arts.20-22 / ICESCR Art.8	ECHR Art.11+
Arts and Sciences	13	ICESCR Art.15(2-3)	Biomedical Convention explanatory notes*
Access to Education	14(1)	UDHR Art.26(1)	ECHR Protocol 1 Art.2
Free Compulsory Ed	14(2)	UDHR Art.26(1) / ICESCR Arts.13(1-2)-14	
Parents Choice of Education	14(3)+	UDHR Art.26(3) / ICCPR Art.18(4) / ICESCR Art.13(3)	ECHR Protocol 1 Art.2+
Occupation (choice)	15(1)	UDHR Art.23(1) / ICESCR Art.6(1)	ESC/ESC96 Art.1
Occupation (movement)	15(2)		ESC/96 Art.18*
Parity of conditions	15(3)		ESC/ESC96 Art.19*
Conduct Business	16		
Property	17+	UDHR Art.17	ECHR Protocol 1 Art.1+
Intellectual Property	17(2)	UDHR Art.27(2)	
Asylum	18	UDHR Art.14	
Collective Expulsion	19(1)	CERD Art. 5	ECHR Protocol 4 Art.4*
Deportation w. risk	19(2)	CAT Art.3	ECHR Art.3 (Soering v UK)
Equality			
Equality before the law	20	UDHR Arts.6+7 / ICCPR Art.14(1)+16	ECHR Art.6 with Art.14

Human Right Defined	Charter	United Nations	Council of Europe
Non-discrimination	21	UDHR Art.2 / ICCPR Art.26	ECHR Art.14 / ECHR Protocol 12*
Respect for Diversity	22	ICCPR Art.27	
Sexual Equality in Work	23	UDHR Art.23(2) / ICCPR Art.3 / CEDAW	ESC AP Art.1*
Protecting Children	24	UDHR Art.24(2) / ICCPR Art. 24	ESC Art.7*
Independence of Elderly	25	UDHR Art.25	ESC AP Art.4*
Disability Integration	26	Convention on the Rights of Persons with Disabilities	ESC Art.15* / ESC96 Art.15*
Solidarity			
Workers' Consultation	27	ILO	ESC AP Arts.2-3*
Collective Bargaining	28	ILO Conventions C87 + C98	ESC/ESC96 Art.6*
Placement Services	29		ESC Art.9*
Against Unjust Dismissal	30		
Fair working conditions	31(1)	UDHR Art.23 / ICESCR Art.7	ESC Arts.3-4* / ESC96 Arts.2-4*
Maximum working hours	31(2)	ICESCR Art.7(d)	ESC Art.2*
Against Child Labour	32	ICESCR Art.10(3)	ESC/ESC96 Art.7*
Family Legal/Econ/Soc Life	33(1)	UDHR Art.23(3) / ICCPR Art.23(1) / ICESCR Art.10	ESC/ESC96 Art.16* and 17
Maternity and Paternity	33(2)	ICESCR Art.10(2)	ESC/ESC96 Art.8*
Social Security	34	UDHR Art.22/23(3) / ICESCR Art.9	ESC/ESC96 Art.12* / 13(1-2)(3-4)* / 14*
Housing Benefit	34(3)	ICESCR Art.11	ESC/ESC96 Art.16*/31*
Health Care (including Preventative)	35	UDHR Art.24 / ICESCR Art.12	ESC/ESC96 Art.11 / Biomedical Convention Art.3*
Economic Services	36		
Environmental Protection	37	ICESCR Art.12(b)	
Consumer Protection	38		
Citizen's Rights			
Vote + run (EU)	39	N/A	N/A
Vote + run (municipal)	40	UDHR Art.21(1) and (3) / ICCPR Art.25	ECHR Protocol 1 Art.3
Good Administration (EU)	41	N/A	N/A
Access to Official Docs	42		
Review by Ombudsman	43	Various measures	ECHR Art.34 / ESC AP2*

Human Right Defined	Charter	United Nations	Council of Europe
Petition the Parliament	44	N/A	N/A
Free Movement/Residence	45	UDHR Art.13 / ICCPR Art.12+	ECHR Protocol 4 Art.2*
Shared Consular Services	45	N/A	N/A
Justice	–		
Effective Remedy	47	UDHR Art.8 / ICCPR Art.2(3)	ECHR Art.13
Fair Trial	47	UDHR Art.10	ECHR Art.6(1) + Protocol 7 Arts.2-3
Legal Aid	47	ICCPR Art.14(3)(d)	ECHR Art.6(3)(b)
Presumption of Innocence	48(1)	UDHR Art.11(1) / ICCPR Art.14(2)	ECHR Art.6(2)
Right to Defence	48(2)	UDHR Art.11(1) / ICCPR Art.14(3)	ECHR Art.6(3)
Retrospective Prohibition	49(1)(2)	UDHR Art.11(2) / ICCPR Art.15	ECHR Art.7
Disproportionate Penalties	49(3)		
Double Jeopardy	50	ICCPR Art.14(7)	ECHR Protocol 7 Art.4

Part 2: Table of Rights not Protected by the EU Charter of Fundamental Rights

Note: The focus here is on those rights that are protected under the UN and Council of Europe systems but not explicitly protected in the EU Charter of Fundamental Rights, based on a comparison of the texts of Charter and the key UN and Council of Europe documents.

Human Right Defined	United Nations	Council of Europe
Nationality	UDHR Art. 15	
Social and international order for the realisation of human rights	UDHR Art. 28	
Participate in the cultural life of the community and benefit from scientific advancements	UDHR Art. 27(1) / ICESCR Art. 15(1) / CERD Art 5(e)(6)	
Purpose of education to strengthen human rights and promote tolerance and understanding among nations and racial or religious groups	UDHR Art. 26(2) / ICESCR Art. 13(1) / CERD Art. 7	
Equal access to public service	UDHR Art. 21(2) / ICCPR Art. 25(c) / CERD Art 5(f)	
Self-determination	ICESCR Art. 1 / ICCPR Art. 1(1)	
Specific national policies to ensure right to work is protected	ICESCR Art. 6(2)	
Adequate standard of living, including adequate food, clothing and housing	ICESCR Art. 11(1) + (2) / CERD Art. 5(e)(3)	ESC96 Arts. 30 + 31
Freely choose one's spouse	ICESCR Art. 10(1) / ICCPR Art. 23(3)	

Enjoyment of highest attainable physical and mental health	ICESCR Art. 12(1)	
Progressive introduction of free secondary and higher education	ICESCR Arts. 13(2)(b) + (c)	
Development of a system of schools, with the material conditions of teaching staff continuously improved	ICESCR Art. 13(2)(e)	
Freedom to leave any country, including his/her own, and to return to his/her country	UDHR Art. 13(2) / ICCPR Art. 12(2)	ECHR Protocol 4 Arts. 2(2)
"Democratic governance", as expressed through periodic and genuine elections	UDHR Art. 21(3) / ICCPR Art. 25(b)	ECHR Protocol 1 Art. 3
Knowledge as to reasons for arrest and prompt information regarding any charges against you	ICCPR Art. 9(2) + 14(3)(a)	ECHR Art. 5(2) + 6(3)(a)
It shall not be the general rule that persons awaiting trial shall be detained in custody	ICCPR Art. 9(3)	
Compensation for unlawful arrest or detention	ICCPR Art. 9(5)	ECHR Art. 5(5)
Separation of accused persons from convicted persons and differential treatment appropriate to their status as unconvicted persons	ICCPR Art. 10(2)(a)	
Separation of accused juvenile persons from adults and speedy adjudication therefor	ICCPR Art. 10(2)(b)	
Juvenile offenders to be accorded treatment appropriate to their age and legal status	ICCPR Art. 10(3)	
Aim of penitentiary system is reformation and social rehabilitation of prisoners	ICCPR Art. 10(3)	
No imprisoned solely for one's inability to fulfil a contractual obligation	ICCPR Art. 11	ECHR Protocol 4 Art. 1
Expulsion of lawfully-resident aliens only in pursuance of a decision reached in accordance with the law, with the right to review	ICCPR Art. 13	ECHR Protocol 7 Art. 1

Review of criminal conviction and sentence by a higher tribunal according to the law	ICCPR Art. 14(5)	ECHR Protocol 7 Art. 2
Compensation for miscarriages of justice	ICCPR Art. 14(6)	ECHR Protocol 7 Art. 3
Positive discrimination with regards racial or ethnic groups or individuals in need of special protection to ensure such groups' or individuals' equal enjoyment of human rights	CERD Art. 1(4) + 2(2)	
Protection from unlawful attacks on a person's honour and reputation	ICCPR Art. 17(1) / UDHR Art. 12	
No propaganda for war	ICCPR Art. 20(1)	
No advocacy of national, racial or religious hatred	ICCPR Art. 20(2) / CERD Art. 4	
Equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution	ICCPR Art. 23(4)	
Necessary protection of children in cases of the dissolution of parents' marriage	ICCPR Art. 23(4)	
Registration of every child immediately after birth, and name	ICCPR Art. 24(2)	
Protection of ethnic, religious or linguistic minorities	ICCPR Art. 27	
Encourage where appropriate integrationist multiracial organisations and movements and discourage that which tends to strengthen racial division	CERD Art. 2(1)(e)	
Just and favourable remuneration for work	UDHR Art. 23(3) / ICESCR Art. 7(a) / CERD Art. 5(e)(i)	ESC / ESC96 Art. 4
Equal opportunity of all employees to be promoted to a higher level subject to no considerations other than those of seniority and competence	ICESCR Art. 7(c)	
Adoption of measures by states to combat racial prejudices and promote understanding, tolerance and friendship among nations and racial or ethnical groups	CERD Art. 7	

States must modify social and cultural patterns of conduct of men and women with a view to the elimination of prejudices	CEDAW Art. 5(a)	
States must ensure that family education teaches the social function of maternity and equal responsibility of men and women in the upbringing of children	CEDAW Art. 5(b)	
Equal rights of men and women with respect to the nationality of their children	CEDAW Art. 9(2)	
States shall promote establishment and development of network of child-care facilities	CEDAW Art. 11(2)(c)	ESC96 Art. 27(1)(c)
States shall ensure appropriate services are provided to women during pregnancy and post-natal periods	CEDAW Art. 12(2)	
States shall take account of the particular problems faced by rural women	CEDAW Art. 14	
Pursuant to right to work, states shall aim to achieve and maintain as high and stable a level of employment as possible, with a view to attainment of full employment		ESC / ESC96 Art. 1(1)
Public holidays with pay	ICESCR Art. 7(d)	ESC / ESC96 Art. 2(2)
Increased remuneration for overtime work		ESC / ESC96 Art. 4(2)
Reasonable period of notice for termination of employment		ESC / ESC96 Art. 4(4)
Restricted allowance for deductions from wages		ESC / ESC96 Art. 4(5)
Fair wage for young workers		ESC / ESC96 Art. 7(5)
No less than 4 weeks' annual holiday with pay for workers under 18 yrs of age		ESC96 Art. 7(7)
Generally no night work for persons under the age of 18		ESC / ESC96 Art. 7(8)

Time spent by young persons in vocational training during normal working hours to be counted as forming part of the working day		ESC / ESC96 Art. 7(6)
Regular medical control of persons under the age of 18 employed in occupations prescribed by national laws or regulations		ESC / ESC96 Art. 7(9)
Sufficient time off work necessary for mothers to nurse their infants		ESC / ESC96 Art. 8(3)
Protection of pregnant women and those who have recently given birth or are nursing from certain types of employment considered unsuitable for them, including prohibition of employing women in underground mines	CEDAW Art. 11	ESC96 Art. 8(4)
Provision of special facilities for re-training of adult workers needed as a result of technological development or new trends in employment		ESC / ESC96 Art. 10(3)(b)
Reduction or abolition of fees or charges relating to vocational training		ESC96 Art. 10(5)(a)
States shall, as far as possible, remove the causes of ill health and prevent as far as possible epidemic, endemic and other diseases		ESC / ESC96 Art. 11
States shall endeavour to raise progressively the system of social security to a higher level		ESC / ESC96 Art. 12(3)
Benefit from social welfare services		ESC / ESC96 Art. 14
Protection and assistance of migrant workers and their families		ESC / ESC96 Art. 19
Progressive reduction of working week		ESC / ESC96 Art. 2(1)
States shall eliminate the risks in dangerous or unhealthy occupations; where not possible, reduced working hours or additional paid holidays in such occupations		ESC / ESC96 Art. 2(4)
Written contract of employment for all workers not later than 2 months after date of commencing employment		ESC96 Art. 2(6)
Night workers to benefit from measures which take account of special nature of that work		ESC96 Art. 2(7)

States shall formulate, implement and periodically review coherent national policy on occupational safety, occupational health and the working environment, as well as issue and enforce health and safety regulations		ESC / ESC96 Art. 3
States shall provide and promote special measures for the retraining and reintegration of the long-term unemployed		ESC96 Art. 10(4)
Free secondary education		ESC96 Art. 17(2)
Participation by workers in the determination and improvement of their working conditions and working environment		ESC96 Art. 22
Compensation for unjustified dismissal from employment		ESC96 Art. 24(b)
Protection of workers' claims in the event of the insolvency of their employer		ESC96 Art. 25
Promotion of awareness, information and prevention of sexual harassment in the workplace		ESC96 Art. 26(1)
Promotion of awareness, information and prevention of recurrent reprehensible or distinctly negative and offensive actions against individuals in the workplace		ESC96 Art. 26(2)
Needs of workers with family responsibilities to be taken account of in terms of conditions of employment and social security		ESC96 Art. 27(1)(b)
Protection of workers' representatives in the undertaking, and facilities to be accorded to them		ESC96 Art. 28
Information regarding and consultation in collective redundancy procedures		ESC96 Art. 29
Protection from poverty and social exclusion		ESC96 Art. 30
Housing	CERD Art. 5(e)(3)	ESC96 Art. 31

Annex 2: Non-Binding UN Instruments (Soft Law)

<http://www2.ohchr.org/english/law/>

In addition to the International Bill of Rights and the core human rights treaties, there are many other universal instruments relating to human rights. A non-exhaustive selection is listed below. The legal status of these instruments varies: declarations, principles, guidelines, standard rules and recommendations have no binding legal effect, but such instruments have an undeniable moral force and provide practical guidance to States in their conduct; covenants, statutes, protocols and conventions are legally-binding for those States that ratify or accede to them.

WORLD CONFERENCE ON HUMAN RIGHTS AND MILLENNIUM ASSEMBLY

- Vienna Declaration and Programme of Action
- United Nations Millennium Declaration

THE RIGHT OF SELF-DETERMINATION

- United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples
- General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources"

RIGHTS OF INDIGENOUS PEOPLES AND MINORITIES

- Declaration on the Rights of Indigenous Peoples
- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

PREVENTION OF DISCRIMINATION

- Declaration on Race and Racial Prejudice
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief
- World Conference against Racism, 2001 (Durban Declaration and Programme of Action)

RIGHTS OF WOMEN

- Declaration on the Protection of Women and Children in Emergency and Armed Conflict
- Declaration on the Elimination of Violence against Women

RIGHTS OF OLDER PERSONS

- United Nations Principles for Older Persons

RIGHTS OF PERSONS WITH DISABILITIES

- Declaration on the Rights of Mentally Retarded Persons
- Declaration on the Rights of Disabled Persons
- Principles for the protection of persons with mental illness and the improvement of mental health care
- Standard Rules on the Equalization of Opportunities for Persons with Disabilities

HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: PROTECTION OF PERSONS SUBJECTED TO DETENTION OR IMPRISONMENT

- Standard Minimum Rules for the Treatment of Prisoners
- Basic Principles for the Treatment of Prisoners
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty
- Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Safeguards guaranteeing protection of the rights of those facing the death penalty
- Code of Conduct for Law Enforcement Officials
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)
- Guidelines for Action on Children in the Criminal Justice System
- United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
- Basic Principles on the Independence of the Judiciary
- Basic Principles on the Role of Lawyers
- Guidelines on the Role of Prosecutors
- Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions
- Declaration on the Protection of All Persons from Enforced Disappearance
- Basic Principles and Guidelines on the Right to a Remedy and Reparation

SOCIAL WELFARE, PROGRESS AND DEVELOPMENT

- Declaration on Social Progress and Development
- Universal Declaration on the Eradication of Hunger and Malnutrition
- Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind

- Declaration on the Right of Peoples to Peace
- Declaration on the Right to Development
- Universal Declaration on the Human Genome and Human Rights
- Universal Declaration on Cultural Diversity

PROMOTION AND PROTECTION OF HUMAN RIGHTS

- Principles relating to the status of national institutions (The Paris Principles)
- Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

MARRIAGE

- Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages

RIGHT TO HEALTH

- Declaration of Commitment on HIV/AIDS

RIGHT TO WORK AND TO FAIR CONDITIONS OF EMPLOYMENT

- Employment Policy Convention, 1964 (No. 122)

FREEDOM OF ASSOCIATION

- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

NATIONALITY, STATELESSNESS, ASYLUM AND REFUGEES

- Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live

WAR CRIMES AND CRIMES AGAINST HUMANITY, INCLUDING GENOCIDE

- Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity

Annex 3: The Charter of Fundamental Rights of the European Union

Preamble

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

TITLE I: DIGNITY

Article 1: Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2: Right to life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

Article 3: Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
 - (a) the free and informed consent of the person concerned, according to the procedures laid down by law,
 - (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons,
 - (c) the prohibition on making the human body and its parts as such a source of financial gain,
 - (d) the prohibition of the reproductive cloning of human beings.

Article 4: Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5: Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

TITLE II: FREEDOMS

Article 6: Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7: Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8: Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

Article 9: Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 10: Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Article 11: Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.

Article 12: Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

Article 13: Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Article 14: Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.

2. This right includes the possibility to receive free compulsory education.

3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Article 15: Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 16: Freedom to conduct a business

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

Article 17: Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

Article 18: Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

Article 19: Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

TITLE III: EQUALITY

Article 20: Equality before the law

Everyone is equal before the law.

Article 21: Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion,

membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 22: Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23: Equality between men and women

Equality between men and women must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24: The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 25: The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 26: Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

TITLE IV: SOLIDARITY

Article 27: Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

Article 28: Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Article 29: Right of access to placement services

Everyone has the right of access to a free placement service.

Article 30: Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.

Article 31: Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

Article 32: Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Article 33: Family and professional life

1. The family shall enjoy legal, economic and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Article 34: Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.

2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.

3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.

Article 35: Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Article 36: Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

Article 37: Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Article 38: Consumer protection

Union policies shall ensure a high level of consumer protection.

TITLE V: CITIZENS' RIGHTS

Article 39: Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.

2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

Article 40: Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

Article 41: Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 42: Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

Article 43: Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

Article 44: Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

Article 45: Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

Article 46: Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

TITLE VI: JUSTICE

Article 47: Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48: Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 49: Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognized by the community of nations.
3. The severity of penalties must not be disproportionate to the criminal offence.

Article 50: Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

TITLE VII: GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

Article 51: Field of application

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

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Article 52: Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

Article 53: Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to

which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article 54: Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

Annex 4: Sexual Orientation and Same-Sex Partnerships

The ECtHR engagement with same-sex relationships is an example of its evolutionary approach to the interpretation of Convention rights. This Annex provides an illustrative sample of the Strasbourg case law, and contrasts it with the EU's limited, but important engagement with these questions in the area of equality in the workplace.

The right to privacy under Article 8 ECHR provided the basis for impugning criminalisation of homosexual acts⁵¹⁷. Later, sexual orientation was recognised as a prohibited ground of discrimination under Article 14 ECHR⁵¹⁸. However, the ECtHR does not yet demand full public recognition of same-sex relationships⁵¹⁹. Yet, the treatment of same-sex relationships is evolving considerably. In *Karner v Austria* the Court found a violation of Article 14 (in conjunction with Article 8) in the failure to allow inheritance rights for a gay partner⁵²⁰, although it expressly refused to determine whether private life or family life was at stake. In 2008, the Grand Chamber in *EB v France* found the refusal of adoption on the basis of sexual orientation in that case to violate Articles 14 (and 8)⁵²¹, marking a shift from the 2002 ruling in *Fretté v France*⁵²².

Change continues. Notably in 2010 in *Schalk & Kopf v Austria*⁵²³, the ECtHR held that although there was no right to marry under Article 12 ECHR for same-sex couples (in the absence of sufficient European consensus), same-sex couples do enjoy family life together under Article 8 ECHR. Article 14 ECHR did not preclude differentiation between same-sex and heterosexual couples, but the Court noted the evolving European consensus towards offering a formal status for same-sex couples, signaling that the absence of any formal status for same-sex couples would in likelihood in the future be regarded as a violation of Articles 8 and 14. As a result, 'we can expect a rapid development of future cases since so far only about half of the Contracting States have comprehensive legislative schemes for same-sex couples'⁵²⁴.

⁵¹⁷ *Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Norris v Ireland* (1989) 13 EHRR 186.

⁵¹⁸ E.g. *Smith and Grady v UK* (1999) 29 EHRR 493.

⁵¹⁹ Grigolo 2003.

⁵²⁰ *Karner v Austria* 24 July 2003 (2004) 38 EHRR 24.

⁵²¹ *EB v France* (2008) 47 EHRR 21.

⁵²² *Fretté v France* (2002) 38 EHRR 438.

⁵²³ *Schalk and Kopf v Austria* [2010] ECHR 30141/04.

⁵²⁴ Scherpe 2010, p. 465.

The EU did not have expressly conferred competence to legislate against sexual orientation discrimination until the Treaty of Amsterdam. Before then, the CJ refused to treat sexual orientation discrimination as sex discrimination, notwithstanding UN Human Rights Committee (UNHRC) jurisprudence in *Toonen v Australia*⁵²⁵, to support this position. The CJ noted that the UNHRC was 'not a judicial institution' and that its 'findings [had] no binding force in law'⁵²⁶. In contrast, it had taken Strasbourg jurisprudence into account in treating discrimination on grounds of transsexuality as sex discrimination, invoking notions of human dignity⁵²⁷. With the Framework Directive⁵²⁸, an express legislative prohibition of discrimination on grounds of sexual orientation in the workplace has now been adopted. In *Maruko*⁵²⁹, a case under the Framework Directive, the CJ held that where national law created two separate statuses of heterosexual marriage and same-sex partnership, couples should be treated equally in the workplace if national judges deemed the statuses to be equal.

The EU has little legislative competence over family law and therefore cannot take the lead on the creation of a status for same-sex couples. However, in defining those family members who enjoy rights under the EU Citizenship Directive and Family Reunification Directive⁵³⁰, the EU legislature has taken a restrictive approach. 'Family member' under the Citizenship Directive includes non-married partners with whom EU Citizens have 'contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member States treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State' (Article 2(2)(b) Directive 2004/38/EC). Although this provision depends on such a status existing in the laws of the home and host state, it goes some way to closing a long-recognised gap in EU protection⁵³¹. In addition, Member States are obliged to 'facilitate entry and residence for the partner with whom the Union citizen has a durable relationship,

⁵²⁵ *Toonen v Australia* (Communication No 488/1992).

⁵²⁶ C-249/96 *Grant v South West Trains* [1998] ECR I-621, para 46.

⁵²⁷ C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143; C-117/01; *KB v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-541.

⁵²⁸ Council Directive 2000/78/EC (Framework Directive) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

⁵²⁹ Case C-267/06 *Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757.

⁵³⁰ Directive 2004/38/EC Of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States OJ L 229/35; Council Directive 2003/86 of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

⁵³¹ Toner 2004.

duly attested' (Article 3(2)(b) Directive 2004/38/EC), a broader formulation which is not linked to the national legislation. In contrast, the Family Reunification Directive only provides for spousal migration for third-country nationals. EU law thus contributes to unequal treatment as well as seeking to combat it. In practice, as a recent FRA Study indicates, some Member States have more liberal rules than the EU requires, but 'an uneven landscape' persists with respect to freedom of movement and family reunification for same-sex couples⁵³².

⁵³² Fundamental Rights Agency (2010) Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity: 2010 Update legal report (FRA: Vienna).

Annex 5: The Dublin System - EU Mutual Recognition and the ECHR

The Dublin Regulation⁵³³ aims to allocate responsibility for processing asylum claims within the EU to a single EU Member State. However, in assigning responsibility to a single Member State, the system is premised on a commonality of standards of protection that does not exist, as has been recognised by the CoE Parliamentary Assembly in 2009⁵³⁴. The Dublin Regulation is but one example of an EU system where Member States' EU law duties of mutual recognition may be in tension with effective protection of human rights⁵³⁵.

The reality of the EU-wide 'protection lottery' means that asylum seekers often resist transfer to other EU States, often invoking the protections of the ECHR when they are in danger of mistreatment in detention, lack of access to fair procedures, or onward transfer to a dangerous country. If domestic courts fail to protect them, they often make interim applications to the Strasbourg Court. It is no exaggeration to say that the ECtHR has been inundated with such cases. As of 15 June 2010 there were approximately 1.450 Dublin Regulation Rule 39 requests pending before the ECtHR⁵³⁶. The Dublin system, the creation of the EU, has become a drain on the Strasbourg resources. In a dubious ruling, the ECtHR in *KRS v UK* seemed to permit blind trust between EU Member States in implementing Dublin returns⁵³⁷.

However, on 21 January 2011, the Grand Chamber of the ECtHR in *MSS v Belgium and Greece* clarified the human rights duties of EU Member States when considering whether to transfer asylum seekers across the EU⁵³⁸. Notable in the case are the range of interventions, not only by governments (Netherlands and UK), but also by the European Commissioner for Human Rights, UNHCR, the Aire Centre, Amnesty International and the Greek Helsinki Monitor. The ECtHR clarified that Belgium had to carry out a careful scrutiny of the conditions in Greece and the danger of onward removal, finding violations of both Articles 3 (due to the conditions in Greece for

⁵³³ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. *Official Journal L 050*, 25/02/2003 P. 0001 - 0010.

⁵³⁴ Council of Europe Parliamentary Assembly (2009) Resolution & Report on Quality and Consistency of Asylum Decisions, Doc. 11990, 15 July 2009.

⁵³⁵ De Schutter 2006.

⁵³⁶ Letter of 23 June 2010 from TL Early, Section Registrar, ECtHR to AIRE CENTRE (on file with the authors).

⁵³⁷ *KRS v UK* (2008) Application No 32733/08.

⁵³⁸ *MSS v Belgium and Greece* (2011) Application No 30696/09.

asylum seekers and the danger of onward removal due to failings in the Greek asylum system) and 13 (right to an effective remedy as Belgian courts were not empowered to assess these risks properly) in the particular case.

Meanwhile, the UK High Court has referred questions to the CJ on this issue⁵³⁹. The CJ should follow the ECHR at a minimum, and also give effect to the right to asylum under Article 18 of the Charter. The Charter breaks new ground in referring to a right to asylum rather than to seek asylum⁵⁴⁰. It refers to the right to asylum which 'shall be guaranteed with due respect for the rules of the [Refugee Convention] and in accordance with the EC Treaty'.

The EU legislature is currently recasting the Dublin Regulation, and we support the contention that it is 'time for fundamental rethink given 'wholly new institutional setting,' being the co-decision powers of the European Parliament⁵⁴¹.

⁵³⁹ *NS v SSHD* pending.

⁵⁴⁰ *Gil-Bazo* 2008.

⁵⁴¹ Maiani and Vevsted 2009, p. 5.

Annex 6: Detention of Migrants

Dynamic interplay between human rights systems is evident in the law on immigration detention. In this annex, we identify some of the many interactions between UN, CoE and EU systems on this issue.

There is extensive UNHRC jurisprudence on immigration detention. For example, in *A v Australia*⁵⁴², the UNHRC condemned the prolonged detention of an asylum seeker as breaching the International Covenant on Civil and Political Rights (ICCPR). The UNHRC stressed the importance of periodic review of detention in order to assess the cogency of the grounds for detention. It also stated that:

'the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal'⁵⁴³.

The UN Human Right Committee also stressed the importance of effective remedies, and that reviewing bodies should be empowered to order release from illegal detention⁵⁴⁴.

Article 31 of the Refugee Convention prohibits states from penalising asylum seekers for illegal entry or presence. It provides:

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

⁵⁴² *A v Australia* (Communication No 560/1993).

⁵⁴³ *A v Australia* (Communication No 560/1993) Paragraph 9.4.

⁵⁴⁴ *A v Australia* (Communication No 560/1993) Paragraph 9.5.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Whilst the interpretation of Article 31 is contested, it is generally accepted that automatic detention of asylum seekers violates Article 31, as is reflected in UNHCR's Revised Guidelines on Detention of Asylum Seekers⁵⁴⁵.

Article 5(1)(f) ECHR distinguishes two forms of migration-related detention, namely 'lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country' and detention 'of a person against whom action is being taken with a view to deportation or extradition'.

The ECtHR did not get the opportunity to clarify the first limb until in *Saadi v UK*⁵⁴⁶. The decision has been criticised for failing to give full effect the Refugee Convention, in that it permits States to treat asylum seekers as 'unauthorised' entrants and detain them for administrative purposes. The partly Dissenting Opinion of Judges Rozakis, Tulkens, Kovler, Hajiyeve, Spielmann and Hirvel set out powerful counterarguments. First, they noted that the majority treated without distinction various categories of non-nationals. Concerning the majority's statement that the power to detain was an adjunct of the 'undeniable sovereign right' to control aliens' entry, they stated that:

'In such a radical form, this statement sits uncomfortably with the principle that asylum seekers who have presented a claim for international protection are ipso facto lawfully within the territory of the State, in particular for the purposes of Article 12 ICCPR and the case-law of the [UNHRC]'.

⁵⁴⁵ UNHCR (1999) Revised Guidelines on Detention of Asylum Seekers 1999 (UNHCR: Geneva); see generally Goodwin-Gill 2003.

⁵⁴⁶ *Saadi v United Kingdom* (2008) 44 EHRR 50.

In *Chahal v UK* 1995⁵⁴⁷, concerning pre-removal detention, the Court permitted detention once it was for a 'reasonable length of time', which would be assumed provided that deportation proceedings were in progress, even if for years. Under both limbs of Article 5(1)(f), the ECtHR leaves much leeway for states to detain, subject to individual assessment.

The EU has now legislated on both forms of detention. The Reception Conditions Directive (RCD) and Procedures Directive (PD) refer to detention of asylum seekers, although in a regrettably oblique manner⁵⁴⁸. Article 7(3) RCD states that 'when it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.' Article 18(1) PD states baldly that detention should not be for the sole reason that the individual is an applicant for asylum.

In November 2010, the Commission announced its intention to submit in 2011 amended proposals for recasts of the RCD and PD⁵⁴⁹. However, until the new proposals emerge, the EP's legislative deliberations on the previous proposals⁵⁵⁰ continue, although there does not appear to be adequate support in the Council for their adoption. The LIBE Committee recently examined the draft report on the Recast Procedures Directive⁵⁵¹ and also debated the recast Reception Conditions Directive.⁵⁵² Both measures are subject to the ordinary legislative procedure, providing the Parliament with a crucial opportunity to ensure EU standards do not violate or erode the requirements of international human rights law.

⁵⁴⁷ *Chahal v UK* (1997) 23 EHRR 413.

⁵⁴⁸ Council Directive 2003/9 of 27 January 2003 (Receptions Conditions Directive) laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18; Council Directive 2005/85/EC (Procedures Directive) of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.

⁵⁴⁹ Council of the European Union, Press Release 15848/10, Justice and Home Affairs Council Meeting, 8 and 9 November 2010.

⁵⁵⁰ Commission Proposal for a Directive laying down minimum standards for the reception of asylum seekers (recast) COM(2008) 815; Commission Proposal for a Directive of the European Parliament and the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast) COM(2009) 554, 21 October 2009.

⁵⁵¹ Draft Report on the Proposal for a Directive of the European Parliament and the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast) COM(2009) 554, Rapporteur: Sylvie Guillaume, 2009/0165(COD), 15 December 2010.

⁵⁵² Committee on Civil Liberties, Justice and Home Affairs (LIBE), Proceedings P3C050, Brussels, 10 January 2011.

The Return Directive (RD) deals with pre-deportation detention⁵⁵³. We note the deep legal and political controversy concerning its impact on human rights⁵⁵⁴. It embodies some standards which are dubious from a human rights perspective. However, in some respects, it establishes higher standards than the ECHR case law, as is exemplified in the CJ's ruling *Kadzoev*⁵⁵⁵. This terse ruling, issued under the new urgent preliminary reference procedure, sets out some important limiting principles concerning the duration of detention and due process, which contrast with *Chahal*. However, it does not explicitly address the international human rights law background.

In some respects, the ECtHR seems to have fallen below ICCPR and Refugee Convention standards. EU legislation in this field is ambiguous, so the CJ has been, and will inevitably continue to be called upon to determine the legality of migration-related detention and protect human rights in this crucial field. Immigration detainees now have EU legal protections and may rely on both EU general principles and the Charter. The CJ and national judges must give effect to these commitments, as well as the ECHR, when dealing with claims from detainees.

A recent FRA report identifies the intertwined fundamental rights standards concerning pre-deportation detention, and the desirability for further national and EU legislation and greater access to courts to prevent arbitrary detention⁵⁵⁶.

⁵⁵³ Directive 2008/115 (Return Directive) of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

⁵⁵⁴ Acosta 2009; Baldacini 2010.

⁵⁵⁵ Case C-357/09 *Kadzoev v Direktsia 'Migratsia' pri Ministerstvo na vatreshnite raboti* [2009]; See Mincheva 2010.

⁵⁵⁶ Fundamental Rights Agency (2010) Detention of Third-Country Nationals in Return Procedures (FRA: Vienna).

Annex 7: Refugee Protection

Dynamic interplay between human rights systems is evident in the law on refugee protection. Some of the many interactions between the Refugee Convention, UN, CoE and EU human rights standards are illustrated in this Annex, focusing on protection against return to human rights violation, or non-refoulement. This field has been subject of extensive legal analysis both pre- and post-Amsterdam⁵⁵⁷.

The Refugee Convention is the global instrument of refugee protection, to which all EU Member States are parties, protecting refugees against refoulement in cases of persecution on Convention grounds, being 'race, religion, nationality, political opinion or membership of a particular social group'. While the Universal Declaration of Human Rights refers to 'the right to seek and enjoy asylum'⁵⁵⁸, the Charter contains a right to asylum⁵⁵⁹, of potentially great legal significance⁵⁶⁰.

The ECtHR has developed a non-refoulement jurisprudence, incorporating this age-old principle into its interpretation of Art 3 ECHR⁵⁶¹, also taking inspiration from THE Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment (CAT). Article 3(1) CAT provides that 'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. Recourse to the ECtHR became commonplace for failed asylum seekers, with the ECHR system offering 'comparative enforcement advantages' over the Refugee Convention⁵⁶². The ECtHR's non-refoulement case-law has focused on those facing a real risk of treatment contrary to Article 3 ECHR on return, although 'flagrant breaches' of other ECHR rights may prevent removal. The ECtHR has explicitly

⁵⁵⁷ Noll 2000; Battjes 2006.

⁵⁵⁸ Article 14(1) UDHR.

⁵⁵⁹ Article 18 Charter.

⁵⁶⁰ Gil-Bazo 2008.

⁵⁶¹ e.g. *Soering v United Kingdom* (1989) 11 EHRR 439.

⁵⁶² Lambert 1999.

recognised this possibility for the rights enshrined in Articles 2⁵⁶³, 4⁵⁶⁴, 5⁵⁶⁵, 6⁵⁶⁶, 7⁵⁶⁷, 8⁵⁶⁸ and 9⁵⁶⁹.

The ECtHR's Article 3 EHCR case law has evolved significantly over time, from *Vilvarajah v UK* in 1992 to *Salah Sheekh v The Netherlands* in 2007 and *NA v UK* in 2008⁵⁷⁰. The earlier cases tended to demand a high degree of individuation of risk, in a way that denied protection to many deserving refugees. As Durieux explains 'the coexistence of the two systems [the Refugee Convention and ECHR] appears to have aggravated the restrictive tendencies of both – in other words, competition between the two systems has resulted in constraining the protection opportunities of asylum seekers, instead of amplifying them'⁵⁷¹.

Council Directive 2004/83 (Qualification Directive) elaborates an EU definition of persecution, stated to be 'within the meaning of Article 1A of the [Refugee Convention]'⁵⁷². The central notion of persecution is a 'severe violation of basic human rights', introducing the notion of hierarchy of rights and violations into the concept of persecution. In addition, Council Directive 2004/83 introduces a Subsidiary Protection status for those whose removal risks serious harm⁵⁷³. Serious harm is defined as arising in any one of three situations: Article 15(a) refers to 'death penalty or execution', while 15(b) refers to 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin'. Council Directive 2004/83 thus protects only some of those who are non-removable under the ECHR. In addition, Article 15(c) Council Directive 2004/83 refers to 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict', providing protection additional to both the

⁵⁶³ *Bader v Sweden* [2005] ECHR 13284/04.

⁵⁶⁴ *Ould Barar v Sweden* 28 EHRR CD 213.

⁵⁶⁵ *Tomic v United Kingdom* [2003] ECHR 17837/03.

⁵⁶⁶ *Soering v United Kingdom* (1989) 11 EHRR 439; *Drozdz and Janousek v France and Spain* (1992) 14 EHRR 745; *Mamatuklov and Askarov v Turkey* [2005] ECHR 165; *Einhorn v France* [2001] ECHR 275; *Al-Moayad v Germany* (2007) 44 EHRR 22.

⁵⁶⁷ Mole 2010.

⁵⁶⁸ *F v United Kingdom* (2004) Application No 17341/03 (unreported).

⁵⁶⁹ *Z and T v UK* (2006) Application No 27034/05.

⁵⁷⁰ *Vilvarajah v UK* (1992) 14 EHRR 248; *Salah Sheekh v The Netherlands* (2007) Application No 1948/04; *NA v UK* (2008) Application No 25904/0726565/05.

⁵⁷¹ Durieux, 2008, 9.

⁵⁷² Article 9 Council Directive 2004/83 (Qualification Directive) of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L/304/12.

⁵⁷³ Article 2(e) Council Directive 2004/83.

Refugee Convention and ECHR, as confirmed by the CJ in *Elgafaji* in 2009⁵⁷⁴. However, Article 15(c)'s effectiveness is undermined by its convoluted drafting.

One worrying tension between EU law and the ECHR is manifest in the broad grounds for exclusion from Subsidiary Protection under Article 17 Council Directive 2004/83. The background to this provision illustrates the pitfalls of EU harmonisation and the fact that overlapping human rights systems offer governments enhanced opportunities to seek to roll back human rights protections. Case law under Article 3 ECHR is clear that protection against removal is not subject to any national security limitation⁵⁷⁵. However, during the drafting of Council Directive 2004/83, the UK and, at its urging, several other States intervened in cases before the ECtHR, inviting it to reconsider its ruling in *Chahal*⁵⁷⁶. Unsurprisingly the governmental interventions provoked counter-interventions, although notably by NGOs rather than other governments⁵⁷⁷. The ECtHR in *Saadi v Italy*⁵⁷⁸ reasserted *Chahal*, ruling out the possibility of 'balancing' national security concerns against the absolute prohibition on removal to face torture⁵⁷⁹.

Council Directive 2004/83 cannot permit Member States to breach the ECHR. Nonetheless, as Gilbert notes, 'the worst aspect of Article 17 is that it undermines the absolute prohibition on surrender to face torture'⁵⁸⁰. All in all, while Council Directive 2004/83 has enhanced refugee protection in some respects, it is also in tension with the Refugee Convention and ECHR in others. It also raises many interpretative uncertainties and has been implemented in divergent ways across the Member States⁵⁸¹.

Like the other asylum measures, the EU legislature is currently recasting Council Directive 2004/83⁵⁸², and the European Parliament is urged to use its co-decision

⁵⁷⁴ Case C-465/07 *Elgafaji v Staatssecreteris van Justitie* [2009].

⁵⁷⁵ *Chahal v UK* (1997) 23 EHRR 413.

⁵⁷⁶ See the Observations of the Governments of UK, Lithuania, Portugal and Slovakia in *Ramzy v the Netherlands* (2005) Application No 25424/05 and *Ramzy v Netherlands* (2008) Application No 25424/05). When the case of *Saadi v Italy* (App. No. 37201/06 222) leapfrogged *Ramzy* in the ECtHR's list, the interveners requested that their interventions be considered in *Saadi v Italy* instead. See further Gil-Bazo 2007, p. 255; Duffy 2008, pp.585–6.

⁵⁷⁷ Amnesty International, Association for the Prevention of Torture, Human Rights Watch, Interrights, International Commission of Jurists, Open Society Justice Initiative and Redress.

⁵⁷⁸ *Saadi v Italy* App. No. 37201/06 222.

⁵⁷⁹ Moeckli 2008.

⁵⁸⁰ Gilbert, 2004, 979-980.

⁵⁸¹ UNHCR 2007.

⁵⁸² Commission Proposal of 21 October 2009 for a Directive of the European Parliament and of the Council

powers not only to ensure full compliance with existing human rights norms, but also to ensure EU law contributes to their progressive development.

on on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted COM(2009) 551 final.

Annex 8: National Human Rights Institutions

State	NHRI
Albania	Republic of Albania People's Advocate
Armenia	Human Rights Defender of Armenia
Azerbaijan	Human Rights Commissioner (Ombudsman)
Bosnia and Herzegovina	Human Rights Ombudsman of Bosnia and Herzegovina
Croatia	Ombudsman of the Republic of Croatia
Denmark	Danish Institute for Human Rights
France	Commission Nationale Consultative des Droits de L'homme
Georgia	Public Defender's Office
Germany	Deutsches Institut für Menschenrechte
Scotland	Scottish Human Rights Commission
Serbia	Protector of Citizens of the Republic of Serbia
Spain	El Defensor del Pueblo
Ukraine	Ukrainian Parliament Commissioner for Human Rights
Great Britain	Equality and Human Rights Commission
Greece	National Commission for Human Rights
Ireland	Irish Human Rights Commission
Luxembourg	Commission Consultative des Droits de L'homme du Grand-Duché de Luxembourg
Norway	Center for Human Rights
Northern Ireland (UK)	Northern Ireland Human Rights Commission
Poland	Commissioner for Civil Rights Protection
Portugal	Provedor de Justiça
Russia	Commissioner for Human Rights in the Russian Federation

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