

Beyond the Charter: How Enlargement has enlarged the Human Rights Policy of the EU

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1. Introduction

In recent years a number of significant legal changes in the landscape of human rights protection in the European Union has taken place. Since 2000, the great majority of commentators has focused on the significance of the Charter of Fundamental Rights which was drafted and proclaimed in that year,¹ on its subsequent reception by the EU legal and political community,² and more recently still on the debate which took place within the Convention on the Future of Europe³ about its proper role within a new European constitutional settlement.⁴ However, the potential of the Charter as a robust instrument of human rights protection has been undermined in part by the provisions inserted as a result of the intense political focus upon certain of its key provisions both at the drafting stage and again during the proceedings of the so-called constitutional Convention. The twin political concerns with limiting the potential of the Charter to expand or alter the powers of the EU on the one hand, and limiting the justiciability of certain of its provisions on the other hand, have sapped its vitality as a legal instrument in various ways. The contention of this article, however, is that a number of other developments have taken place which - in mostly unanticipated ways - may contribute more to strengthening the scope and shape of EU human rights policy than the Charter alone.

In particular, two developments have combined in recent years to open the way for a more general and comprehensive human rights policy which, while less concerned with the contentious ‘competence’ and ‘justiciability’ debates generated by the Charter of Fundamental Rights, is already beginning to manifest itself in interesting ways. The first of these developments was the shaping of a more principled and graduated ‘crisis-response’ procedure for the suspension of the rights of Member States in response to

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¹ Official Journal of the EC [2000] C 364/1. For accounts of the process, see T. Goldsmith “A Charter of Rights, Freedoms and Principles” (2001) 38 CMLRev 1201 and G. de Búrca “The Drafting of the EU Charter of Fundamental Rights” (2001) 26 E.L.Rev. 126.

² See e.g. J. Morijn, “Judicial Reference to the EU Fundamental Rights Charter” http://europa.eu.int/futurum/documents/other/oth000602_en.pdf, and more generally P. Craig and G. de Búrca, *EU Law* (3rd edn). p 362.

³ This Convention took place between February 2002 and July 2003, and most of the official documents relating to the proceedings of the Convention and its working groups are to be found on a dedicated website, <http://european-convention.eu.int/>.

⁴ See in particular the final report of Working Group II on Incorporation of the Charter and Accession to the ECHR, CONV 354/02, available on the website listed at n 3. The recommendations of the Working Group were adopted practically in their entirety by the Convention presidency and plenary, and the Charter was incorporated into part II of the draft constitutional treaty presented by the Convention at the conclusion of its work: see CONV 850/03.

serious and persistent violations of human rights. This was one of the unanticipated consequences of the ‘Haider affair’ in 2000 when the governments of the EU Member States reacted hastily to the entry into coalition government of an extreme right-wing party in Austria.⁵ The second was the introduction of an unprecedented degree of scrutiny of human rights performance of prospective Member States which served to highlight the familiar ‘double-standards’ critique in relation to the EU’s internal and external policies,⁶ and provided a major impetus to the development of more effective ongoing monitoring and coordination arrangements

The EU, in other words, has been hoist on its own petard, and the combined influence of these events has arguably triggered the initiation of what could become the kind of comprehensive human rights monitoring which has been called for by various reform proposals over the years⁷ but largely ignored by the Council and until recently by the Commission. It may also have triggered the emergence of an embryonic ‘open method of coordination’ (OMC), as this particular new mode of governance has become known,⁸ to develop and promote amongst the Member States an observance of the standards contained in the Charter of Fundamental Rights.⁹ These arguments will be developed further below.

2. The characteristics of a human rights system

There are three principal features of a functioning international human rights system.

The *first* and perhaps the most visible is the normative-judicial dimension. This means that the norms of human rights protection are agreed, articulated and inscribed in legal form, whether in a treaty, a bill or charter of rights, a constitution or other special legislative measure, and that some degree of judicial or quasi-judicial oversight is established. The content of the particular norms may vary, as may the nature of the legal instrument in which they are contained, and more specifically the nature and degree of judicial power to enforce the norms, but this is nonetheless a central characteristic of

⁵ The reference is to Jorg Haider, who was leader of the Austrian Freedom Party (FPÖ), which was invited into coalition government with the conservative People’s Party in 2000. See M. Merlingen, C Muddle and U. Sedelmeier ‘The right and the righteous? : European norms, domestic politics and the sanctions against Austria’ (2001) 39 JCMS 59.

⁶ For accounts of this double-standards charge, see e.g. P. Alston and J.H.H. Weiler “An ‘ever closer union’ in need of a human rights policy” in *The EU and Human Rights*, P. Alston, M. Bustelo and J.Heenan, eds, (Oxford: OUP, 1999) “A Williams “Enlargement of the Union and Human Rights conditionality: a policy of distinction?” (2000) 25 ELRev 601

⁷ See e.g. Alston and Weiler, n.6 above, also the conclusions of the ‘three wise men’ report into the situation of Austria following the Haider affair: Report of M. Ahtisaari, J. Frowein and M. Oreja on 8 September 2000, and the annual report of the European Parliament on Fundamental Rights in the European Union for 2000-2001, A-5 223/2001 adopted on 5 July 2001. See also points 4- of the introduction to the Parliamentary Committee Report on Fundamental Rights in the EU for 2002-3, A-5 281/2003.

⁸ See M. Rodrigues “The Open Method of Coordination as a New Governance Tool”, 2001, available online at the University of Wisconsin OMC Forum, <http://eucenter.wisc.edu/OMC>

⁹ See the proposal made in the first report on fundamental rights in the EU of the network of experts on fundamental rights, [Http://europa.eu.int/comm/justice_home/cfr/doc/rapport_summary_2002_en.pdf](http://europa.eu.int/comm/justice_home/cfr/doc/rapport_summary_2002_en.pdf), published in March 2003.

most functioning human rights systems. To give the key examples, the United Nations' Human Rights Committee established under the International Covenant on Civil and Political Rights has quasi-judicial powers in relation to individual complaints, the European Court of Human Rights (which replaced the two-tier system previously consisting also of a quasi-judicial Commission) is a crucial component of the European Convention system, the Inter-American system has both a Commission and a Court,¹⁰ and a recent Protocol to the African Charter on Human and Peoples' Rights¹¹ envisages the establishment of a Court with possible jurisdiction to hear individual complaints, to complement the promotional role of the existing Commission.¹²

The *second* characteristic of human rights systems is the existence of some form of systemic monitoring of the observance or non-observance of human rights commitments. This is generally a routine exercise in information-gathering, whether by a specially created monitoring body, by a parliamentary or expert committee or otherwise, and its function is to provide an ongoing picture of the extent of compliance with the normative guarantees which have been established and agreed. Again, there may be variance in the nature and resources of the monitoring body, in the means by which and the sources from which information is gathered or supplied, and in the frequency of the process, but some form of periodic monitoring is a key element of a functioning international human rights system.

The *third* characteristic is the existence of a mechanism for responding to crises, in other words a method by which effective action can be taken in response to evidence of a serious violation of human rights standards. This will normally be some form of sanction or other intervention designed to bring the violation to an end. The effectiveness of a human rights system generally depends on the relative strength of these different features and on their capacity over time to instil a culture and an environment of respect for human rights in the functioning of day-to-day political and social life.

When we examine the human rights system of the European Union, we find a system that is still emergent, if not embryonic. As will be seen below, there was originally an implicit division of functions between the Council of Europe and the European Community respectively, so that the EC until relatively recently played little or no role in relation to the establishment or protection of human rights. What has become evident in particular since the establishment of the European Union in the 1990s, however, is that the EU is increasingly developing a human rights system of its own, in addition to, perhaps complementary to, but distinct from that of the Council of Europe. And as far as

¹⁰ See J. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press, 2003)

¹¹ See M. Evans and R. Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (Cambridge University Press, 2002)

¹² See Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. The rate of ratification of this protocol has so far been slow, but see the Final Communiqué of the Conference for West African states on the Protocol for the establishment of the African Court on Human and Peoples' Rights, Niamey, Niger Republic, 28-29 May 2003

the three characteristics identified above are concerned, the picture emerging in relation to the EU system is an interesting one. As will be discussed in further detail below, the normative dimension, clearly evident in the drafting and proclamation of the Charter of Fundamental Rights, is rendered ambiguous and contingent both by the postponement of a decision on the Charter's legal status, as well as by the apparent decision to discriminate in terms of justiciability between economic and social rights as compared with civil and political rights. However, the second and third elements, the monitoring and crisis-response elements respectively, which have developed in less clearly anticipated and more organic ways, suggest that the EU's human rights system contains the promise of a possibly stronger and more effective regime than most existing international and regional human rights systems.

Even as it expands to twenty-five members, the closeness of relations between member states of the EU and the nature of the political community established amongst them means that the conduct of any one state is of greater concern to all others than is generally true of the international community of states, and national sovereignty concerns over 'external intervention' are less stark and less compelling within the EU. In this sense, the development of an effective response mechanism, in particular following the lessons of the Haider affair, is likely to be a higher priority and a more realistic prospect than in the case of other regional systems, or of the international system in general. Rather than the choice which faces looser organizations of states, between inadequately effective attempts at mediation and influence on the one hand and drastic mechanisms such as suspension or expulsion from membership, or resort by the international community to the use of force in extreme situations, the EU has both the incentive and the means to develop more graduated response mechanisms in relation to its own member states. Further, the gradual emergence of human rights monitoring mechanisms in the EU, where other experiments with monitoring and benchmarking processes are being developed in a number of social and economic policy fields,¹³ has the potential to go beyond what other international human rights systems have so far done, by developing the information-gathering and monitoring process into a genuine exercise in mutual learning, reflexive standard-setting, and articulation of best practices.

3. Evolution of the EU's human rights role: the orthodox account

The familiar account of the EU's engagement with human rights issues tells us that while the Council of Europe and its leading instrument, the European Convention on Human Rights (ECHR), were established in 1949 with the primary purpose of promoting human rights, democracy and the rule of law, the European Communities subsequently founded in the 1950s were almost entirely devoted to economic integration and left the task of human rights protection to the broader sister organization in Strasbourg.¹⁴ In so far as

¹³ See below, at nn 85-87 and accompanying text.

¹⁴ For early and comprehensive accounts of the emergence of human rights –in EC parlance 'fundamental rights' - as an EC concern, see A. Clapham "A Human Rights Policy for the EU" (1990) 10 Yearbook of European law 309, and A. Cassese, A. Clapham, and J. Weiler, (eds.), *European Union: The Human Rights Challenge* (Nomos, 1991)

human rights issues made their way onto the EC's agenda, this was mostly in a reactive response by the European Court of Justice to challenges posed to its authority by national constitutional courts which were concerned about the standards of protection in EC law for domestic constitutional rights.¹⁵ The question of accession by the EC to the ECHR was raised on various occasions, in particular by the European Commission,¹⁶ but never found favour with the Member States. Between the 1970s and the 1990s, the ECJ went on to deliver a handful of judgments which touched on issues relating to fundamental rights (mostly rights to property and to trade, and procedural rights in competition cases), and the then relatively weak European parliament regularly voiced its opinion on international and domestic human rights issues,¹⁷ but otherwise the EC's role in promoting or protecting human rights at home or abroad remained minor.

The official and orthodox statement on the position of human rights within the EU was made by the Court of Justice in its 1996 Opinion on Accession to the European Convention on Human Rights,¹⁸ in which it declared that although respect for human rights was a "condition for the legality" of EU action, the EC had no specific competence to adopt general rules on human rights, and its residual powers clause in Article 308 (formerly 235) of the Treaty could not be misused in order to do so. In the particular case at hand, the Court took the view that to use Article 308 in order to facilitate the EC's accession to the ECHR would bring about such fundamental institutional changes that it would constitute a de facto amendment of the Treaty, without using the appropriate procedure for amendment. This statement in fact remains the orthodox position, and in the absence of any final settlement on the Charter and on the draft constitutional treaty produced by the Convention on the Future of Europe, it currently has two dimensions: first, that the EU lacks general competence to act in the field of human rights¹⁹ and has specific competence only as a dimension of a restricted range of external policies and in its internal anti-discrimination policy²⁰; and secondly that Member States are only subject to the European Court of Justice's interpretation of human rights requirements when they are acting within the 'scope of EC law', in particular when they are implementing EU laws.²¹ The EU therefore has no general human rights role, and the Member States are

¹⁵ The classic line of case law announcing the European Court of Justice's concern for fundamental human rights is 29/69, *Stauder v. City of Ulm* [1969] ECR 419, *Internationale Handelsgesellschaft v. Einfuhr-und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125 and 4/73, *Nold v. Commission* [1974] ECR 491, and the famous German case which challenged the stance of the European Court was the so-called 'Solange I' decision, given by the Bundesverfassungsgericht in 1974, [1974] 2 CMLR 540.

¹⁶ Memorandum of 4 April 1979, Bulletin of the European Communities Supplement 2/79.

¹⁷ See also the Declaration of Fundamental Rights and Freedoms made by the European Parliament in 1989, [1989] Official Journal C120/51.

¹⁸ Opinion 2/94 [1996] ECR I-1759.

¹⁹ However, the general residual powers clause in Article 308 (ex 235) of the EC Treaty can be and has been used to enact a number of human rights measures which are seen to fall within the EU's proper remit, in particular the establishment of the Vienna Monitoring Centre for Racism and Xenophobia, see Council Regulation 1035/97 [1997] OJ L151, and the establishment of a program on democratization and human rights in external cooperation policy by Regulation 976/1999, OJ 1999 L 120/8.

²⁰ See Article 177 EC on development policy, Article 13 EC on anti-discrimination measures and most recently Article 181a on cooperation policy. The use of human rights clauses in external trade agreements concluded by the EC under Article 133 of the Treaty has been said to be based on international law.

²¹ For the ECJ case law on this point, see Case 5/88, *Wachauf v. Germany* [1989] ECR 2609, C-260/89, *ERT v DEP* [1991] ECR I-2925 and C-292/97, *Karlsson* [2000] ECR I-2737, and for the ambiguous

not subject to EU or ECJ jurisdiction in relation to human rights matters except within a relatively circumscribed context.

4. The EU's legitimacy deficit: rediscovering human rights discourse through the Charter of Rights

Momentum for broadening the EU's discourse on human rights came, however, after the pivotal moment of the Maastricht Treaty on European Union (TEU) in 1992. This treaty, which moved definitively beyond the previous step-by-step and largely functionalist approach to integration and took the radical step towards economic and monetary union, as well as some steps in the direction of political union, at the same time accompanied and precipitated the first real signs of a popular legitimacy crisis.²² The significance of Maastricht as a turning-point and the growing articulation of popular opposition to the EU over the past decade is a story which has been told many times. Its particular relevance for present purposes, however, is that at a certain point in the 1990s, the Member States and the Commission began to have recourse to the language and discourse of human rights as one of several strategies for responding to criticisms of the EU, to its perceived legitimacy deficit, and to the lack of popular support or 'citizen-identification' with its policies.²³ At least three ad-hoc *comités des sages*, or so-called groups of wise persons, were appointed at different times and asked to present reports on various aspects of human rights in the EU: the 1996 Comité des Sages report on civic and social rights,²⁴ the 1998 Comité des Sages "Leading by Example" report on a human rights agenda for the EU,²⁵ and the 1999 expert committee report on fundamental rights in the EU chaired by Spiros Simitis.²⁶

While the 1998 report in particular emphasised the incoherence and the double standards practised by the EU as between its external and internal policies,²⁷ and stressed the need for a comprehensive human rights policy with adequate monitoring mechanisms, but saw no particular value in having a specific EU bill of rights,²⁸ the Simitis report on the other

codification of this case law by the Charter, see Article 51 thereof, together with the explanatory memorandum to the Charter. For further discussion, see G. de Búrca, n. 1 above.

²² See J.H.H. Weiler 'Fin de Siècle Europe' in R. Dehousse (ed.) *Europe after Maastricht. An Ever Closer Union?* (Munich: Law Books in Europe, 1994), J. Lodge 'Transparency and Democratic Legitimacy' (1994) 32 *JCMS* 343.

²³ See also G. de Búrca 'The Language of Rights and European Integration' in J. Shaw and G. More (eds) *New Legal Dynamics of European Union* (OUP, 1996).

²⁴ 1996 Final Report by the committee chaired by Maria de Lourdes Pintasilgo, 'For a Europe of Civic and Social Rights'. See also the Report of the High Level Panel on the Free Movement of Persons, commissioned by the European Commission and chaired by Simone Veil, which was presented on 18 March 1997.

²⁵ This report was commissioned by the external relations Directorate General of the Commission at the time, and it resulted in a human rights 'agenda' signed by A. Cassese, C. Lalumiere, P. Leuprecht and M. Robinson together with a report and an accompanying volume of essays by P. Alston, M. Bustelo and J. Heenan (eds) *The EU and Human Rights* (OUP, 1999).

²⁶ *Affirming Fundamental Rights in the EU: Time to Act*, Report of the Expert Group on Fundamental Rights, February 1999.

²⁷ These criticisms were subsequently acknowledged by the Council in its Annual Report on Human Rights 2000.

²⁸ See further J. Weiler "Does the European Union Truly Need a Charter of Rights?" (2000) 6 *ELJ* 95.

hand recommended the adoption of a bill of rights for the EU. It was on this latter proposal which the EU presidency seized, in 1999, as one of the ways of seeking to 'bring the EU closer to its citizens'. Under the German presidency of the Union the European Council called, at its Cologne summit in 1999, for the establishment of a body (which later named itself the Convention) which was then charged with the task of drawing up a charter of rights for the EU,²⁹ with the apparent intention of showcasing what the EU was already committed to without needing to introduce any real change or any new institutions or mechanisms.

This indeed, was largely what occurred when the finalised Charter, backed up by political support from the heads of state and government, was 'proclaimed' by the Council, Commission and Parliament at the Nice European Council summit in 2000. What can be seen both in the provisions of the Charter itself, but even more starkly in the proceedings of the Convention on the Future of Europe which followed in 2002-3,³⁰ is a high degree of political anxiety about the potential impact of the Charter on the ever-elusive sovereignty of the Member States, and a determination to neutralize any novel effects it might have. Apart from the prolonged prevarication about the eventual legal status of the Charter, the most notable manifestation of this anxiety is in the general and so-called "horizontal" clauses originally drafted by the Charter Convention in Articles 51-54.³¹ Article 51 in particular asserts that the Charter confers no new powers on the EU, and that it does not alter the division of powers between the EU and the Member States.³² This is a clear example of the fear of 'creeping competences',³³ which lay behind much of the political determination to clarify the competences of the EU during the constitutional Convention on the Future of Europe.³⁴ Yet as though this were not safeguard enough, the working group of the latter Convention which was examining the possible incorporation of the Charter into a future constitutional treaty, proposed further reassurances of this kind within the horizontal clauses.³⁵

²⁹ Conclusions of the Cologne European Council, June 1999, <http://ue.eu.int/presid/conclusions.htm>

³⁰ See n.3 above.

³¹ E. Vranes "The Final Clauses of the Charter of Fundamental Rights" European Integration Online Papers, Vol. 7 (2003) No. 7, <http://eiop.or.at/eiop/texte/2003-007a.htm>

³² Article 51 as originally drafted by the Charter Convention provides: "1. The provisions of this Charter are addressed to the institutions and bodies 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. 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."

³³ See M. Pollack 'The End of Creeping Competence? EU Policy-Making Since Maastricht' 38 (2000) JCMS 519.

³⁴ The issue of clarifying EU competence was one of the fundamental four issues on the so-called 'post-Nice agenda' which was identified by the European Council at the Nice IGC in December 2000 as the basis for future constitutional reflection and reform. For the eventual outcome of the Convention, see in particular the final report of Working Group V on Complementary Competences CONV 375/02, and the eventual Title III of Part I (Articles 9-17) of the draft treaty establishing a European Constitution, CONV 850/03, which lists the categories of Union competence.

³⁵ See the final report of Working Group II on Incorporation of the Charter/Accession to the European Convention on Human Rights, CONV 354/02, available on the website listed at n. 3 above.

This determination to limit the potential effects of the Charter can be seen in two specific amendments proposed by the constitutional Convention's Working Group, which were adopted by the plenary of the Convention into the text of the draft constitutional treaty produced in July 2003.³⁶ The first such amendment was to Article 51(1) and (2) of the Charter, which declares that the obligation of Member States and of the EU to respect, observe and promote the rights and principles in the Charter must be carried out '*respecting the limits of the powers of the Union as conferred on it in the other parts of the Constitution*', and adds that the Charter '*does not extend the field of application of Union law beyond the powers of the Union*'. This clumsy over-egging of the pudding seems to have been a response by the working group to earlier observations which had pointed to a tension between the obligation in Article 51(1) on the institutions of the EU to 'promote' the application of Charter rights and the assertion in Article 51(2) that the Charter does not modify powers or tasks defined by the treaty.³⁷ Apart from their apparent superfluity, the new amendments seem unlikely to remove the tension in question. It appears inevitable and, to many, desirable, that the existence and incorporation of a Charter of Rights should influence the nature and interpretation of EU tasks and powers, although in subtler ways than the crude notion of 'establishing new power' suggests.³⁸

The second limiting amendment introduced by the Convention Working Group was to add a paragraph to Article 52 of the Charter, drawing a distinction between 'principles' and other rights contained in the Charter.³⁹ Provisions containing principles are declared to be 'judicially cognisable' *only* in the interpretation of legislative and executive acts which choose to implement them. This is the one amendment proposed by the Working Group which appears to be an attempt to revisit the substance of the Charter as drafted in 2000,⁴⁰ despite the Working Group's assertion that it was proceeding on the basis that the

³⁶ For the final draft of this constitutional treaty (or 'draft treaty establishing a European constitution') which was produced by the Convention, see CONV 850/03 available online at <http://european-convention.eu.int>. The Charter is reproduced, together with the amendments proposed by the working group, in part II of the draft treaty.

³⁷ See in particular the interventions of the Directors of the Legal Services of the European Parliament, Council and Commission respectively, in a meeting of Working Group II on Incorporation of the Charter, CONV 223/02, para 11.

³⁸ See G. de Búrca, "Human Rights: the Charter and Beyond" in *The Future of the EU Charter of Fundamental Rights*, Working Paper No. 10/01, <http://www.jeanmonnetprogram.org/papers/papers01.html>

³⁹ The new subparagraph (5) of Article 52 provides: "The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions and bodies 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."

⁴⁰ For a contrary view, see O. de Schutter "Les droits fondamentaux dans le projet européen", forthcoming, who sees the amendment to Article 52(5) as being 'perfectly in conformity with the compromise which permitted the conclusion of work on the elaboration of the Charter during the summer of 2000' ["parfaitement conforme au compromis qui avait permis de clore les travaux portant sur l'élaboration de la Charte au cours de l'été 2000"]. It is difficult to accept his conclusion, in particular since he indicates clearly how other influential members of the Convention (specifically the French governmental representative, Guy Braibant) considered that social rights under the Charter would and should be at least partly justiciable, even in the absence of implementing measures, if they were invoked as negative constraints against an action which directly undermined the essence of those rights. Yet although the amendment to Article 52(5) clearly states that provisions of the Charter which contain 'principles' shall be

content of the Charter as proclaimed at the Nice European Council should not be re-opened. The amendment was pressed in particular by UK members of the Convention, since the UK government's representative on the previous Convention which drafted the Charter in 2000 had attempted to keep most social and economic rights out of the text and to divide the Charter into two parts, but had been defeated in this attempt at an early stage of the Charter drafting process.⁴¹ The main motivation for this position seems to be the wish not to render justiciable many of the so-called economic and social rights, which are considered to require a greater degree of positive action and social expenditure than other rights. The aim of the amendment to Article 52 seems therefore to have been to reclassify such provisions as 'principles', while maintaining the more traditional and often negatively framed civil and political rights as justiciable individual rights, since they are considered primarily to require non-interference by public bodies. This apprehension in the constitutional Convention about the potential impact of social and economic rights being contained in the Charter is all the more interesting given the fact that these rights were already significantly downgraded in the original Charter-drafting process,⁴² as is evident from the weak wording of many of them and from the fact that many are expressed as being subject to national laws and practices. Further, the prohibition on judicial cognisability seems to go beyond preventing those provisions from conferring directly enforceable rights on individuals, and appears intended to prevent the courts – most particularly the European Court of Justice – from taking any judicial account of them, even as interpretative aids or soft legal sources.

There is of course an extensive and longstanding academic and policy debate on the relevance of the distinction between economic and social rights on the one hand and civil and political rights on the other, focusing on whether the alleged need for a greater degree of positive action, legislative intervention and expenditure in the case of the former category requires a different legal and constitutional approach to their enforcement, and challenges their alleged indivisibility under international law.⁴³ Whatever stance is adopted on this contested question, the likelihood of the amendment to Article 52 rendering non-justiciable all of the 'social rights' contained in the Charter seems slight. The distinction introduced between 'principles' and 'subjective rights' - to use the language of the Working Group's explanatory note on the proposed amendment⁴⁴ - is

judicially cognisable *only* in the interpretation of, or in ruling on the legality of, acts which implement them, de Schutter argues boldly that a more generous (and, in his view, a more 'faithful') interpretation of the amendment would enable such 'principles' to be justiciable albeit in a limited way even without implementation.

⁴¹ For some of the interventions made by Lord Goldsmith, the UK Government representative on the Charter-drafting Convention, see CHARTRE 4122/00 of 7 February 2000, and CHARTRE 4146/00 of 8 March 2000, available on the website established at the time of drafting: <http://db.consilium.eu.int/df/default.asp?lang=en>. For an account of the Charter process from Goldsmith's perspective, see n. 1 above.

⁴² See generally L. Betten, "The EU Charter of Fundamental Rights: a Trojan Horse or a Mouse?" (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations* 151 and B. Hepple "The EU Charter of Fundamental Rights" (2001) 30 *Industrial Law Journal* 255, section 4.

⁴³ See e.g. H. Steiner and P. Alston, *International Human Rights in Context* (2nd edn., OUP, 2000), Chap. 4; C. Fabr , *Social Rights Under the Constitution* (OUP, 2000); S. Holmes and C. Sunstein, *The Cost of Rights* (NY: Norton, 1999).

⁴⁴ See Working Document 023 of 2002, available on the website at n.3 above.

hazy, not least because there is no clear division between economic and social rights on the one hand and civil and political rights on the other in the Charter itself. While it is undeniable that the latter division does not in any case map onto a neat distinction between rights which require positive action or expenditure for their enforcement, and rights which require only non-interference for their protection,⁴⁵ it is also the case that the various social rights contained in the Charter are scattered across different sections: the right to education being contained in Title II on Freedoms, the rights of the elderly in Title III on Equality, and the right to social and housing assistance in Title IV on Solidarity. There are also provisions of the Charter expressed in terms of principles, such as the principle of sex equality in Article 23 which has always been a justiciable and indeed directly effective right in European Community law, which would almost certainly not suddenly be rendered non-judicially cognisable by the amendment to Article 52 of the Charter. In further illustration of the lack of clarity in relation to the distinction between rights and principles introduced by Article 52, the revised explanatory memorandum to the Charter, which was supplemented to cater specifically for the amendments made by the second Convention to the horizontal clauses of the Charter,⁴⁶ gives ‘the rights of the elderly’⁴⁷ and ‘the rights of the disabled’⁴⁸ as examples of ‘principles’ recognised by the Charter, even though these are clearly expressed in terms of rights.

Yet however awkward or difficult to operationalize they may prove to be, both of these sets of amendments introduced by the constitutional Convention Working Group to the Charter quite clearly constituted attempts to limit its legal and judicial impact,⁴⁹ to counter some of the anticipated effects of incorporating it within the draft constitutional treaty, and to return to the idea of the legitimacy-enhancing showcase which the Charter was initially intended by the European Council to be. The desire of the EU institutions and of the heads of state and government to enhance the legitimacy of the EU by drawing on the discourse of human rights was accompanied by no less pressing a determination to do nothing to enhance the actual role or capacity of the EU in the domain of human rights protection. In this way the intense political activity which focused around the drafting of the Charter, and the high-profile status which it subsequently occupied within the debates in the Convention on the Future of Europe meant that despite the eventual decision to incorporate it into a new constitutional text, it was simultaneously reined firmly in and

⁴⁵ See in particular Sunstein and Homes, n 43 above.

⁴⁶ For the original Charter explanatory memorandum, see CHARTRE 4473/00 of 11 October 2000; and for the memorandum as revised after the second Convention had finished its work on the Charter, see CONV 828/03 of 9 July 2003.

⁴⁷ Article 25 of the Charter declares that the EU recognises and respects ‘the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life’.

⁴⁸ Article 26 of the Charter declares that the EU 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’.

⁴⁹ Although in fact, from the point of view of the *judicial* impact of human rights in the EU, the complaint has most often been that the ECJ does not ‘take rights seriously’ in the sense that it has only rarely struck down any provision of EU law, other than individual administrative or staff actions, for violation of human rights: see J. Coppel and A. O’Neill, ‘The European Court of Justice: Taking Rights Seriously?’ (1992) 12 *Legal Studies* 227, and the response in J. Weiler and N. Lockhart “‘Taking Rights Seriously’ Seriously: The European Court and its Fundamental Rights Jurisprudence” (1995) 32 *CMLRev.* 51, 579

hedged around with a series of constraints. The aim of these restrictive provisions was to prevent the Charter as far as possible from having novel effects in practice, to confine it to showcase status, and to reconfirm the orthodox position on human rights in the EU. In other words, there should be no increase in EU powers in the field of human rights protection, no extension in the 'scope of application' of EU law such as could affect the residual powers of the Member States and a restricted role for the European Court of Justice in adjudicating on the provisions of the Charter. The boldest decision taken in the context of the Convention's draft treaty establishing a Constitution for Europe, in a sense, was the decision to commit the European Union (with what would be a newly acquired single legal personality) to accession to the European Convention on Human Rights, the novelty of this move being that the EU institutions would henceforth be formally subject to the jurisdiction and scrutiny of the European Court of Human Rights.⁵⁰ However, even in this context, the drafters felt the need to reiterate that accession would not in any way affect the competences of the EU.⁵¹

5. Unanticipated events within the EU: Article 7 TEU and the Haider Affair

Even while the frustrations of the Charter and the Convention debates were absorbing so much of the attention of political observers and legal scholars, however, other important developments have been taking place with considerably less fanfare and analysis. The combination of the EU's preparations for its substantial enlargement eastwards and the repercussions of unexpected events within the EU have led to the introduction of legal and constitutional changes with potentially very significant repercussions for the human rights policy of the EU.

The first of these was the inclusion of Article 7 of the Treaty on European Union by the Amsterdam Treaty in 1997, which provided for the suspension of the rights of a Member State which is in persistent breach of the fundamental principles, including respect for human rights and fundamental freedoms, on which the EU declares itself to be founded. Article 7 must be understood in the light of earlier changes which were introduced at the time the Maastricht Treaty on European Union was drafted and signed. In 1992, Article 6 (formerly F) of the Treaty on European Union was adopted, declaring that the Union was committed to respect for fundamental rights, and declaring that the systems of government of the Member States were founded on the principles of democracy. It is difficult to avoid the impression that this was in part a reaction by the Member States to the then recent fall of the communist regimes to the east and to the likelihood of a wave of applications for membership from the countries of central and eastern Europe. This impression is bolstered by the fact that the Amsterdam Treaty five years later codified for the first time in the EU Treaties the so-called 'Copenhagen criteria', by specifying in Articles 6 and 49 TEU that the Union is founded on the principles of liberty, democracy,

⁵⁰ See Article I-7(2) of the draft treaty: "The Union shall seek accession 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 Constitution." In recent years, in fact, the European Court of Human Rights has been moving towards exercising a kind of de facto jurisdiction over actions of the EU: see R Harmsen, 'National responsibility for EC acts under the European Convention on Human Rights: recasting the accession debate', (2001) *European Public Law* 625

⁵¹ See, Article I-7(2) *ibid*.

respect for human rights and fundamental freedoms, and the rule of law, and that respect for these principles is a condition of EU membership.⁵² In other words, the EU was asserting its own virtue and the virtue of its existing members, while simultaneously sending a note of warning to the new and future candidate states to the east. Further, the addition of Article 7 TEU by the Amsterdam Treaty, providing for the possible suspension the rights of a Member State which was found to be in serious and persistent breach of the principles in Article 6, was evidently perceived as a necessary safeguard clause to provide for urgent action should one of the ‘newer’ democracies, after its admission as a member, collapse or significantly fail to meet the standards asserted by the EU.

The pleasing irony, of course, is that the first time attention focused seriously on this article was when the Freedom Party (FPÖ), following its success in domestic elections, was about to enter into coalition government in Austria in 2000. While the other fourteen Member States collectively panicked, it became apparent that Article 7 would afford no response since it required the existence of a “serious and persistent breach” of the principles of Article 6(1). In Austria, however, there was no evidence as yet of any breach of these principles, but rather a generalized fear of the consequences of an extremely right-wing party whose views on asylum-seekers and immigration appeared to be highly illiberal, whose use of defamation laws against opponents was considered very repressive, and whose leader was perceived to be an apologist for the activities of the Waffen-SS during the second world war, coming into government in an EU member state. The situation became an embarrassment for the fourteen Member States when Austria refused to bow to pressure and its conservative party went ahead to form a government with the FPÖ, resulting in the imposition by the other Member States of diplomatic sanctions on Austria without any clear sense of how the problem could subsequently be resolved.⁵³ The situation was eventually defused by the use of an *ad hoc* procedure, where the president of the European Court of Human Rights (which is not, of course, formally an EU court or institution) was requested by the European Union presidency to nominate a three-person committee to report on the situation in Austria and to make a recommendation to the fourteen Member States as to whether the sanctions should be revoked or not. This Report, which was published late in 2000 and which did indeed recommend removal of the sanctions against Austria, also contained a number of more general recommendations, many of which echoed the proposals of the 1999 “Leading by Example” human rights report, such as the need for a human rights monitoring body in the EU, and for more systematic monitoring of the policies of the Member States in this respect.⁵⁴

The Austrian debacle led in fact to some longer-term changes, including the subsequent revision of Article 7 TEU by the Treaty of Nice in 2000. Proposals were put forward

⁵² See B. de Witte and G. Toggenburg “Human Rights and Membership of the Union”, in S. Peers and A. Ward (eds), *The EU Charter of Fundamental Rights: Politics, Law and Policy*, Hart Publishing 2004 forthcoming, and M. Nowak ‘Human Rights Conditionality in relation to entry to, and full participation in, the EU’ in P. Alston, M Bustelo and J. Heenan (eds) n.25 above., 687.

⁵³ See M.Happold ‘Fourteen against One: The EU Member States’ Response to Freedom Party Participation in the Austrian Government’ (2000) 49 ICLQ 953.

⁵⁴ See n. 7 above.

during the Nice Intergovernmental Conference (IGC) both by Austria, as the Member State with perhaps most experience of the deficiencies of the original Article 7, and by Belgium,⁵⁵ which envisaged the possibility of taking action where there was a threatened breach and not only where an existing serious and persistent breach is found. The amendment to Article 7 which was eventually agreed during the Nice IGC finally came into force in February 2003, so that now the *risk* of a serious breach may trigger action in relation to a given Member State. Secondly, there is provision for recommendations to be made to the state in question, and the ad hoc Austrian solution has been codified so that there is now also provision for the appointment of a committee of independent persons to report on the situation in that state.⁵⁶ The key lessons of the Haider affair, in other words were, in the first place, that it was not the advent of a group of new states which might render necessary a system of scrutiny of the internal democratic and human rights systems of the Member States, and in the second place that a more systematic and procedurally appropriate process ought to be designed if the Article 7 safeguard mechanism were to be a useful one rather than a never-used emergency clause. The desirability of introducing some system for monitoring of the practices and policies of the existing Member States had therefore been highlighted more effectively and with more legal and political impact than the various advisory reports over the years had managed to do.

⁵⁵ See CONFER 4782/00 of 5 October 2000.

⁵⁶ The revised Article 7 TEU provides:

‘1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four-fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1), and address appropriate recommendations to that State. Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. For the purposes of this Article, the Council shall act without taking into account the vote of the representative of the government of the Member State in question. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph.

2. A qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in Article 205(2) of the Treaty establishing the European Community. This paragraph shall also apply in the event of voting rights being suspended pursuant to paragraph 3.

6. For the purposes of paragraphs 1 and 2, the European Parliament shall act by a two-thirds majority of the votes cast, representing a majority of its Members.

6. Enlargement and the sharpening of the ‘double standards’ critique

The allegation of hypocrisy and of double-standards as between the internal and external human rights policies of the EU, which was articulated forcefully in the 1998 *Leading by Example* Report, has since that time increasingly been highlighted by commentators and perhaps most starkly within the field of accession policy.⁵⁷ While the critique has been applied to the EU’s external policies in general, with particular focus on the consistent practice of inserting human rights clauses into trade and cooperation agreements,⁵⁸ and in promoting human rights goals in its development policies,⁵⁹ the area in which the differential standards between ‘external’ and ‘internal’ is perhaps most marked is that of the EU’s approach to enlargement. The latest round of candidatures of central and Eastern European countries has, since 1997, seen a far more interventionist and ongoing process of scrutiny of the human rights records of the applicant countries by the Commission, than ever was the case before.⁶⁰ Not only is there no apparent limit to the scope of application of EC scrutiny, since all areas of national law and policy – including those which clearly fall outside the scope of application of EU competence in relation to its existing Member States⁶¹ - are regularly examined, but the candidate countries have also been held to standards to which several existing EU member states clearly do not conform, the most glaring of these being in the field of minority rights,⁶² a field which once again was largely ignored when the EU Charter of Rights was drafted.⁶³ This double-standard problem has again recently been criticised in reports by non-governmental organizations (NGOs) active in the field – in particular by the impressive European Union Accession Monitoring Programme of the Open Society Institute (EUMAP)⁶⁴ and by Minority Rights Group International (MRG).⁶⁵

Further, the imminence of the 2004 enlargement, and the disparity between the level of scrutiny of the human rights policies of the candidate states as compared with existing member states, has raised the additional question whether the EU is suddenly to cease its pre-accession scrutiny and to lose all interest in the policies of the candidate states which

⁵⁷ See n. 6 above, and more extensively A. Williams in *The Irony of Human Rights in the European Union* (OUP, forthcoming 2004). Also B. de Witte ‘Enlargement and the EU Constitution’ in M. Cremona (ed) *The Enlargement of the European Union* (OUP, 2003), 209 at 233-241.

⁵⁸ See E. Fierro, *The EU’s Approach to Human Rights Conditionality in Practice* (Kluwer/Martinus Nijhoff, 2003).

⁵⁹ A. Williams, n. 57 above, chapter 2..

⁶⁰ B. de Witte, *ibid.*

⁶¹ Compare the determination to limit the impact of the Charter of Rights in expanding this ‘scope of application’ in relation to existing Member States, nn. 32-36 above, and subsequent text.

⁶² See B. de Witte ‘Politics versus Law in the EU’s Approach to Ethnic Minorities’ in J. Zielonka (ed), *Europe Unbound. Enlarging and Reshaping the Boundaries of the European Union* (Routledge, 2002) 137.

⁶³ See G. Schweltnus ‘Much Ado about Nothing? Minority Protection and the EU Charter of Fundamental Rights’ Paper No. 5/2001, Constitutionalism Web Papers Series, <http://les1.man.ac.uk/conweb/>.

⁶⁴ See R. Guglielmo ‘EU Enlargement: A Union of Values or a Union of Interests?’

<http://www.eumap.org/articles/content/91/914> and S. Humphreys ‘Monitoring: a Cure for the "Democratic Deficit"’ <http://www.eumap.org/articles/content/91/911>

⁶⁵ See ‘EU Accession Exposes Double Standards on Minority Rights’ www.minorityrights.org, 15 April 2003, and A. Philips ‘The Framework Convention for the Protection of National Minorities: A Policy Analysis’ <http://www.minorityrights.org/admin/Download/pdf/FCNMPolicyPaperAug2002.pdf>

were so vigorously monitored during the accession process, once they become full members of the polity.⁶⁶ Concern about the prospect of a sudden disappearance of interest in the human rights policies of the new members upon accession has been voiced by some of the relevant NGOs⁶⁷ and also by politicians from the candidate countries who, far from resenting the process and seeking its cessation upon membership, see an ongoing role for the EU in relation to all of its members on these issues.⁶⁸ Here we see two dimensions of the bifurcation of the EU's human rights policy coming together⁶⁹: on the one hand the clear presumption raised by the differential treatment during the pre-accession process that such disparity is unjustified, and on the other hand the presumption – at least on the part of certain actors from within the candidate states – that the way to address the disparity is not to cease monitoring whether before or after membership, but rather to extend the scrutiny to all EU candidate-states and member states alike. Combining these insights with the consequences of the post-Haider revision of Article 7 of the Treaty on European Union discussed above, certain implications become apparent. The EU has an interest in monitoring its Member States, both new (to ensure fulfilment of the Copenhagen admission criteria) and old (to enable appraisal of the risk of a breach of Article 7), but the institutions and procedures established for doing so have so far been inadequate. Reports and recommendations for change by advisory groups, including *comités des sages* or *ad hoc* experts appointed by the Council and Commission themselves, have not led directly to institutional reform, and there remains an evidently strong political reluctance to envisage an enhanced role for the European Union in relation to human rights issues concerning its own members. This role is still seen as one which is primarily for the Member States themselves, in conjunction with the supervisory role of the Council of Europe and the international human rights mechanisms. Despite the growth in size, power and cohesiveness of the European Union as a political entity, despite the increasing transfer of powers by the states to the EU, and despite its explicit adoption of a constitutional discourse in recent years, a corresponding change concerning the acceptance of the legitimacy of its interest in the human rights policies of its members, and in shaping its own European Union human rights policy has evidently not come about.

7. The emergence of monitoring

In this partial vacuum, however, a number of interesting developments have been occurring on different fronts, which arguably contribute, despite the lack of political will or initiative, to the likelihood of a more comprehensive and systematic EU human rights monitoring system in the future. The first of these is that a number of the NGOs themselves, most prominent amongst them the Budapest-based Open Society Institute,

⁶⁶ See B. de Witte, n 57 above at 240-241.

⁶⁷ See T. Waters 'Judges for a New Order: The Case for Continued Monitoring after Membership' <http://www.eumap.org/articles/content/91/912>

⁶⁸ A proposal was made in the context of the Convention by Jozsef Szájer of the Hungarian FIDESZ party, who was a Hungarian representative in the Convention on the Future of Europe, for the creation of an advisory committee on minority problems in Europe: see <http://www.euobserver.com/index.phtml?sid=15&aid=9344>

⁶⁹ For an extended analysis of the nature and causes of this 'bifurcation', see A. Williams, *The Irony of Human Rights in the European Union*, n.57 above.

whose previous work has assisted significantly in the process of monitoring the systems of the candidate countries in terms of democracy, minority rights, sex equality etc.,⁷⁰ have begun to apply their scrutiny also to existing EU Member States. In 2002, for example, they reported critically on the situation of minorities within the EU, including muslims in France, Italy and the UK, and the Roma in Germany and Spain.⁷¹

The second promising innovation, this time initiated not by third-sector actors such as NGOs, but by an EU institution, has been the way in which the European Parliament has interpreted the mandate of the revised Article 7 TEU and combined it with the existence of the recently proclaimed Charter of Fundamental Rights. The Parliament declared recently in its annual report on fundamental rights in the EU that “it is the particular responsibility of the European Parliament by virtue of the role conferred on it under the new Article 7(1)... to ensure (in cooperation with the national parliaments and the parliaments of the applicant countries) that both the EU institutions and the Member States uphold the rights set out in the various sections of the Charter”.⁷² In other words, the Charter is invoked here as a set of standards which the European Parliament is to deploy, in conjunction with national parliaments of candidate states and member states, in carrying out the mandate of Article 7 TEU to preempt the risk of a serious breach of the principles of Article 6 by any state. Further, in recognition of its own ‘lack of adequate resources’ the Parliament also called for the establishment of a network of legal experts on human rights from each of the Member States so as to assist Parliament in providing ‘an assessment of the implementation of each of the rights laid down in the Charter, taking account of developments in national laws, the case law of the Luxembourg and Strasbourg Courts and any notable case law of the Member States’ national and constitutional courts’.⁷³

While the earlier calls which had been made by various ad hoc committees⁷⁴ for the EU to establish a human rights monitoring agency either by extending the remit of the Vienna Monitoring Centre on Racism and Xenophobia and the associated RAXEN network⁷⁵ or by establishing an entirely new agency had been rejected,⁷⁶ the call of the European Parliament this time to establish a network of experts specifically for the purpose of

⁷⁰ See the series of reports on Monitoring the EU Accession Process, <http://www.eumap.org/reports>.

⁷¹ See the reports on Monitoring Minority Protection in EU Member States, <http://www.eumap.org/reports/2002/content/09>

⁷² Report on the Situation as regards Fundamental Rights in the European Union (2000), A-5 223/2001.

⁷³ Ibid.

⁷⁴ In particular those of the Leading by Example group in 1999, and the ‘three wise men’ committee which reported on the situation in Austria in 2000, see nn 7 and 54 above and accompanying text.

⁷⁵ See <http://eumc.eu.int/eumc/index.php> and <http://www.antiracisme.be/raxen/raxen.htm> for information on these two organizations. An external evaluation of the work of the Vienna Monitoring Centre was made in 2002 and reported on by the Commission in 2003, where a number of criticisms was made, in particular in relation to the comparability of the data provided: see COM(2003)483. The Commission also reached the firm conclusion that the Centre’s remit should not be extended beyond race discrimination even to other forms of discrimination covered by Article 13 of the EC Treaty, let alone to cover human rights monitoring in general. Its proposal to recast the original Regulation establishing the Monitoring Centre is also included in this communication COM(2003)483.

⁷⁶ See the Commission’s report on “The European Union’s Role in Promoting Human Rights and Democratisation in Third Countries” COM(2001)252, part 5, rejecting the proposal to establish an EU human rights agency.

helping to operationalize Article 7 TEU did not remain unheeded. A network of experts was established by the European Commission late in 2002, charged with the task of preparing an annual report on fundamental rights within the EU, and the first such report was published in March 2003.⁷⁷ Amongst the various interesting things in this report, including its ‘indexing the Charter of Fundamental Rights to international and European human rights law’, thereby avoiding the tendency to treat the Charter as a self-contained EU bill of rights which is disconnected from the broader international human rights context, was the proposal to establish ‘an open method of co-ordination in implementing the fundamental rights set out in the Charter’.⁷⁸ The purpose of the proposal to establish an open method of coordination (OMC) was declared by the network to be to promote mutual evaluation and learning, with the aim of identifying ‘best practices’ in relation to particular fundamental rights which should be observed and promoted by all member states. This emphasises the preventative and learning function of monitoring, rather than the ex-post dimension of scrutiny which would be designed to discover and react to a violation. The report also suggests that in some cases, the identification of a problem, where it relates to or indicates a sufficiently serious disparity in the standards of protection as between Member States, should lead not only to a soft coordination of best practices by the states, but to some kind of stronger harmonising action or regulation by the EU. The network has since been used by a prominent UK-based NGO as the appropriate monitoring organ to which to submit an unsolicited report setting out its concerns about the impact of the so-called ‘war on terrorism’ on individual rights and liberties, and democratic standards at both national and European levels.⁷⁹

More recently still, the rapporteur who drafted the European Parliament’s 2002-3 report on fundamental rights in the European Union also drew on the methodology and aims of the OMC process, by declaring that the Parliament’s annual report itself “constitutes a valuable point of reference for elaborating and implementing EU policies. It is also an open method of coordination which highlights good practices in the Member States and makes it possible to draw a comparison between initiatives and to ensure compatibility between them”.⁸⁰ Finally, in its recent communication on Article 7 of the Treaty on European Union, the Commission argued strongly for a promotional and preventative approach through ongoing monitoring, rather than a crisis-reaction approach to be adopted to that provision.⁸¹ In particular, the Commission argued that the ‘pilot project’ involving the network of experts on fundamental rights which it had established in 2002 would be meaningful only if its continuity or even permanence was ensured.⁸² And in another sign of the complementary role being played by civil society organizations in the various human rights monitoring initiatives, a European NGO has recently launched a

⁷⁷ See n. 9 above.

⁷⁸ *Ibid.*, p. 24.

⁷⁹ Statewatch submission to the Network of Independent Experts on Fundamental Rights in the EU, October 2003: see www.statewatch.org.

⁸⁰ Report on the situation as regards fundamental rights in the EU (2002), A-5 281/2003.

⁸¹ See COM((2003)606 “Communication on Article 7 of the TEU : Respect for and promotion of the Values on which the Union is based”.

⁸² *Ibid.*, para 2.1.

petition⁸³ to the European Parliament requesting it to initiate the Article 7 TEU procedure against Italy, for the serious and persistent breach of Article 6 caused by its repeated violation of the freedom and pluralism of the media under Prime Minister Berlusconi.⁸⁴

What is the significance of the various invocations of the mechanism of an ‘open method of coordination’ in the process of monitoring the practices of states in areas which affect human rights? The OMC is a form of policy coordination, a version of which was first introduced in the EU when the states sought to coordinate their economic policies after the introduction of economic and monetary union in 1992, and which was subsequently developed and applied to employment policy following the Amsterdam Treaty in 1997. Since then it has been expanded under the so-called Lisbon Agenda to a range of other policies and issue areas.⁸⁵ It is a process or mode of policy making which is not uncontroversial,⁸⁶ but which appears as part of a general attempt by the EU and its member states to find effective solutions to common and apparently intractable social and economic problems while seeking to avoid what are perceived to be some of the restrictive features of traditional constitutional instruments and regulatory methods. It has attracted attention because of its apparent promise in addressing some of the central dilemmas of European integration. In the first place, it offers a methodology which can neither be dismissed as ‘primarily national’ or ‘primarily EU-level’ but which is genuinely multilevel in nature, and which at its best could integrate the European, national and also regional and local levels in the process of policy-making. And in the second place, it has so far been utilised in many sensitive areas of social policy such as employment, social inclusion (or ‘anti-poverty’), pensions reform and education, raising hopes that it could constitute a means of promoting social and other forms of solidarity in Europe in a context where the EU lacks the authority, legitimacy and ability to pursue centralised policies.⁸⁷ The OMC is a strategy which blends the setting of objectives at EU level with the elaboration of Member State reports or plans in a reflexive, iterative process intended to bring about greater coordination and mutual learning in the policy fields or issue areas in question.

There are arguably at least two reasons for the attractiveness of an instrument like the OMC in the field of human rights.⁸⁸ In the first place, the OMC instantiates a process

⁸³ Article 194 of the EC Treaty, and also Article 44 of the as yet non-legally binding Charter of Fundamental Rights, provide the possibility for any citizen or resident of the EU to address a petition to the European Parliament.

⁸⁴ For details of the petition and the allegations, see <http://save-democracy.net/>.

⁸⁵ For the Lisbon European Council Conclusions of 2000, see <http://ue.eu.int/presid/conclusions.htm>.

See also more generally C. de la Porte and P. Pochet, *Building Social Europe through the Open Method of Coordination* (Brussels, PIE Peter Lang, 2002)

⁸⁶ See for some critical analyses: D. Chalmers and M. Lodge “The OMC and the European Welfare State” LSE ESRC Centre for Analysis of Risk and Regulation, Discussion Paper No. 11, 2003 and C. de la Porte and P. Nanz “OMC – a Deliberative-democratic Mode of Governance? The Cases of Employment and Pensions”, forthcoming, *Journal of European Public Policy*.

⁸⁷ For some of the vast and growing literature on the open method of coordination, both in general, and in specific policy fields, see the bibliography collected by the European Union Centre at the University of Wisconsin, Madison, at <http://eucenter.wisc.edu/OMC/>

⁸⁸ For a proposal to link the implementation of the rights contained in the Charter of Fundamental Rights with the OMC, see N. Bernard “A ‘new governance’ approach to economic, social and cultural rights in the

which clearly seeks to move beyond the purely informational realm in which annual reports on human rights – especially in the EU context - have often languished. The aim is for the information gathered to be made useful, and to be employed not simply in an attempt to shame participating states by its publication, but to gather comparable data and actively to encourage states to learn from one another's practices, and to identify better ways of approaching shared problems, with the eventual possibility of resort to harder forms of regulation as a default or supplementary solution in certain situations. The second reason for the potential attractiveness of an OMC-type mechanism in the EU human rights context is the converse of the first, in the sense that it is likely to avoid the powerful reaction by governments, which was seen in the discussion of the Charter of Rights above, against the extension either of the EU's traditional regulatory powers in the human rights field or of the Court of Justice's power to adjudicate upon and enforce certain types of rights. In other words, it seems less interventionist, more voluntary, and thus less threatening to the sovereignty of the states. What Member States seem to fear is something like the prospect of an EU directive aiming to regulate in a binding manner the conditions of prisons and psychiatric hospitals, or the ECJ proclaiming the right of access to health care or disability rights to be directly enforceable in the national context. The OMC on the other hand is increasingly seen as an instrument which has the capacity, if effectively designed and used, to navigate between the stormy waters of the 'creeping competences' debate, and the stagnant waters of unheeded annual reporting. Whether the establishment of an OMC could successfully develop a serious information-gathering and standard-setting role which influences the practices of the states will depend, of course, on the extent to which mechanisms to encourage national responsiveness and interaction between states are built into the design of the OMC,⁸⁹ so that the process of monitoring does in fact move beyond the gathering, collation and publication of information to its use in reflexively shaping and implementing better standards in practice.

8. A surplus of monitoring regimes?

One argument which may be mounted against this view is that the growth of and the increasing emphasis on human rights monitoring within the EU merely adds to the plethora of monitoring regimes existing at the regional and international levels, without providing any added value. In particular, the UN, the Organization for Security and Cooperation in Europe (OSCE), and the Council of Europe are all engaged in different forms of human rights monitoring - of the member states of the European Union amongst others. What could yet another layer of monitoring add to these existing systems?

Within the UN system, there is a range of different monitoring mechanisms.⁹⁰ In terms of the most comprehensive mechanisms, mention should be made in the first place of the system of state reporting to the Human Rights Committee under the International

EU" in T. Hervey and J. Kenner (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights* (OUP, 2003), 247.

⁸⁹ The 'peer review' mechanism which operates within some of the other OMCs, in particular that of employment policy, is currently under review in an attempt to strengthen it and render it more effective. See for information <http://www.peerreview-employment.org/en/>.

⁹⁰ See in general P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000).

Covenant on Civil and Political Rights (ICCPR). Reports are generally requested of states within a year of ratification and thereafter every five years only. But there are regular problems of non-reporting and delays as illustrated by the Committee's own recent lament that "only a small number of States have submitted their reports on time. Most of them have been submitted with delays ranging from a few months to several years and some States parties are still in default, despite repeated reminders by the Committee."⁹¹ Moreover, as observed by the Committee in 2002, "[o]ther States have announced that they would appear before the Committee but have not done so on the scheduled date."⁹² Individual complaints can also be made to the Committee by means of a written and partly confidential procedure, but this is a quasi-judicial function which is rather different from the general and regular monitoring system.⁹³

A similar kind of mandatory reporting to that under the ICCPR also takes place to the UN Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women, the Committee on the Elimination of Racial Discrimination, the Committee against Torture, the Committee on the Rights of the Child, and as from 2004 the Committee on the Rights of Migrant Workers.⁹⁴ In the event of failure by a state to submit a report, most of these committees undertake their own monitoring of the situation by relying on information supplied by other actors such as NGOs, specialized agencies and other bodies of the UN, and regional organisations. "Charter-based" monitoring is also carried out by the UN Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights, but these mechanisms are less systematic and are triggered either by complaints made by individuals or groups, or on the basis of resolutions adopted at the Commission's annual session where problem situations in particular states are identified.⁹⁵

The OSCE system of human rights monitoring has evolved over the years, and there are a number of different mechanisms including the 'Vienna mechanism' which is based on specific state requests to another state to provide information on a particular situation, and the 'Moscow mechanism' which builds on this to allow for expert missions and powers of investigation in order to resolve a specific situation. There is also provision for special and ad hoc missions in certain circumstances, and the High Commissioner on Minorities also can play a kind of monitoring role in states where it is active in conflict

⁹¹ Human Rights Committee, General comment No. 30 (2002) on "Reporting obligations of States parties under article 40 of the Covenant", in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN doc HRI/GEN/1/Rev.6 (12 May 2003), p. 194. More generally, see Ineke Boerefijn, *The Reporting Procedure under the Covenant on Civil and Political Rights: Practice and Procedures of the Human Rights Committee* (Intersentia, 1999)

⁹² Human Rights Committee, *ibid.*

⁹³ See R. Hanski and M. Scheinin (eds.), *Leading Cases of the Human Rights Committee* (Institute for Human Rights, Åbo Akademi University, 2003).

⁹⁴ See A. Bayefsky (ed.), *The UN Human Rights Treaty System in the Twenty First Century* (Kluwer Law International, 2001).

⁹⁵ M. Lempienen, *Challenges facing the system of special procedures of the United Nations Commission on Human Rights* (Institute for Human Rights, Åbo Akademi University, 2001). G. Alfredsson et al. (eds.), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller* (Martinus Nijhoff, 2001).

prevention. But the OSCE – apart perhaps from the Representative on freedom of the media - does not have a system of regular, information-gathering and ‘preventive’ human rights monitoring and reporting, rather than one which is based more specifically on conflict prevention and reaction to crisis.⁹⁶

The Council of Europe also has a range of monitoring mechanisms. The most wide-ranging and open-ended of them is a system of monitoring introduced by the Committee of Ministers in 1994 when they adopted a ‘Declaration on compliance with commitments accepted by member States of the Council of Europe’⁹⁷ which has led to three types of monitoring: general, thematic,⁹⁸ and ad hoc monitoring. The Declaration provides that "questions of implementation of commitments concerning the situation of democracy, human rights and the rule of law in any member State" can be brought before the Committee of Ministers by one or more member States, by the Secretary General, or on the basis of a recommendation from the Parliamentary Assembly of the Council of Europe.

Another of the Council’s monitoring mechanisms, leaving aside the judicial mechanism of the Convention on Human Rights, is that of the (revised) European Social Charter.¹⁰¹ Under the Social Charter, there is an annual system of state reporting to the Committee on Social Rights (previously the committee of independent experts), although not covering all provisions in the Charter in each year’s report. Reports can also be requested by the Committee of Ministers on provisions which states have not accepted, but this is

⁹⁶ W. Kemp (ed.), *Quiet diplomacy in action : the OSCE High Commissioner on National Minorities* (Kluwer Law International, 2001); and S. Ratner, ‘Does international law matter in preventing ethnic conflict?’, 32 *New York University Journal of International Law and Politics* (2001) 591.

⁹⁷ Relations with the Parliamentary Assembly, Parliamentary Assembly Recommendation 1536 (2001) on Progress of the Assembly’s monitoring procedure (2000-2001), Council of Europe docs. CM/Del/Dec(2001)767/2.3 and 778/2.8, at http://cm.coe.int/stat/E/Decisions/2002/779/d02_6.htm. See generally A. Drzemczewski, ‘The Prevention of Human Rights Violations: Monitoring Mechanisms of the Council of Europe’, in L.-A. Sicilianos (ed.), *The Prevention of Human Rights Violations* (Martinus Nijhoff, 2001) p.139.

⁹⁸ A wide range of general themes has been studied in relation to the situation in Member States. including: freedom of expression and information, functioning and protection of democratic institutions, functioning of the judicial system, local democracy, policy and security forces, capital punishment, effectiveness of judicial remedies, and non-discrimination, with emphasis on the fight against intolerance and racism.

⁹⁹ Relations with the Parliamentary Assembly, Parliamentary Assembly Recommendation 1536 (2001) on Progress of the Assembly’s monitoring procedure (2000-2001), Council of Europe docs. CM/Del/Dec(2001)767/2.3 and 778/2.8, at http://cm.coe.int/stat/E/Decisions/2002/779/d02_6.htm. See generally A. Drzemczewski, ‘The Prevention of Human Rights Violations: Monitoring Mechanisms of the Council of Europe’, in L.-A. Sicilianos (ed.), *The Prevention of Human Rights Violations* (Martinus Nijhoff, 2001) p.139.

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¹⁰¹ There are also Council of Europe monitoring mechanisms under the Convention for the Prevention of Torture, which are more intensive than some others in that they entail country visits and investigative procedures; and that which is carried out by the European Commission against Racism and Intolerance, which conducts country-studies every 4-5 years.

rare. Further, the Committee of Ministers can issue recommendations to states which have been found not to be in compliance with commitments accepted under the Charter, following the regular reporting procedure before the Committee on Social Rights, although such cases can also be dealt with in less formal ways through the Government Committee which prepares for the Committee of Ministers meetings, and indeed the response of states to recommendations actually issued is at best mixed. Also, following the adoption of an additional Protocol in 1995, a collective complaints mechanism under the European Social Charter, empowering specified organisations to lodge such complaints. By June 2003 sixteen such complaints had been lodged.¹⁰² Although the record of timely reporting to the Committee on Social Rights is reasonably good, especially in comparison with the UN system, the ESC system however has been criticised for the length of the periods between consideration of particular provisions of the Charter, and for the distinction between core and non-core provisions, as well as for the incompleteness of information provided.¹⁰³

In addition, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment conducts regular and ad hoc visits to States and issues reports thereon.¹⁰⁴ There is also a five-year reporting mechanism to the Advisory Committee established under the Framework Convention on the Protection of National Minorities. While this system seeks to engage states in an ongoing and consultative dialogue with a view to improving practices, the Chair of the Advisory Committee established to oversee its implementation has complained of the delays by States in the publication of its reports, inadequate support from the Council of Europe's Committee of Ministers, and an understaffed Secretariat.¹⁰⁵ The Council of Europe's European Commissioner on Human Rights also has a broad mandate in the field of human rights, including awareness raising, identifying shortcomings and assisting in remedying problems, but without any systemic monitoring or reporting mechanism, and with relatively few resources at his disposal.

To return then to the question posed above: is the EU, in moving towards a system of ongoing monitoring of the human rights practices of its member states, simply adding another superfluous layer to the many existing and overlapping regimes? The clearest answer to this argument is that while each of the other systems described has its own particular strengths and weaknesses, none of them enjoys the combination of regularity and frequency of monitoring, the relative degree of institutional and political closeness and trust between participating states, and the established mechanisms, institutions and array of instruments for policy coordination and mutual learning as does the European Union system. There is no mechanism, under any of the international or regional monitoring regimes for the states to cooperate together following the provision of

¹⁰² Council of Europe, Human Rights Information Bulletin, No. 59, March-June 2003, p. 39 at http://www.coe.int/T/E/Human_rights/PDFs/IB59E_light.pdf

¹⁰³ See D. Harris and J. Darcy, *The European Social Charter*, (Washington: PAIL Institute, 2nd Edn, 2001)

¹⁰⁴ R. Morgan and M. Evans (eds.), *Combating torture in Europe* (Council of Europe, 2001); and *Ibid.*, *Protecting Prisoners: The Standards of the European Committee for the Prevention of Torture in Context* (OUP, 1999).

¹⁰⁵ Interview with Prof. Rainer Hofmann, at http://www.coe.int/T/E/Communication_and_Research/Press/News/2003/20031031_interv_hofmann.asp

information, to engage in systematic peer review or to foster exchanges with a view to mutual learning, or to agreeing best practices, of the kind that is built into the OMC process. Further, in addition to the closer degree of integration between the states of the EU and the leverage which this provides, there is always – as was pointed out in the first report of the Network of Experts – the possibility of recourse to a harder legal mechanism or to harmonization measures in a situation where a specific problem seems to merit such a solution. In this sense, the European Union, with its unmatched degree of institutional density and of legal and political integration amongst participating states, is uniquely well placed to develop an (internal) human rights system which is stronger and more effective than any of the overlapping regimes which exist on a regional or international level.

9. Conclusion

Returning to the three core characteristics of a human rights system which were outlined above, the picture which emerges of the EU's human rights system is one in which all three elements are increasingly taking shape. As regards the judicial-normative dimension, the adoption of the Charter of Fundamental Rights and the likelihood of its being incorporated into a constitutional text in the near future is one important step in this direction. The incrementally developed role of the Court of Justice in relation to the protection of individual rights could be considerably enhanced by this development, despite the various constraints and limiting devices imposed on the Charter during the recent constitutional convention. The third element, the crisis-response element, which came to prominence and was subsequently given a more operative dimension through the revision of Article 7 TEU following the Haider affair,¹⁰⁶ has been refined somewhat and indeed has begun to be invoked by civil society organisations in an attempt to bring sharper pressure to bear on Member States which are perceived to be flouting the shared values of democracy and human rights on which the EU is supposedly based.¹⁰⁷ But perhaps most interesting is the way in which the second element, the monitoring mechanism, is emerging and beginning to take shape, both as a consequence of the need to operationalize the revised Article 7, and as a result of the imminence of full membership of the candidate states which were subject to such extensive monitoring processes in the pre-accession period.

One of the major critiques of the EU in the past has been that its human rights policy, such as it was, was primarily externally focused. In addition to the accession monitoring, the use of the human rights clause in trade and association agreements, the 'mainstreaming' of human rights in its development policies, and the growth of the EU's 'human rights and democratization programme', all seemed to contrast starkly with the orthodox internal position, in accordance with which the EU was said to have no general competence in the field of human rights protection, and in accordance with which its legitimate interest in the practices of its member states was apparently extremely restricted. And yet, the annual reports on fundamental rights within the EU presented by the European Parliament in recent years, which catalogue problems such as policing

¹⁰⁶ See COM(2003)606, at n.81 above.

¹⁰⁷ See n.84 above and text.

practices, anti-terrorism measures, domestic slavery, protection of minorities, and freedom of expression, demonstrate clearly that the human rights issues faced by Member States are often no less pressing than those faced by many of the candidate states which were so thoroughly monitored, and indeed that there may be much to be learned from the experiences and solutions tested by some of the latter.¹⁰⁸ The apparently instinctive sovereignty-inspired impulse of Member State governments to reduce and confine the role of the EU as regards human rights protection and promotion sits curiously and uncomfortably alongside the extensive powers granted to the EU to intervene in so many other aspects of economic and political life.

Yet there has been a vivid and interesting contrast between the highly charged constitutional debate on the Charter of Fundamental Rights with heated discussions on how to confine the Charter strictly within the existing competences of the EU, and how to render many of its provisions non-justiciable on the one hand, and the low-key but organic spread of more comprehensive monitoring of candidate states and member states alike, following the revision of Article 7 and in the light of imminent enlargement. And if the moves towards something like an open method of coordination in the area of protection and implementation of human rights are as yet embryonic, they present a real way forward for an EU human rights policy which avoids the circular disputes on the division of competences, and the exaggerated dichotomy of justiciability and non-justiciability which have characterised the constitutional-level debate on the Charter of Rights. The three core elements of a functioning human rights system are gradually taking shape, and while it may be some time yet before the EU has a mature and fully-fledged system, it is arguably one which for the reasons outlined above is uniquely placed, amongst international and regional systems, to become a strong and effective human rights regime.

¹⁰⁸ See M. Minárik ‘The Quality of Democracy: Learning from the Candidates?’ www.eumap.org/articles/content/91/915.