

# monitoring fundamental rights in the eu

*The Contribution of the  
Fundamental Rights Agency*

*essays in european law*

*edited by*  
philip alston and olivier de schutter

# Monitoring Fundamental Rights in the EU

The Contribution of the Fundamental  
Rights Agency

Edited by  
Philip Alston and  
Olivier De Schutter



• H A R T •  
PUBLISHING

OXFORD AND PORTLAND, OREGON

2005

Hart Publishing  
Oxford and Portland, Oregon

Published in North America (US and Canada) by  
Hart Publishing c/o  
International Specialized Book Services  
5804 NE Hassalo Street  
Portland, Oregon  
97213-3644  
USA

© The editors and contributors severally 2005

The editors and contributors have asserted their right under the Copyright,  
Designs and Patents Act 1988, to be identified as the authors of this work

Hart Publishing is a specialist legal publisher based in Oxford, England.  
To order further copies of this book or to request a list of other  
publications please write to:

Hart Publishing, Salter's Boatyard, Folly Bridge,  
Abingdon Road, Oxford OX1 4LB  
Telephone: +44 (0)1865 245533 or Fax: +44 (0)1865 794882  
e-mail: [mail@hartpub.co.uk](mailto:mail@hartpub.co.uk)  
WEBSITE: <http://www.hartpub.co.uk>

British Library Cataloguing in Publication Data  
Data Available  
ISBN 1-84113-534-8 (hardback)

Typeset by Hope Services (Abingdon) Ltd.  
Printed and bound in Great Britain by  
TJ International Ltd., Padstow, Cornwall

## MONITORING FUNDAMENTAL RIGHTS IN THE EU

Coherent laws enforced by a central authority are part of the reason why human rights protection works at the national level in Europe. But when it comes to the EU these dimensions are lacking. The present system for protecting fundamental rights emerged on an ad hoc basis, with measures being improvised to respond to particular problems. In the next couple of years, however, this situation is likely to change very significantly. The proposed European Constitution incorporates the EU Charter of Fundamental Rights, and a specialized EU Fundamental Rights Agency is likely to be established. As a result, the situation of the EU will more closely resemble that of its Member States. Fundamental rights will occupy a central role, and coherent and systematic arrangements will be in place to protect rights, using both judicial and non-judicial means. The Fundamental Rights Agency, in particular, has immense potential to ensure effective monitoring of fundamental rights in the EU, and to ensure a unified strategy for their promotion in EU law and policy.

This volume is the first to critically examine the proposals put forward by the European Commission in October 2004 on the creation of the EU Fundamental Rights Agency. Leading scholars in the field of European and international human rights law analyse the potential significance of this innovative Agency, and seek to locate it in relation to various other human rights mechanisms, both in the EU's constitutional structure and within Member States. They review the tasks which the Agency could be called upon to perform, and make proposals as to how it can function most effectively. The relationship of EU law to the international law of human rights emerging from both the United Nations and the Council of Europe is examined. The authors also address the challenge of ensuring improved coherence between EU law and the other human rights obligations undertaken by the Member States. Taken together, these contributions address urgent questions facing the EU at a time when the central unifying function of fundamental rights has been recognized but the way forward remains largely uncharted.

# Contents

Introduction: Addressing the Challenges Confronting the EU Fundamental Rights Agency	1
<i>Olivier De Schutter and Philip Alston</i>	

## Part I. The Constitutional Background

1. New Modes of Governance and the Protection of Human Rights	25
<i>Gráinne de Búrca</i>	
2. Mainstreaming Human Rights in the European Union	37
<i>Olivier De Schutter</i>	
3. The Relationship between the Agency and the Network of Independent Experts	73
<i>Martin Scheinin</i>	
4. The Agency and National Institutions for the Promotion and Protection of Human Rights	91
<i>Manfred Nowak</i>	

## Part II. The Tasks Ahead

5. The Contribution of the EU Fundamental Rights Agency to Civil and Political Rights	111
<i>Steve Peers</i>	
6. The Contribution of the EU Fundamental Rights Agency to Combating Discrimination and Promoting Equality	131
<i>Christopher McCrudden</i>	
7. The Contribution of the EU Fundamental Rights Agency to the Realization of Economic and Social Rights	159
<i>Philip Alston</i>	
8. The Contribution of the EU Fundamental Rights Agency to the Realization of Workers' Rights	189
<i>Brian Bercusson</i>	

**Part III. The EU Fundamental Rights Agency in a Wider Context**

9. The Contribution of the Agency to the Implementation in the EU of  
International and European Human Rights Instruments 229

*Rick Lawson*

10. The Contribution of the Agency to the External Policies of the  
European Union 253

*Mielle Bulterman*

- Index* 279

# Introduction

## *Addressing the Challenges Confronting the EU Fundamental Rights Agency*

OLIVIER DE SCHUTTER\* AND PHILIP ALSTON\*\*

HUMAN RIGHTS DEPEND for their protection on adequate legislative and regulatory frameworks, as well as on the possibility of effective judicial enforcement. They depend on the allocation of adequate resources. What this collection of essays illustrates is how the realisation of human rights depends also on appropriate governance mechanisms designed to ensure that human rights are taken fully into account, especially in the preliminary stages of policy setting and law-making, and on the participation of the relevant stakeholders in the design and implementation of these policies.

This third dimension is of particular importance in the context of the European Union. The present study of the potential contribution to be made by a new EU Fundamental Rights Agency not only considers how best it might perform its work; taking this debate as its departure point, it also identifies, more broadly, the challenges that face all such agencies in the human rights field.

### 1. THE BACKGROUND

#### **Towards a Fundamental Rights Agency**

In a report prepared for the *Comité des Sages* responsible for drafting *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000*, Philip Alston and JHH Weiler insisted on the need for the establishment of a monitoring centre for human rights within the European Union.<sup>1</sup> The main

\* Professor at the University of Louvain and Co-ordinator of the EU Network of independent experts on fundamental rights, Member of the Global Law School Faculty at New York University.

\*\* Professor at New York University, previous Chair of the UN Committee on Economic, Social and Cultural Rights.

<sup>1</sup> P Alston and JHH Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights", in P Alston, with M Bustelo and J Heenan (eds), *The European Union and Human Rights* (Oxford, Oxford University Press, 1999), p 3.

argument in favor of the creation of such a body was that it could encourage the Union to adopt a more preventive approach to human rights. The argument ran as follows: instead of human rights simply being monitored *post hoc* by the possibility of judicial review in the event of violation, what was required was a tool alerting the institutions to the need to address certain issues, where they had been given the power to do so and where an initiative on their part would be justified because these issues could not be satisfactorily addressed by the Member States acting individually, and because the objectives to be achieved could be better achieved by an initiative adopted at the level of the Union. "Systematic, reliable, and focused information", it was then argued, "is the starting point for a clear understanding of the nature, extent, and location of the problems that exist and for the identification of possible solutions".

The Union has moved towards implementing this proposal, albeit using a remarkably indirect route. In a communication of 2001 on the Union's external human rights policy, the Commission had stated, in answer to a call to follow upon this proposal, that such an additional supervisory body was not required, as the Commission "does not lack sources of advice and information. It can draw on reports from the United Nations, the Council of Europe and a variety of international NGOs".<sup>2</sup> Although this communication only concerned the human rights policy of the Union vis-à-vis third countries, many saw in this pronouncement a definitive rejection of the idea. When the Heads of States and Governments of the Member States of the European Union announced at their Brussels European Council of 13 December 2003 their intention to extend the mandate of the EU Monitoring Centre on Racism and Xenophobia<sup>3</sup> in order to create a "Human Rights Agency" entrusted with the mission to collect and analyse data in order to define the policy of the Union in this field, the decision therefore took most observers by surprise. Indeed, not only was the very proposal for such an Agency unexpected; but the proposal to build on the existing EUMC, was equally not an obvious one. On the basis of an external evaluation of the activities of the EUMC between its creation in 1998 and end 2001,<sup>4</sup> the Commission had considered that "the Centre should continue to concentrate on racism" and that "an extension to other fields would be an unwelcome distraction within the limits of the resources likely to be available to the Centre and that it would lead to a weakening of the emphasis on racism".<sup>5</sup> In a commun-

<sup>2</sup> Communication from the Commission to the Council and the European Parliament, The European Union's Role in Promoting Human Rights and Democratisation in Third Countries, COM(2001) 252 final, p 7.

<sup>3</sup> The EU Monitoring Centre was created by Council Regulation (EC) 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 151 of 10.6.1997, p 1. Based in Vienna, it has a staff of approximately 30 persons. In 2003, its budget was 6.5 million euros.

<sup>4</sup> [http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/pdf/origin/eumc\\_eval2002\\_en.pdf](http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/origin/eumc_eval2002_en.pdf)

<sup>5</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Activities of the European Monitoring Centre on Racism and Xenophobia, together with proposals to recast Council Regulation (EC) 1035/97, COM(2003)483 final of 5.8.2003.



ication of 5 August 2003, the Commission therefore had proposed a number of amendments to the Regulation establishing the EU Monitoring Centre in order to improve its effectiveness and the coherence of its tasks.

By announcing the decision to move towards the establishment of a Fundamental Rights Agency (as the Commission was soon to call it) by extending the mandate of the EUMC, the Brussels European Council of December 2003 answered the question of what should be done with the EUMC: the answer was that it should be transformed into something else. That decision however opened another question, namely what contribution a Fundamental Rights Agency could make to improving the monitoring of fundamental rights in the Union, and how that new body should relate to the mechanisms already existing in the field of the promotion and protection of fundamental rights in the Union.

It is this question which the essays of this volume seek to address. The authors examine the present situation of monitoring human rights in the Union and the possible contribution the Fundamental Rights Agency could make to the human rights policy of the Union. They address these questions at a particularly important time. Indeed, five recent and interrelated developments illustrate the central position fundamental rights have come to occupy in the constitutional discourse of the Union and in the practice of its institutions. The Charter of Fundamental Rights has been adopted and shall be incorporated in the Constitution now proposed for ratification by the 25 Member States. An EU Network of independent experts in fundamental rights has been established. The Council may adopt sanctions against, or address recommendations to, a Member State threatening to breach the values—including respect for human rights—on which the Union is founded. If and when the Constitution enters into force, the Union shall have the competence to accede to the European Convention on Human Rights. Finally, the division of powers between the Union and its Member States has evolved to the extent that the development of a fundamental rights policy of the Union has become a genuine possibility, although the identification of the circumstances in which the Union can and will use its powers to that effect remains a matter of controversy. Together, these developments form the background of the debate on the tasks of the future Agency, and on how it will fit into the institutional landscape. Each of these developments is significant in its own right, but they are also related to one another in complex ways.

### **The Adoption of the Charter of Fundamental Rights**

The Charter of Fundamental Rights was adopted at the Nice European Summit of December 2000, as a solemn declaration from the European Council, the European Commission and the European Parliament. Though formally a non-binding document, the Charter was immediately perceived by the commentators

as the single most authoritative restatement of the *acquis* of the Union in the field of human and fundamental rights, and its impact was immediate on the practice of the institutions. In a Communication of 11 October 2000, the European Commission had insisted that the binding character of the Charter as a codification of that *acquis* should not depend on the formal integration of the Charter into the European Treaties.<sup>6</sup> In March 2001, a requirement was imposed on the services of the European Commission to accompany all legislative proposals which could have an impact on fundamental rights with an indication that these proposals were considered to be compatible with the requirements of the Charter.<sup>7</sup> When Working Group II of the European Convention presided over by Commissioner A. Vitorino had to examine the issue of the incorporation of the Charter into the Constitution for Europe which was prepared in the framework of the Convention between February 2002 and July 2003, its members unanimously agreed on the principle of full incorporation.<sup>8</sup> While preserving the substantive provisions of the Charter, the members of the Working Group nevertheless agreed on certain adaptations being made to its general provisions, which although presented as mere clarifications of the initial understanding of the drafters of the Charter, raised certain fears as to the invocability of the Charter before courts applying Union law or acts adopted by the Member States in the scope of application of Union law. The Charter now forms part II of the Treaty establishing a Constitution for Europe. If and when the Constitution enters into force, it will be relied upon by the European Court of Justice in reviewing the validity of secondary Union law, although the Court of Justice should also continue to develop, alongside its reliance on the Charter, those fundamental rights which are protected as general principles of Union law.

Although by no means a revolutionary development changing the nature of the Union—and, indeed, this was not the intention of the European Council when, in June 1999, it initially agreed on the codification of the *acquis* of the Union in the field of fundamental rights—the constitutionalisation of fundamental rights in the Union nevertheless gives them a heightened visibility within the legal order of the Union.<sup>9</sup> Even before the entry into force of the

<sup>6</sup> Communication from the Commission on the legal nature of the Charter of fundamental rights of the European Union, COM(2000) 644 final, of 11.10.2000 (stating, at para 9, that “it is reasonable to assume that the Charter will produce all its effects, legal and others, whatever its nature. [...] it is clear that it would be difficult for the Council and the Commission, who are to proclaim it solemnly, to ignore in the future, in their legislative function, an instrument prepared at the request of the European Council by the full range of sources of national and European legitimacy acting in concert”).

<sup>7</sup> Memorandum of M Vitorino and the Presidency: Application of the Charter of Fundamental Rights, SEC(2001) 380/3.

<sup>8</sup> See the Final Report presented by the Chairman of Working Group II “Incorporation of the Charter/Accession to the ECHR”, CONV 354/02, 22 October 2002.

<sup>9</sup> See, for further examples of the impact the Charter has had since its proclamation, the Report on the impact of the Charter of Fundamental Rights of the European Union and its future status (2002/2139(INI)) adopted by the Committee on Constitutional Affairs (rapporteur: Andrew N Duff) (doc EP A5-0332/2002, 8 October 2002).

Constitution, the adoption of the Charter makes it easier for national courts, before which litigants contest the validity of acts adopted by the Union, to decide whether a referral to the European Court of Justice is required. It encourages individuals affected by Union law or by state measures adopted in the scope of application of Union law to claim that their fundamental rights are being violated, either in order to file a complaint with the European Commission, or to challenge these acts before the national courts or the Court of First Instance. Moreover, the adoption of the Charter of Fundamental Rights encourages the development of political forms of monitoring, on which the Charter confers a greater degree of objectivity and thus also of legitimacy. In particular, since 2000, the European Parliament's annual report on the situation of fundamental rights in the Union uses the Charter of Fundamental Rights as its main source of reference, and as the authoritative template on which to base its examination of the evolution of fundamental rights in the Member States.

### **The Creation of the EU Network of Independent Experts on Fundamental Rights**

It is this monitoring by the European Parliament which led to the creation, in September 2002, of the EU Network of independent experts on fundamental rights.<sup>10</sup> Indeed, the Network was set up by the European Commission (DG Justice and Home Affairs), in response to the resolution of the European Parliament based on the Report on the state of fundamental rights in the European Union in the year 2000.<sup>11</sup> The EU Network of Independent Experts on Fundamental Rights is currently<sup>12</sup> composed of 25 experts—one per Member State—and monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the EU Charter of Fundamental Rights. It currently holds three meeting sessions each year. Its tools are the publication of annual reports which examine the situation of fundamental rights in each

<sup>10</sup> One of the co-editors of this volume (Olivier De Schutter) chairs the Network. Three of the other authors are members of the Network (Manfred Nowak, Rick Lawson and Martin Scheinin). The positions adopted here of course are formulated by these authors in their personal capacity, and should not necessarily be seen as reflecting the position of the Network.

<sup>11</sup> In its resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000/2231(INI)) (rapporteur Mr Thierry Cornillet, MEP), the European Parliament recommended "that a network be set up consisting of legal experts who are authorities on human rights and jurists from each of the Member States in order to ensure a high degree of expertise and enable the Parliament to receive an assessment of the implementation of each of the rights laid down in the European Union Charter of Fundamental Rights, taking into account 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".

<sup>12</sup> Initially, only 15 experts, one from each Member State, composed the Network. Independent experts covering the new Member States joined the Network in 2003, simultaneously with the signature of the Accession Treaty. They submitted their first full reports in January 2004, prior to the formal date of accession of the new Member States.

Member State and the activities of the institutions of the Union, as well as the publication of a consolidated report synthesizing on an annual basis its main conclusions and recommendations, which are addressed both to the Member States and the Union institutions. The Network also prepares Thematic Comments, examining cross-cutting issues which, typically, concern both the Member States and the Union and may therefore pose the problem of coordination between both levels in the promotion and protection of fundamental rights in the Union.<sup>13</sup> Further, it submits opinions on issues relating to the protection of fundamental rights in the Union, usually based on a comparison, as complete as possible, of the situations which exist in the different Member States on a given question, and systematically seeking to take into account the state of international and European human rights law.<sup>14</sup>

### The Role of the Council in the Prevention of Human Rights Violations

How, it may be asked, could such monitoring be justified, when not only the institutions of the Union but also the Member States are monitored in relation to all of their fields of activity, whether or not they are acting in the scope of application of Union law? After all, Article 51 of the Charter of Fundamental Rights limits the scope of application of the Charter to the institutions of the Union and to the Member States only in their implementation of Union law. However—and this illustrates the impact the adoption of the Charter has had, beyond and prior to any strictly legally binding effect it may have in the future—the Network of independent experts on fundamental rights took the view that the Charter also constitutes a catalogue of common values of the Member States of the Union. In that respect, the Charter may be taken into account in the interpretation of Article 6(1) EU. This provision identifies human rights as part of the values on which the Union is based,<sup>15</sup> and the Charter, while not exclusive of other fundamental rights, constitutes an authoritative catalogue of the rights recognized as fundamental in the legal order of the Union. Moreover, Article 6(1) EU is referred to by Article 7 EU. This provision was initially inserted in the

<sup>13</sup> The Thematic Observation appended to the 2003 Synthesis Report (covering the year 2002) relates to “The Balance between Freedom and Security in the Response by the European Union and its Member States to the Terrorist Threats”. The Thematic Comment contained in the 2004 Synthesis Report (covering the year 2003) examines “Fundamental Rights in the External Activities of the European Union in the Fields of Justice and Asylum and Immigration”. The Thematic Observation appended to the 2005 Synthesis Report (covering the year 2004) will focus on the protection of minorities in the Union.

<sup>14</sup> The opinions of the Network, as well as the report on the activities of the institutions of the Union and the synthesis report, are available online at [http://europa.eu.int/comm/justice\\_home/cfr\\_cdf/index\\_en.htm](http://europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm). The country reports are currently accessible online at [www.cpdf.ucl.ac.be/cridho](http://www.cpdf.ucl.ac.be/cridho) (“documentation online”).

<sup>15</sup> These values include democracy, respect for human rights and fundamental freedoms, and the rule of law. Article 49 EU provides that respect for these values is a condition for membership of the Union.

Treaty of the European Union by the Treaty of Amsterdam which entered into force on 1 May 1999. It was limited, then, to providing the possibility for the Council of the Union to adopt certain sanctions against a Member State persistently committing serious violations of the values on which the Union is based: clearly, the provision was conceived in order to meet certain fears raised by the perspective of the enlargement of the Union to certain newly democratized States, especially at a time where the Union was being attributed further powers in the fields of justice and home affairs. Since the entry into force of the Nice Treaty on 1 February 2003,<sup>16</sup> Article 7 EU gives the Council the possibility to determine that there exists a clear risk of a serious breach by a Member State of the common values on which the Union is based. This preventive mechanism, provided for in Article 7(1) EU, now complements the possibility of adopting sanctions against a State which, according to the determination made by the Council, has seriously and persistently breached the principles mentioned in Article 6(1) EU.<sup>17</sup>

As recounted by Manfred Nowak in his contribution to this volume, this improvement of Article 7 EU was proposed by the *Comité des Sages* which reported in September 2000 to the European Council on the human rights situation in Austria and the means by which the EU could respond to possible human rights problems in an EU Member State.<sup>18</sup> However, in order to ensure that such a mechanism is used in a non-selective manner, it should proceed on the basis of a systematic monitoring by independent experts, providing comparable data and objective assessments on the situation of fundamental rights in all the Member States of the Union. It is with this objective in mind that the communication which the Commission presented to the Council and the European Parliament on Article 7 EU entitled “Respect for and promotion of the values on which the Union is based”<sup>19</sup>, notes that, by its reports, the Network of independent experts in fundamental rights may help to “detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty”; and that it may “help in finding solutions to remedy confirmed anomalies or to prevent potential breaches”. Therefore, while the adoption by the Network of the Charter of Fundamental Rights as the catalogue of rights on which its monitoring should be based was motivated both by the practice inaugurated in 2000 by the annual reports of the European Parliament and by the understanding of the Charter as a codification of the fundamental rights which were considered to be part of the common values on which the Union is based, it is Article 7 EU which explains

<sup>16</sup> OJ C 180, of 10.3.2001.

<sup>17</sup> Art 7(2) to (4) EU (Art I-59 of the Treaty establishing a Constitution for Europe) (“Suspension of certain rights resulting from Union membership”) and, for the implementation of these sanctions in the framework of the EC Treaty, Art 309 EC.

<sup>18</sup> The report was submitted by Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, adopted in Paris on 8 September 2000: See <http://www.virtual-institute.de/en/Bericht-EU/report.pdf>.

<sup>19</sup> COM (2003) 606 final, of 15.10.2003.

the reliance on the Charter even with regard to situations which, under Article 51 of the Charter, would in principle not fall under its scope of application. The need for an objective and impartial assessment of the situation of fundamental rights in the Member States of the Union, in order to facilitate the exercise by the institutions of their constitutional functions under this article, has been clearly recognized, and one of the most important functions fulfilled by the Network of independent experts is to offer such an assessment.

### **The Accession of the European Union to the European Convention on Human Rights**

After having failed to seize the opportunities created by the intergovernmental conferences for the revision of the treaties of 1996–1997 and of 1999–2000, which led respectively to the treaties of Amsterdam and of Nice, the Heads of State and Government agreed, in adopting the Treaty establishing a Constitution for Europe, to provide a legal basis for the accession of the Union to the European Convention on Human Rights.<sup>20</sup> Of course, although the political will now appears to be present, both within the Member States of the Union and within the overwhelming majority of the Member States of the Council of Europe, a number of technical difficulties remain, which will have to be solved before the Protocol providing for the accession of the Union to the European Convention on Human Rights can be opened for signature and ratification. But even the simple prospect of such accession constitutes a strong encouragement to the Union to ensure that fundamental rights are adequately protected within its own legal order, in order to limit the risk that, in the future, it may be found by the European Court of Human Rights to have violated them. Such pressure has been rising since the European Court of Human Rights first concluded in 1999, in the case of *Matthews v the United Kingdom*, that a Member State of the Union, which is a Party to the European Convention on Human Rights, could be in violation of its obligations under the Convention even where the source of the violation is located in an act of the Union. Although the Court still has to clarify the precise implications of this judgment—and, especially, whether it extends to acts of secondary Union law which the European Court of Justice

<sup>20</sup> This was required by the Opinion delivered by the European Court of Justice on 28 March 1996, concluding that the European Community could not rely on its implicit powers in order to accede to the European Convention on Human Rights, because of what the Court called the “constitutional significance” of such a change in the regime of protection of human rights in the legal order of the Community: see Opinion 2/94 [1996] ECR I-1759. The Court stated in that opinion that the Community institutions do not have at their disposal a “general power to enact rules on human rights or to conclude international conventions in this field”, although it did not question that respect for human rights constituted a “condition of lawfulness of Community acts”: see paras 27 and 34 of the opinion. On this opinion, see, inter alia, O De Schutter and Y Lejeune, ‘L’adhésion de la Communauté européenne à la Convention européenne des droits de l’homme. A propos de l’avis 2/94 de la Cour de justice des Communautés européennes’, (1996) *Cahiers de droit européen*, 555; G Gaja, ‘Opinion 2/94’, (1996) 33 *Common Market Law Review* 973.

may review for compatibility with the fundamental rights protected in the legal order of the Union—, it can hardly be argued today that the Union may ignore the requirements of the ECHR where it legislates, if it wishes to avoid engaging the Member States' international responsibility in the implementation of Union law.

There is no reason in principle to consider that the European Convention on Human Rights should be given a specific legal status, distinguishing it from any other international human rights treaty in force with respect to one or more of the EU Member States. Even those who may believe it premature to envisage the accession of the Union to instruments other than the European Convention on Human Rights or the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data<sup>21</sup> could hardly deny that, as its powers are being extended, and as it exercises more of the powers conferred upon it by the Member States, the Union is not in a position to ignore, in its law- and policy-making, the requirements of international and European human rights instruments. Indeed, the EU Network of independent experts in fundamental rights has been consistent in its preoccupation with this dimension of the protection of fundamental rights in the legal order of the Union. In the explanatory introduction to its conclusions and recommendations on the situation of fundamental rights in the Union in 2003, it emphasized that the privileged status recognized to the European Convention on Human Rights by the text of the EU Charter of Fundamental Rights should not lead to an underestimation of the need to take into account other international or European human rights treaties in the interpretation of the Charter. It noted:

... in accordance with Article 52(3) of the EU Charter of Fundamental Rights, the Network reads the provisions of the Charter which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms as having the same meaning and the same scope than those rights, as interpreted by the European Court of Human Rights; in certain cases, the provisions of the Charter however are recognized a broader scope, as confirmed by the second sentence of Article 52(3) of the Charter. The Network also takes into account the fact that other provisions of the Charter have to be read in accordance with the rights guaranteed in instruments adopted in the field of human rights in the framework of the United Nations, the International Labour Organisation or the Council of Europe. Where this is the case, these provisions of the Charter are interpreted by taking into account those instruments and the interpretation given to them in the international legal order.<sup>22</sup>

One of the most underestimated, yet crucial, stakes of the future system of monitoring fundamental rights in the Union concerns the role of instruments

<sup>21</sup> See the Amendments to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data authorizing the accession of the European Communities adopted by the Committee of Ministers of the Council of Europe at its 675th meeting, on 15 June 1999.

<sup>22</sup> EU Network of Independent Experts on Fundamental Rights, *Synthesis report on the situation of fundamental rights in the Union in 2003: Conclusions and Recommendations*, March 2004, p 10.

adopted within the United Nations or within the Council of Europe in the fundamental rights policy of the Union. When the Charter of Fundamental Rights was adopted, certain fears were expressed that it could result in diverging interpretations of the requirements of fundamental rights by the institutions of the Union—including the European Court of Justice—on the one hand, and the European Court of Human Rights, on the other hand. Article 52(3) of the Charter was adopted in order to alleviate that fear. It would be a paradoxical consequence of that effort if it resulted in encouraging, *a contrario* of the clauses of the Charter which are considered to correspond to provisions of the European Convention on Human Rights, an interpretation of the other clauses of the Charter which would not take into account what may be referred to as the emerging common law of international human rights.

### The Rise of the Category of Shared Competences

Finally, one last aspect of the current situation should be highlighted. Although fundamental rights have emerged in the jurisprudence of the European Court of Justice as limits imposed on EC law from outside, respect for which should be controlled by the Court as one aspect of its constitutional mission to ensure that the law is respected,<sup>23</sup> they have now assumed, in many respects, a different status. Although they are not actually ranked among the objectives of the Union—thus ruling out the possibility that the Union may legislate on the basis of its implied powers<sup>24</sup>—, they may nevertheless inspire the adoption of legislation where there exists an adequate legal basis therefor in the Treaties. There are many such legal bases in the existing treaties.<sup>25</sup> Together, they form a canvass through which an authentic fundamental rights policy of the Union can be envisaged—a policy, that is, which would go beyond judicial protection, in a purely reactive mode, of victims of human rights violations, but which would be proactive, anticipating the risk of violations occurring in the legal order of the Union by the adoption of the necessary legislative instruments.<sup>26</sup> The Treaty

<sup>23</sup> Art 220 EC (ex art 164 of the EC Treaty).

<sup>24</sup> Art 308 EC (ex art 235 of the EC Treaty).

<sup>25</sup> For an overview of the competences of the EU in the field of fundamental rights, see, e.g. P Alston and JHH Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights', in P Alston, with M Bustelo and J Heenan (eds), *The European Union and Human Rights*, cited above n 1, at pp 24–25 (see also in the same volume JHH Weiler and S Fries, 'A Human Rights Policy for the European Community and Union: the Question of Competences'); section II of the Introduction to the *Report on the Situation of Fundamental Rights in the European Union and Its Member States in 2002*, presented by the EU Network of Independent Experts in March 2003, at pp 12–19; and O De Schutter, 'The Implementation of the Charter of Fundamental Rights through the Open Method of Coordination', in O De Schutter and S Deakin (eds), *Social Rights and Market Forces. Is the open coordination of employment and social policies the future of Social Europe?* (Bruxelles, Bruylant, 2004) (also available as a *Jean Monnet Working Paper*, [www.JeanMonnetProgram.org](http://www.JeanMonnetProgram.org)).

<sup>26</sup> See JHH Weiler, 'Editorial Comments: Does the European Union Truly Need a Charter of Rights?', (2000) 6 *European Law Journal*, 95, at 96.



establishing a Constitution for Europe confirms in this respect the many developments which previous treaties have prepared.

First, certain fundamental rights are ranked among the objectives of the Union as defined in Article I-3 of the Treaty establishing a Constitution for Europe, which has been proposed for ratification by the Member States.<sup>27</sup> The realization of those objectives could justify using the flexibility clause now located in Article I-18 of the Constitutional Treaty. These objectives include in particular: 'combat[ing] social exclusion and discrimination'; promoting 'social justice and protection'; pursuing 'equality between women and men' and 'solidarity between generations'; and protecting children's rights. For the fulfilment of these values, the flexibility clause may apply, according to which 'If action by the Union should prove necessary within the framework of the policies [of the Union] to attain one of the objectives set by the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall take the appropriate measures.' This provision, which retains and somewhat enlarges Article 308 EC (ex Article 235 of the EC Treaty), therefore makes it possible for the Union to adopt certain measures for the realization of the abovementioned objectives, provided of course there exists the political will to do so.

Second, like the existing European Treaties, the Treaty establishing a Constitution for Europe has conferred upon the Union a number of powers which, although not necessarily framed as powers to realize fundamental rights, nevertheless could easily fulfil that objective—and, indeed, have already been used for that purpose. For instance, Article III-124 of the Treaty establishing a Constitution for Europe provides that the Council acting unanimously may adopt a European law or framework law in order to establish the measures needed to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. It may also, acting by qualified majority, establish basic principles for Union incentive measures and define such incentive measures, and support action taken by Member States in order to contribute to combating discrimination. This provision corresponds to Article 13 EC, as revised by the Treaty of Nice. It is on the basis of this article that the Council has adopted Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin<sup>28</sup> and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.<sup>29</sup> Under Article III-125 of the Treaty establishing a Constitution for Europe, European laws or framework laws may be adopted in order to facilitate the exercise of the right of every citizen of the Union to move and reside freely and the Constitution. It is

<sup>27</sup> In the renumbered version signed in Rome on 29 October 2004 (CIG 87/2/4 REV 2).

<sup>28</sup> OJ L 180 of 19.7.2000, p 22.

<sup>29</sup> OJ L 303 of 2.12.2000, p 16.