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## Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union

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# Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union

Gráinne de Búrca

## **Abstract**

The contention of this Article, however, is that a number of other developments have taken place which—in mostly unanticipated ways—may lead to more significant change in 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, 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 serious and persistent violations of human rights. The second development was an unprecedented degree of scrutiny of the 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, and provided a major impetus to the development of more effective ongoing monitoring and coordination arrangements.

# BEYOND THE CHARTER: HOW ENLARGEMENT HAS ENLARGED THE HUMAN RIGHTS POLICY OF THE EUROPEAN UNION

*Gráinne de Búrca\**

## INTRODUCTION

In recent years, a number of significant legal changes in the landscape of human rights protection in the European Union (“EU”) have taken place. Since 2000, commentators have focused most of their attention on the significance of the Charter of Fundamental Rights (“Charter”), which was drafted and proclaimed in that year,<sup>1</sup> on its subsequent reception by the EU legal and political community,<sup>2</sup> and more recently on the debate which took place within the Convention on the Future of Europe (“European Convention”)<sup>3</sup> about its proper role within a new European constitutional settlement.<sup>4</sup> However, the potential of the Charter as a robust instrument of human rights pro-

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1. Charter of Fundamental Rights of the European Union, O.J. C 364/1 (2000) [hereinafter Charter]. For an in-depth discussion on the drafting and proclamation process of the Charter, see generally Lord Goldsmith, *A Charter of Rights, Freedoms and Principles*, 38 COMMON MKT. L. REV 1201 (2001); Gráinne de Búrca, *The Drafting of the EU Charter of Fundamental Rights*, 26 EUR. L. REV. 126 (2001).

2. See, e.g., John Morijn, *Judicial Reference to the EU Fundamental Rights Charter*, available at [http://europa.eu.int/futurum/documents/other/oth000602\\_en.pdf](http://europa.eu.int/futurum/documents/other/oth000602_en.pdf) (last visited Dec. 23, 2003); see generally PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES & MATERIALS* 362 (3d ed. 2003).

3. The Convention on the Future of Europe took place between February 2002 and July 2003. See The European Convention, Documents of the Convention, available at [http://european-convention.eu.int/doc\\_register.ASP?MAX=161&LANG=EN&Content=DOC](http://european-convention.eu.int/doc_register.ASP?MAX=161&LANG=EN&Content=DOC) (last visited Dec. 23, 2003) [hereinafter European Convention] (providing most of the official documents relating to the proceedings of the Convention and its working groups).

4. See, e.g., The European Convention, Working Group II, Incorporation of the Charter/Accession to the ECHR, CONV 354/02, available at <http://register.consilium.eu.int/pdf/en/02/cv00/00354en2.pdf> (Oct. 22, 2002) [hereinafter 2002 Working Group II Final Report]. The recommendations of the Working Group were adopted practically in their entirety by the European Convention’s presidency and plenary, and the Charter was incorporated into Part II of the Draft Treaty Establishing a Constitution for Europe presented by the European Convention at the conclusion of its work. See Draft Treaty Establishing a Constitution for Europe, July 18, 2003, O.J. C 169/1 (2003) (not yet ratified) [hereinafter Draft Treaty].

tection has been undermined in part by the intense political focus upon certain of its key provisions, both at the drafting stage and during the proceedings of the so-called constitutional Convention. The twin political concerns of 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 several ways. The contention of this Article, however, is that a number of other developments have taken place which — in mostly unanticipated ways — may lead to more significant change in 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, 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 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.<sup>5</sup> The second development was an unprecedented degree of scrutiny of the 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,<sup>6</sup> and provided a major impetus to the development of more effective ongoing monitoring and coordination arrangements.

The EU, in other words, has been hoisted on its own petard,

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5. The reference is to Jorg Haider who was the leader of the Austrian Freedom Party ("FPO"), which was invited into the coalition government with the conservative People's Party in 2000. See generally Michael Merlingen et al., *The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria*, 39 J. COMMON MKT. STUD. 59 (2001).

6. For accounts of this double standards charge, see, e.g., Philip Alston & Joseph H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights*, in *THE EU AND HUMAN RIGHTS 3* (Philip Alston ed., 1999); Andrew Williams, *Enlargement of the Union and Human Rights Conditionality: A Policy of Distinction?*, 25 EUR. L. REV. 601 (2000).

and the combined influence of these events has arguably triggered the commencement of what could become the kind of comprehensive human rights monitoring that has been called for by various reform proposals over the years,<sup>7</sup> but has been largely ignored by the Council of Ministers and, until recently, the European Commission. It may also have triggered the emergence of an embryonic open method of coordination (“OMC”)<sup>8</sup> to develop and promote amongst the Member States an observance of the standards contained in the Charter.<sup>9</sup>

### I. 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. The norms of human rights protection are agreed upon, articulated, and inscribed in legal form, whether in a treaty, bill, charter of rights, constitution or other special legislative measure, and some degree of judicial or quasi-judicial oversight is established. Although the content of the particular norms may vary, as may the legal instrument that contains them and the degree of judicial power that enforces them, the quasi-judicial dimension is nonetheless a central characteristic of most functioning human rights systems. The key examples include: the United Nations’ Human Rights Committee established under the International Covenant on Civil and Political Rights which has quasi-judicial powers in relation to individual complaints; the European Court of Human Rights (which replaced the two-tier system previously consisting

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7. See, e.g., Alston & Weiler, *supra* note 6. See also MARTTI AHTISAARI ET AL., MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, REPORT, available at <http://www.virtual-institute.de/en/Bericht-EU/report.pdf> (Sept. 8, 2000) (providing conclusions of the Three Wise Men report into the situation of Austria following the Haider affair); European Parliament resolution on the situation as regards fundamental rights in the European Union, EUR. PARL. DOC. (A5-0223/2001), available at <http://www.greekhelsinki.gr/special-issues-annual-EUPARL.html> (2001); Final Report on the Situation as Regards Fundamental Rights in the European Union, EUR. PARL. DOC. (A5-281/2003), ¶ 4 (2003).

8. See Maria J. Rodrigues, *The Open Method of Coordination as a New Governance Tool*, in *L'evoluzione della governance europea*, EUROPA/EUROPE No. 2-3, at 96-107 (Mario Teló ed., 2001).

9. See E.U. NETWORK OF INDEPENDENT EXPERTS IN FUNDAMENTAL RIGHTS (CFR-CDF), REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION AND ITS MEMBER STATES IN 2002 (Mar. 31, 2003), available at [http://europa.eu.int/comm/justice\\_home/cfr\\_cdf/doc/rapport\\_2002\\_en.pdf](http://europa.eu.int/comm/justice_home/cfr_cdf/doc/rapport_2002_en.pdf).

also of a quasi-judicial Commission) which is a crucial component of the European Convention system; the Inter-American system which has both a Commission and a Court;<sup>10</sup> and a recent Protocol to the African Charter on Human and Peoples' Rights<sup>11</sup> which envisages the establishment of a Court with possible jurisdiction to hear individual complaints, to complement the promotional role of the existing African Commission.<sup>12</sup>

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. Its function is to provide an ongoing picture of the extent of compliance with the normative guarantees which have been established and agreed upon. 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 instill 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 EU, we find a system that is still emergent, if not embryonic. As will be

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10. *See generally* JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* (2003).

11. *See generally* *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986-2000* (Malcolm D. Evans & Rachel Murray eds., 2002).

12. *See* Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 5, June 9, 1998, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT (III) (discussing access to court). The rate of ratification of this protocol has so far been slow. *But see* Final Communiqué of the Conference for West African States on the Protocol for the Establishment of the African Court on Human and Peoples' Rights (May 2003).

seen below, there was originally an implicit division of functions between the Council of Europe and the European Community ("EC") 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 EU in the 1990s, however, is that the EU is increasingly developing a human rights system of its own, in addition to, and perhaps complementary to, but distinct from that of the Council of Europe. And as far as 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, 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,<sup>13</sup> 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. Additionally, 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 —

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13. See *Enlargement*, at <http://www.europa.eu.int/comm/enlargement/enlargement.htm> (explaining that ten countries are expected to become Member States on May 1, 2004). These ten countries are: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia. *Id.*

such as suspension or expulsion from membership, or resort by the international community to the use of force in extreme situations — on the other, 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,<sup>14</sup> has the potential to go beyond what other international human rights systems have done so far. These mechanisms achieve this by developing the information gathering and monitoring process into a genuine exercise in mutual learning, reflexive standard setting, and articulation of best practices.

## II. *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"),<sup>15</sup> 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.<sup>16</sup> In so far as human rights issues made their way onto the EC's agenda, this was mostly in a reactive response by the European Court of Justice ("ECJ") to challenges posed to its authority by national constitutional courts that were concerned about the standards of protection in EC law for domestic constitutional rights.<sup>17</sup> The question of accession by the EC to the

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14. See *infra* notes 104-06.

15. European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221. The European Convention on Human Rights and Fundamental Freedoms ("ECHR") entered into force on September 3, 1953.

16. For early and comprehensive accounts of the emergence of human rights — in EC parlance "fundamental rights" — as an EC concern, see generally Andrew Clapham, *A Human Rights Policy for the European Community*, 10 Y.B. EUR. L. 309 (1990); 2 HUMAN RIGHTS AND THE EUROPEAN COMMUNITY: METHODS OF PROTECTION (Antonio Cassese et al. eds., 1991).

17. The classic line of case law announcing the European Court of Justice's concern for fundamental human rights follows: *Erich Stauder v. City of Ulm-Sozialamt*,



ECHR was raised on various occasions, in particular by the European Commission,<sup>18</sup> but never found favor 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,<sup>19</sup> 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 ECJ in its 1996 Opinion on Accession to the European Convention on Human Rights,<sup>20</sup> 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 Establishing the European Community ("EC Treaty")<sup>21</sup> could not be misused in order to do so.<sup>22</sup> In the par-

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Case 29/69, [1969] E.C.R. 419, [1970] 9 C.M.L.R. 112; Internationale Handelsgesellschaft v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel, Case 11/70, [1970] E.C.R. 1125, [1972] C.M.L.R. 225; J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities, Case 4/73, [1974] E.C.R. 491, [1974] 2 C.M.L.R. 338; Judgment of May 29, 1974, 37 BVerfGE 271, [1974] 2 C.M.L.R. 540 (famous German case which challenged the stance of the European Court, also referred to as the so-called *Solange I* decision, given by the Bundesverfassungsgericht in 1974).

18. See Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, E.C. BULL. SUPP. 2/79 (1979).

19. See Resolution adopting the Declaration of Fundamental rights and freedoms, O.J. C 120/51 (1989).

20. See *Re the Accession of the Community to the European Human Rights Convention*, Case 2/94, [1996] E.C.R. I-1759 (Mar. 28, 1996) [hereinafter *Opinion 2/94*].

21. See Consolidated version of the Treaty establishing the European Community, art. 308, O.J. C 325/33, at 153 (2002), 37 I.L.M. 79, at 140 (ex Article 235) [hereinafter *Consolidated EC Treaty*], incorporating changes made by Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Feb. 26, 2001, O.J. C 80/1 (2001) [hereinafter *Treaty of Nice*] (amending Treaty on European Union ("TEU"), Treaty establishing the European Community ("EC Treaty"), Treaty establishing the European Coal and Steel Community ("ECSC Treaty"), and Treaty establishing the European Atomic Energy Community ("Euratom Treaty") and renumbering articles of TEU and EC Treaty). Article 308 states the following:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall,

ticular case at hand, the ECJ took the view that to use Article 308 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 EC 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 Treaty Establishing a Constitution for Europe ("Draft Treaty")<sup>23</sup> produced by the European Convention, it currently has two dimensions: first, that the EU lacks general competence to act in the field of human rights<sup>24</sup> and has specific competence only as a dimension of a restricted range of external policies and in its internal anti-discrimination policy;<sup>25</sup> and second, that Member States are only subject to the ECJ's interpretation of human rights requirements when they are acting within the scope of EC law, particularly when they are implementing EU laws.<sup>26</sup> The EU therefore has no general human rights role, and the Member States are not subject to EU or ECJ jurisdiction in relation to human rights matters except within a relatively circumscribed context.

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acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

*Id.*

22. See Opinion 2/94, *supra* note 20.

23. See Draft Treaty, *supra* note 4, O.J. C 169/1 (2003).

24. However, the general residual powers clause in Article 308 of the Consolidated EC Treaty can be, and has been, used to enact a number of human rights measures which fall within the EU's proper remit. See Consolidated EC Treaty, *supra* note 21, art. 308, O.J. 325/33, at 153 (2002), 37 I.L.M. at 140 (ex Article 235). See also Council Regulation No. 1035/97, O.J. L 151 (1997) (establishing a European Monitoring Centre for Racism and Xenophobia); Council Regulation No. 976/99, O.J. L 120/8 (1999) (establishing a program on democratization and human rights in external cooperation policy).

25. See Consolidated EC Treaty, *supra* note 21, art. 13, O.J. C 325/33, at 43 (2002), 37 I.L.M. at 82 (ex Article 6a). *Id.* art. 177, O.J. C 325/33, at 109-10 (2002), 37 I.L.M. at 117 (ex Article 130u). *Id.* art. 181, O.J. C 325/33, at 110 (1997), 37 I.L.M. at 118 (ex Article 130y). The use of human rights clauses in external trade agreements concluded by the EC under Article 133 of the Consolidated EC Treaty is said to be based on international law. *Id.* art. 133, O.J. C 325/33, at 90-91, 37 I.L.M. at 108 (ex Article 113).

26. For the European Court of Justice's case law on this point, see *Wachauf v. Germany*, Case 5/88, [1989] E.C.R. 2609, [1991] 1 C.M.L.R. 328; *ERT v. DEP*, Case C-260/89, [1991] E.C.R. I-2925, [1994] 4 C.M.L.R. 540; *Karlsson*, Case C-292/97, [2000] E.C.R. I-2737. For the ambiguous codification of this case law by the Charter, see Charter, *supra* note 1, art. 51, O.J. C 364/1, at 21 together with the explanatory memorandum to the Charter. For further discussion, see generally de Búrca, *supra* note 1.

### III. 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.<sup>27</sup> The TEU moved definitively beyond the previous 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, the TEU accompanied and precipitated the first real signs of a popular legitimacy crisis.<sup>28</sup> The significance of the TEU as a turning point and the growing articulation of popular opposition to the EU over the past decade is a story that 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 European 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.<sup>29</sup> 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 including: the 1996 *Comité des Sages* report on civic and social rights,<sup>30</sup> the 1998

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27. Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU] (amending Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA]). The TEU was amended by the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam]. These amendments were incorporated into the TEU, and the articles of the TEU were renumbered in the Consolidated version of the Treaty on European Union, O.J. C 325/5 (2002), 37 I.L.M. 67 [hereinafter Consolidated TEU], incorporating changes made by Treaty of Nice, *supra* note 21.

28. See Joseph H. H. Weiler, *Fin de Siècle Europe, in EUROPE AFTER MAASTRICHT: AN EVER CLOSER UNION?* 203 (Renaud Dehousse ed., 1994); Juliet Lodge, *Transparency and Democratic Legitimacy*, 32 J. COMMON MKT. STUD. 343 (1994).

29. See Gráinne de Búrca, *The Language of Rights and European Integration, in NEW LEGAL DYNAMICS OF EUROPEAN UNION* (Jo Shaw & Gillian More eds., 1995).

30. See Final Report by the *Comité des Sages*, For a Europe of Civic and Social Rights, Chaired by Maria de Lourdes Pintasilgo (1996); Report of the High Level Panel on the Free Movement of Persons, Chaired by Simone Veil (1997).

*Comité des Sages* report on a human rights agenda for the EU,<sup>31</sup> and the 1999 expert committee report on fundamental rights in the EU chaired by Spiros Simitis.<sup>32</sup>

While the 1998 report, in particular, emphasized the incoherence and the double standards practiced by the EU as between its external and internal policies,<sup>33</sup> and stressed the need for a comprehensive human rights policy with adequate monitoring mechanisms, it saw no particular value in having a specific EU bill of rights.<sup>34</sup> The Simitis report,<sup>35</sup> on the other hand, recommended the adoption of a bill of rights for the EU. The EU presidency seized the recommendation of the Simitis Report in 1999 as a method 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 (“Charter Convention”)<sup>36</sup> which was then charged with the task of drawing up a charter of rights for the EU,<sup>37</sup> 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 finalized Charter, backed by political support from the heads of State and

31. *Comité des Sages*, Leading by Example: A Human Rights Agenda for the European Union for the Year 2000, Agenda of the *Comité des Sages* and Final Project Report (1998), available at [http://www.eumap.org/library/datab/Documents/1048604636.54/da\\_1998.rtf](http://www.eumap.org/library/datab/Documents/1048604636.54/da_1998.rtf) [hereinafter Leading by Example Report]. The Leading by Example 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 Antonio Cassese, Catherine Lalumiere, Peter Leuprecht, and Mary Robinson together with a report and an accompanying volume of essays. See generally THE EU AND HUMAN RIGHTS, *supra* note 6 (containing the volume of essays about the human rights agenda).

32. *Affirming Fundamental Rights in the European Union: Time to Act*, Report of the Expert Group on Fundamental Rights (1999) [hereinafter *Affirming Fundamental Rights*].

33. See European Union Annual Report on Human Rights 2000, available at [http://www.euromedrights.net/english/barcelona-process/EU\\_initiatives/Council/Councilannualreport.htm](http://www.euromedrights.net/english/barcelona-process/EU_initiatives/Council/Councilannualreport.htm) (last visited Dec. 23, 2003) (acknowledging these criticisms).

34. See Joseph H.H. Weiler, *Editorial: Does the European Union Truly Need a Charter of Rights?*, 6 EUR. L.J. 95 (2000).

35. See *Affirming Fundamental Rights*, *supra* note 32.

36. See *The EU Charter of Fundamental Rights*, at [http://www.europarl.eu.int/charter/press/index\\_en.htm](http://www.europarl.eu.int/charter/press/index_en.htm) (last visited Dec. 23, 2003) (describing the “Charter Convention”).

37. See Cologne European Council, *Conclusions of the Presidency*, available at <http://ue.eu.int/newsroom/LoadDoc.asp?BID=76&DID=57886&from=&LANG=1> (June 3-4, 1999).

government, was proclaimed by the Council, Commission, and Parliament at the Nice European Council Summit in 2000.<sup>38</sup> What can be seen both in the provisions of the Charter itself, but even more starkly in the proceedings of the European Convention which followed in 2002-2003,<sup>39</sup> 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 II-51 to II-54.<sup>40</sup> Article II-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.<sup>41</sup> This is a clear example of the fear of creeping competences,<sup>42</sup> which lay behind much of the political determination to clarify the competences of the EU during the constitutional European Convention.<sup>43</sup> Yet, if this were not safeguard enough, the working group of the European Convention, which was examining the possible incorporation of the

38. For more information on the Nice European Council, see Nice European Council: December 7-9 2000, at [http://europa.eu.int/comm/nice\\_council/index\\_en.htm](http://europa.eu.int/comm/nice_council/index_en.htm) (last visited Dec. 23, 2003).

39. See European Convention, *supra* note 3.

40. See Erich Vranes, *The Final Clauses of the Charter of Fundamental Rights — Stumbling Blocks for the First and Second Convention*, 7 EUR. INTEGRATION ONLINE PAPERS 7 (2003), at <http://eiop.or.at/eiop/texte/2003-007a.htm>. See also Draft Treaty, *supra* note 4, arts. II-51 – II-54, O.J. C 169/1, at 28-29 (2003).

41. Draft Treaty, *supra* note 4, art. II-51, O.J. C 169/1, at 28 (2003). Article II-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.

*Id.*

42. See generally Mark A. Pollack, *The End of Creeping Competence? EU Policy-Making Since Maastricht*, 38 J. COMMON MKT. STUD. 519 (2000).

43. 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 European Council summit 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 (2002); Draft Treaty, *supra* note 4, arts. 9-17, O.J. C 169/1, at 10-11 (2003).

Charter into a future constitutional treaty, proposed further reassurances of this kind within the horizontal clauses.<sup>44</sup>

This determination to limit the potential effects of the Charter can be seen in two specific amendments proposed by the Charter Convention's Working Group, which were adopted by the plenary of the Charter Convention into the text of the Draft Treaty produced in July 2003.<sup>45</sup> The first such amendment was to Article II-51(1) and II-51(2) of the Charter, which declare 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."<sup>46</sup> 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 II-51(1) on the institutions of the EU to *promote* the application of Charter rights and the assertion in Article II-51(2) that the Charter does not modify powers or tasks defined by the Draft Treaty.<sup>47</sup> 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 should influence the nature and interpretation of EU tasks and powers, although in subtler ways than the crude notion of *establishing new power* suggests.<sup>48</sup>

The second limiting amendment introduced by the Charter Convention Working Group was to add a paragraph to Article II-52 of the Charter, drawing a distinction between "principles"

44. See 2002 Working Group II Final Report, *supra* note 4.

45. See generally Draft Treaty, *supra* note 5, O.J. C 169/1 (2003).

46. See *id.*, *supra* note 4, arts. II-51(1), II-51(2), O.J. C 169/1, at 20 (2003).

47. See The European Convention, Summary of the Meeting held on July 23, 2002 chaired by Commissioner Antonio Vitorino, CONV 223/02, ¶ 11, available at <http://register.consilium.eu.int/pdf/en/02/cv00/00223en2.pdf> (July 31, 2002) (containing 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).

48. See Grainne de Búrca, *Human Rights: The Charter and Beyond*, in THE FUTURE OF THE EU CHARTER OF FUNDAMENTAL RIGHTS (Working Paper No. 10/01, 2001), available at <http://www.jeanmonnetprogram.org/papers/01/013601.html>.

and other rights contained in the Charter.<sup>49</sup> Provisions containing principles are declared to be judicially cognizable *only* in the interpretation of legislative and executive acts that 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,<sup>50</sup> despite the Working Group's assertion that it was proceeding on the basis that the content of the Charter as proclaimed at the Nice European Council should not be reopened. The amendment was pressed in particular by U.K. members of the Charter Convention, since the U.K. 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.<sup>51</sup> 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

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49. See Draft Treaty, *supra* note 5, art. II-52(5), O.J. C 169/1, at 29 (2003). 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.

*Id.*

50. For a contrary view, see Olivier de Schutter, *Les droits fondamentaux dans le projet européen* (forthcoming) (on file with author) (describing 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 judicially cognizable *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 justifiable albeit in a limited way even without implementation.

51. For some of the interventions made by Lord Goldsmith, the U.K. Government representative on the Charter-drafting Convention, see CHARTRE 4122/00 of Feb. 7, 2000, and CHARTRE 4146/00 of Mar. 8, 2000, available at <http://db.consilium.eu.int/df/default.asp?lang=en>. For an account of the Charter process from Goldsmith's perspective, see Goldsmith, *supra* note 1.

considered to require a greater degree of positive action and social expenditure than other rights. The aim of the amendment to Article II-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 Charter 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,<sup>52</sup> 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 cognizability seems to go beyond preventing those provisions from conferring directly enforceable rights on individuals, and appears intended to prevent the courts — most particularly the ECJ — 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. This debate focuses on whether the alleged need for a greater degree of positive action, legislative intervention, and expenditure in the case of economic and social rights requires a different legal and constitutional approach to their enforcement, and challenges their alleged indivisibility under international law.<sup>53</sup> Whatever stance is adopted on this contested question, the likelihood of the amendment to Article II-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 amend-

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52. See generally Lammy Betten, *The EU Charter of Fundamental Rights: A Trojan Horse or a Mouse?*, 17 INT’L J. OF COMP. LAB. L. & INDUS. RELATIONS 151 (2001); Bob Hepple, *The EU Charter of Fundamental Rights*, 30 INDUS. L.J. 255, 266-70 (2001).

53. See, e.g., HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 237-323 (2d ed. 2000); CECILE FABRÉ, *SOCIAL RIGHTS UNDER THE CONSTITUTION* (2000); STEPHEN HOLMES & CASS SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999).



ment<sup>54</sup> — is 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 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,<sup>55</sup> it is also the case that the various social rights contained in the Charter are scattered across different sections: the right to education is 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.<sup>56</sup> There are also provisions of the Charter expressed in terms of principles, such as the principle of sex equality in Article II-23 which has always been a justiciable and indeed directly effective right in EC law, which would almost certainly not suddenly be rendered non-judicially cognizable by the amendment to Article II-52 of the Charter.<sup>57</sup> In further illustration of the lack of clarity in relation to the distinction between rights and principles introduced by Article II-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,<sup>58</sup> gives “the rights of the elderly”<sup>59</sup> and

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54. See Compromise Proposals Concerning Drafting Adjustments in the Horizontal Articles (Working Doc. 23, 2002).

55. See HOLMES & SUNSTEIN, *supra* note 53.

56. See Draft Treaty, *supra* note 4, art. II-14, O.J. C 169/1, at 24 (2003) (“Right to education”); *id.* art. II-25, O.J. C 169/1, at 25 (2003) (“The rights of the elderly”); *id.* art. II-34, O.J. C 169/1, at 26 (2003) (“Social security and social assistance”).

57. See *id.* art. II-23, O.J. C 169/1, at 25 (2003) (“Equality between men and women”); *id.* art. II-52, O.J. C 169/1, at 28 (2003) (“Scope and interpretation of rights and principles”). Article II-23 provides:

Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

*Id.* art. II-23, O.J. C 169/1, at 25 (2003). Article II-52 provides:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

*Id.* art. II-52, O.J. C 169/1, at 28 (2003).

58. See CHARTRE 4473/00 of October 11, 2000 (providing the original Charter explanatory memorandum); Updated Explanations relating to the text of the Charter

“the rights of the disabled”<sup>60</sup> as examples of “principles” recognized 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,<sup>61</sup> 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 a no less pressing 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 that focused around the drafting of the Charter, and the high-profile status that it subsequently occupied within the debates in the European Convention meant that despite the eventual decision to incorporate it into a new constitutional text, it was simultaneously reined firmly in and hedged around with a series of constraints. The aim of these restrictive provisions was to prevent the Charter 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

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of Fundamental Rights, CONV 828/03, July 9, 2003 (providing the memorandum as revised after the second Convention had finished its work on the Charter).

59. Article 25 of the Charter declares that the EU recognizes and respects “the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.” Charter, *supra* note 1, art. 25, O.J. C 364/1, at 14 (2000).

60. Article 26 of the Charter declares that the EU recognizes 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.” Charter, *supra* note 1, art. 26, O.J. C 364/1, at 14 (2000).

61. 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 Jason Coppel & Aidan O’Neill, *The European Court of Justice: Taking Rights Seriously?*, 12 L. STUD. 227 (1992); Joseph H. H. Weiler & Nicolas J.S. Lockhart, “Taking Rights Seriously” *The European Court and its Fundamental Rights Jurisprudence — Part I*, 32 COMMON MKT. L. REV. 51, 579 (1995).

application of EU law such as could affect the residual powers of the Member States, and a restricted role for the ECJ in adjudicating the provisions of the Charter. The boldest decision taken in the context of the Charter Convention's Draft Treaty, in a sense, was the decision to commit the EU (with what would be a newly acquired single legal personality) to accession to the ECHR. The novelty of this move is that the EU institutions would henceforth be formally subject to the jurisdiction and scrutiny of the European Court of Human Rights.<sup>62</sup> 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.<sup>63</sup>

#### IV. UNANTICIPATED EVENTS WITHIN THE EU: ARTICLE 7 OF THE TEU AND THE HAIDER AFFAIR

Even while the frustrations of the Charter and the Charter Convention debates were absorbing so much of the attention of political observers and legal scholars, 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 to the Treaty on European Union by the Treaty of Amsterdam in 1997, which provided for the suspension of the rights of a Member State that 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.<sup>64</sup> Article 7 must be understood in the light of earlier changes that were introduced at the time the TEU was drafted and signed. In 1992, Article 6 (ex

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62. See Draft Treaty, *supra* note 4, art. I-7(2), O.J. C 169/1, at 9 (2003). Article 7(2) provides: "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." *Id.* 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 Robert Harmsen, *National Responsibility for European Community Acts Under the European Convention on Human Rights: Recasting the Accession Debate*, 7 EUR. PUB. L. 625 (2001).

63. See Draft Treaty, *supra* note 4, art. I-7(2), O.J. C 169/1, at 9 (2003).

64. See Consolidated TEU, *supra* note 27, art. 7, O.J. C 325/5, at 12 (2002), 37 I.L.M. at 69 (ex Article F.1).

Article F) of the TEU was adopted, declaring that the Union was committed to the respect of 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 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 Treaty of Amsterdam five years later codified for the first time in the EU Treaties the so-called Copenhagen criteria, by specifying in Articles 6 and 49 of the TEU that the EU is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, and that respect for these principles is a condition of EU membership.<sup>65</sup> 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 to the TEU by the Amsterdam Treaty, providing for the possible suspension of 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

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65. See Bruno de Witte & Gabriel Toggenburg, *Human Rights and Membership of the Union*, in *THE EU CHARTER OF FUNDAMENTAL RIGHTS: POLITICS, LAW AND POLICY* (S. Peers & A. Ward eds., forthcoming 2004); Manfred Nowak, *Human Rights 'Conditionality' in Relation to Entry to, and Full Participation in, the EU*, in *THE EU AND HUMAN RIGHTS*, *supra* note 31, at 687. See also Consolidated TEU, *supra* note 27, art. 6, O.J. C 325/5, at 11-12 (2002), 37 I.L.M. at 69 (ex Article F); *id.* art. 49, O.J. C 325/5, at 31 (2002), 37 I.L.M. at 78 (ex Article O). Article 49 provides:

Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

*Id.*

focused seriously on this Article was when the Freedom Party ("FPO"), following its success in domestic elections, was about to enter into coalition government in Austria in 2000.<sup>66</sup> 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).<sup>67</sup> 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 World War II, coming into government in an EU Member State.<sup>68</sup> 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 FPO, 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.<sup>69</sup> The situation was eventually defused by the use of an *ad hoc* procedure, where the president of the ECHR (which is not, of course, formally an EU court or institution) was requested by the EU 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

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66. See Merlingen et al., *supra* note 5 (describing the "FPO").

67. Consolidated TEU, *supra* note 27, art. 6(1), O.J. C 325/5, at 11 (2002), 37 I.L.M. at 69 (ex Article F). Article 6(1) provides that "[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." *Id.*

68. See K. Lesli Ligorner, *Nazi Concentration Camp Guard Service Equals "Good Moral Character?"*: *United States v. Lindert*, 12 AM. U.J. INT'L L. & POL'Y 145, 157 (1997) (describing the Waffenn-SS as "the elite armed guard and intelligence unit of the Nazi Party of Germany").

69. See generally Mathew Happold, *Fourteen Against One: The EU Member States' Response to Freedom Party Participation in the Austrian Government*, 49 INT'L & COMP. L.Q. 953 (2000).

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.<sup>70</sup>

The Austrian debacle led in fact to some longer-term changes, including the subsequent revision of Article 7 of the TEU by the Treaty of Nice in 2000. Proposals were put forth during the Nice Intergovernmental Conference ("IGC")<sup>71</sup> both by Austria, as the Member State with perhaps most experience of the deficiencies of the original Article 7, and by Belgium,<sup>72</sup> which envisaged the possibility of taking action even in cases of a threatened breach and not only where an existing serious and persistent breach is found. The amendment to Article 7, which was eventually agreed upon 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.<sup>73</sup> Secondly, there is a 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 a provision for the appointment of a committee of independent persons to report on the situation in that State.<sup>74</sup> The key lessons of the Haider affair, in

70. See, e.g., Alston & Weiler, *supra* note 6. See also MARTTI AHTISAARI ET AL., *supra* note 7; Final Report on the Situation as Regards Fundamental Rights in the European Union, *supra* note 7; European Parliament Resolution on the Situation as Regards Fundamental Rights in the European Union, *supra* note 7.

71. For more information on the Nice Intergovernmental Conference ("IGC"), see *2000 Intergovernmental Conference*, at [http://europa.eu.int/comm/archives/igc2000/index\\_en.htm](http://europa.eu.int/comm/archives/igc2000/index_en.htm) (last visited Dec. 23, 2003).

72. See Conference of the Representatives of the Governments of the Member States, IGC 2000 — Article 7 of the TEU, CONFER 4782/00, available at <http://ue.eu.int/cigdocs/EN/4782en.pdf> (Oct. 5, 2000).

73. Consolidated TEU, *supra* note 27, art. 7, O.J. C 325/5, at 12 (2002), 37 I.L.M. at 69 (ex Article F.1).

74. See *id.* art. 7, C 325/5, at 12 (2002), 37 I.L.M. at 69 (ex Article F.1). Article 7 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 Govern-

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 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.

#### V. 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

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ment 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.

6. 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.

7. 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.

*Id.*

Report, has since that time increasingly been highlighted by commentators and perhaps most starkly within the field of accession policy.<sup>75</sup> 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,<sup>76</sup> and in promoting human rights goals in its development policies,<sup>77</sup> 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 European Commission, than ever was the case before.<sup>78</sup> 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 States — 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,<sup>79</sup> a field which once again was largely ignored when the Charter was drafted.<sup>80</sup> This double-standard problem has again recently been criticized in reports by non-governmental organizations (“NGOs”) active in the field — in particular by the impressive EU Accession Monitoring Programme of the Open Society Institute (“EUMAP”)<sup>81</sup>

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75. See Alston & Weiler, *supra* note 6; Williams, *supra* note 6; ANDREW WILLIAMS, *EU HUMAN RIGHTS POLICIES: A STUDY IN IRONY* (OUP, forthcoming Apr. 2004) [hereinafter *A STUDY IN IRONY*]; Bruno de Witte, *Enlargement and the EU Constitution*, in *THE ENLARGEMENT OF THE EUROPEAN UNION* 209, 233-41 (Marise Cremona ed., 2003).

76. See generally ELENA FIERRO, *THE EU'S APPROACH TO HUMAN RIGHTS CONDITIONALITY IN PRACTICE* (2003).

77. See *A STUDY IN IRONY*, *supra* note 75, at ch. 2.

78. See *id.*

79. See Bruno de Witte, *Politics versus Law in the EU's Approach to Ethnic Minorities*, in *EUROPE UNBOUND: ENLARGING AND RESHAPING THE BOUNDARIES OF THE EUROPEAN UNION* 137 (Jan Zielonka ed., 2002).

80. See Guido Schwellnus, *Much Ado about Nothing? Minority Protection and the EU Charter of Fundamental Rights*, Paper No. 5/2001, Constitutionalism Web Papers Series, available at <http://les1.man.ac.uk/conweb> (last modified Aug. 7, 2003).

81. See Rachel Guglielmo, *EU Enlargement: A Union of Values or a Union of Interests?*, available at <http://www.eumap.org/articles/content/91/914> (Nov. 6, 2002); Stephen Humphreys, *Monitoring: A Cure for the Democratic Deficit*, available at <http://www.eumap.org/articles/content/91/911> (Nov. 6, 2002).



and by Minority Rights Group International (“MRG”).<sup>82</sup>

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 were so vigorously monitored during the accession process, once they become full members of the polity.<sup>83</sup> 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 NGOs<sup>84</sup> 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.<sup>85</sup>

Here, two dimensions of the bifurcation of the EU’s human rights policy coming together are present.<sup>86</sup> On the one hand is the clear presumption raised by the differential treatment during the pre-accession process that such disparity is unjustified. While on the other hand is 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 EU discussed above, certain implications become apparent. The EU has an

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82. See *EU Accession Exposes Double Standards on Minority Rights*, at [www.minorityrights.org/news\\_detail.asp?ID=117](http://www.minorityrights.org/news_detail.asp?ID=117) (Apr. 15, 2003); Alan Philips, Minority Rights Group International, *The Framework Convention for the Protection of National Minorities: A Policy Analysis*, at <http://www.minorityrights.org/admin/Download/pdf/FCNMPolicyPaperAug2002.pdf> (2002).

83. See de Witte, *supra* note 75, at 240-41.

84. See Tim Waters, *Judges for a New Order: The Case for Continued Monitoring after Membership*, Open Society Institute, at <http://www.eumap.org/articles/content/91/912> (Nov. 6, 2002).

85. See Mihaela Gherghisan, *Hungarian Party Proposes EU Minorities Committee*, at <http://www.euobserver.com/index.phtml?sid=15&aid=9344> (Feb. 12, 2003). 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 European Convention, for the creation of an advisory committee on minority problems in Europe. *Id.*

86. For an extended analysis of the nature and causes of this bifurcation, see generally A STUDY IN IRONY, *supra* note 75.

interest in monitoring its Member States, both new (to ensure fulfillment 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 that 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 EU 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 EU human rights policy has evidently not come about.

## VI. *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, 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.,<sup>87</sup> 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 U.K.,

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87. See Open Society Institute, Reports on Monitoring the EU Accession Process, available at <http://www.eumap.org/reports> (2001-2002).

and the Roma in Germany and Spain.<sup>88</sup>

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 of the TEU and combined it with the existence of the recently proclaimed Charter. The European 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.<sup>89</sup>

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 of the 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 European Parliament also called for the establishment of a network of legal experts on human rights from each of the Member States 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."<sup>90</sup>

The earlier calls which had been made by various *ad hoc* committees<sup>91</sup> 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 network<sup>92</sup> or by establishing an entirely new agency had at the

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88. See Open Society Institute, Reports on Monitoring Minority Protection in EU Member States, available at <http://www.eumap.org/reports/2002/content/09> (2002).

89. Final Report on the Situation as Regards Fundamental Rights in the European Union, *supra* note 7.

90. *Id.*

91. See, e.g., AHTISAARI ET AL., *supra* note 7; Final Report on the Situation as Regards Fundamental Rights in the European Union, *supra* note 7; European Parliament Resolution on the situation as regards fundamental rights in the European Union, *supra* note 7; Leading by Example Report, *supra* note 31.

92. See European Monitoring Centre on Racism and Xenophobia, at <http://>

time been rejected.<sup>93</sup> However, the call of the European Parliament this time to establish a network of experts, specifically for the purpose of helping to operationalize Article 7 of the 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.<sup>94</sup> 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."<sup>95</sup> The purpose of the proposal to establish an OMC was to promote mutual evaluation and learning, with the aim of identifying best practice in relation to particular fundamental rights which should be observed and promoted by all Member States. This emphasizes the preventative and learning function of monitoring, rather than the ex-post dimension of scrutiny that 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

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[eumc.eu.int/eumc/index.php](http://eumc.eu.int/eumc/index.php) (providing further information on the European Monitoring Centre on Racism and Xenophobia); RAXEN, at <http://www.antiracisme.be/raxen/raxen.htm> (providing information on RAXEN). 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 were made, particularly in relation to the comparability of the data provided. See Commission of the European Communities, Proposal for a Council Regulation on the European Monitoring Centre on Racism and Xenophobia, 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. *Id.* However, at its meeting on December 13, 2003, the European Council (i.e., heads of government) finally decided that the mandate of the Vienna Center should be extended so that it becomes a Human Rights Agency. See Conclusions of the Representatives of the Member of the Representatives of the Member States, available at <http://www.europa-web.de/europa/03euinf/10counc/seatoffi.htm>.

93. See Commission of the European Communities, The European Union's Role in Promoting Human Rights and Democratisation in Third Countries, COM (2001) 252, part 5 (2001) (rejecting proposal to establish EU human rights agency).

94. See First Report on Human Rights in the EU, *supra* note 9.

95. *Id.* at 24.

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 harmonizing action or regulation by the EU. The network has since been used by a prominent U.K.-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.<sup>96</sup>

More recently still, the rapporteur who drafted the European Parliament's 2002-2003 report on fundamental rights in the European Union also drew on the methodology and aims of the OMC process, by declaring that the European 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."<sup>97</sup> Finally, in its recent communication on Article 7 of the TEU, the European Commission argued strongly for a promotional and preventative approach through ongoing monitoring, rather than a crisis-reaction approach to be adopted to that provision.<sup>98</sup> In particular, the European 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.<sup>99</sup> 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 petition<sup>100</sup> to the European Parliament requesting it to initiate the Article 7 TEU procedure against Italy, for the serious and persistent breach of Arti-

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96. Statewatch submission to the EU Network of Independent Experts on Fundamental Rights, *available at* <http://www.statewatch.org> (Oct. 2003).

97. Final Report on the Situation as Regards Fundamental Rights in the European Union and its Member States, *supra* note 7.

98. See Commission of the European Communities, Communication on Article 7 of the TEU: Respect for and Promotion of the Values on which the Union is Based, COM (2003) 606 [hereinafter Communication on Article 7].

99. See *id.* ¶ 2.1.

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

cle 6 caused by its repeated violation of the freedom and pluralism of the media under Prime Minister Berlusconi.<sup>101</sup>

What is the significance of the various invocations of the mechanism of an OMC 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.<sup>102</sup> It is a process of policy-making which is not uncontroversial,<sup>103</sup> 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 utilized in many sensitive areas of social policy such as employment, social inclusion (or anti-poverty), pension 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 centralized policies.<sup>104</sup> The OMC is a

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

102. See, e.g., Lisbon European Council, Conclusions of the Presidency, E.U. BULL., no. 3 (2000) [hereinafter Lisbon Presidency Conclusions]; see also BUILDING SOCIAL EUROPE THROUGH THE OPEN METHOD OF COORDINATION (Caroline de la Porte & Philippe Pochet eds., 2002).

103. For critical analyses, see Damian Chalmers & Martin Lodge, *The OMC and the European Welfare State* (LSE ESRC Centre for Analysis of Risk and Regulation, Discussion Paper No. 11, 2003); CAROLINE DE LA PORTE & PATRIZIA NANZ, OMC — A DELIBERATIVE-DEMOCRATIC MODE OF GOVERNANCE? THE CASES OF EMPLOYMENT AND PENSIONS (forthcoming).

104. For some of the vast and growing literature on the open method of coordina-

strategy that 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.<sup>105</sup> In the first place, the OMC instantiates a process 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 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 above, against the extension of either the EU's traditional regulatory powers in the human rights field or of the ECJ'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 that has the capacity, if effectively designed and used, to navigate between

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tion, both in general, and in specific policy fields, see EUC Books, Papers & Speeches, European Union Center at the University of Wisconsin-Madison, available at <http://eucenter.wisc.edu/OMC> (last modified June 16, 2003).

105. 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 EU*, in *ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS* 247 (Tamara Hervey & Jeff Kenner eds., 2003).

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,<sup>106</sup> 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.

### VII. 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.<sup>107</sup> 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 Covenant on Civil and Political Rights ("ICCPR"). Reports are generally requested of States within one 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 State parties are still in default, despite repeated

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106. The "peer review" mechanism that 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 The Peer Review Program of the European Employment Strategy, at <http://www.peerreview-employment.org/en> (2000).

107. See generally THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING (Philip Alston & James Crawford eds., 2000).



reminders by the Human Rights Committee.”<sup>108</sup> Moreover, as observed by the Human Rights Committee in 2002, “[o]ther States have announced that they would appear before the Committee but have not done so on the scheduled date.”<sup>109</sup> Individual complaints can also be made to the Human Rights Committee by means of a written and partly confidential procedure, but this is a quasi-judicial function that is rather different from the general and regular monitoring system.<sup>110</sup>

A similar kind of mandatory reporting exists: in 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 of 2004 the Committee on the Rights of Migrant Workers.<sup>111</sup> 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 organizations. “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.<sup>112</sup>

The OSCE system of human rights monitoring has evolved over the years, and there are a number of different mechanisms

108. 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*, at 194, U.N. Doc. HRI/GEN/1/Rev.6 (2003). See generally, INEKE BOEREFIJN, *THE REPORTING PROCEDURE UNDER THE COVENANT ON CIVIL AND POLITICAL RIGHTS: PRACTICE AND PROCEDURES OF THE HUMAN RIGHTS COMMITTEE* (1999).

109. Human Rights Committee, *supra* note 108, at 194.

110. See LEADING CASES OF THE HUMAN RIGHTS COMMITTEE (Raija Hanski & Martin Scheinin eds., 2003).

111. See *THE UN HUMAN RIGHTS TREATY SYSTEM IN THE TWENTY FIRST CENTURY* (Anne Bayefsky ed., 2001).

112. MIKO LEMPINEN, *CHALLENGES FACING THE SYSTEM OF SPECIAL PROCEDURES OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS* (2001); *INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JAKOB TH. MÖLLER* (Gudmundu Alfredsson et al. eds., 2001).

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 to resolve a specific situation. There is also a 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 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 that is based more specifically on conflict prevention and reaction to crisis.<sup>113</sup>

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<sup>114</sup> which has led to three types of monitoring: general, thematic,<sup>115</sup> and *ad hoc*. The Declaration provides that “questions of implementation of commitments concerning the situation of democracy, human rights, and the rule of law in any [M]ember 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

113. See *QUIET DIPLOMACY IN ACTION: THE OSCE HIGH COMMISSIONER ON NATIONAL MINORITIES* (Walter Kemp ed., 2001); Steven Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. INT’L L. & POL. 591 (2001).

114. See Relations with the Parliamentary Assembly, Parliamentary Assembly 1536 on Progress of the Assembly’s monitoring procedure (2000-2001), at [http://cm.coe.int/stat/E/Decisions/2002/779/d02\\_6.htm](http://cm.coe.int/stat/E/Decisions/2002/779/d02_6.htm) (Dec. 2001). See also Andrew Drzemczewski, *The Prevention of Human Rights Violations: Monitoring Mechanisms of the Council of Europe*, in *THE PREVENTION OF HUMAN RIGHTS VIOLATIONS* 139 (Linos-Alexander Sicilianos ed., 2001).

115. 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.

Rights, is that of the (revised) European Social Charter.<sup>116</sup> 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 that States have not accepted, but this is rare. Further, the Committee of Ministers can issue recommendations to States that do not comply with commitments accepted under the Charter, following the regular reporting procedure before the Committee on Social Rights. Following the adoption of an additional Protocol in 1995, a collective complaints mechanism was created under the European Social Charter to empower specified organizations to lodge such complaints. By June 2003, sixteen such complaints had been lodged.<sup>117</sup> 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 has been criticized 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.<sup>118</sup>

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.<sup>119</sup> 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 com-

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116. 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 four to five years.

117. See Council of Europe, Human Rights Information Bulletin, No. 59, at 39, at [http://www.coe.int/T/E/Human\\_rights/PDFs/IB59E\\_light.pdf](http://www.coe.int/T/E/Human_rights/PDFs/IB59E_light.pdf) (Mar.-June 2003).

118. See generally DAVID J. HARRIS & JOHN DARCY, *THE EUROPEAN SOCIAL CHARTER* (2d ed. 2001).

119. *COMBATING TORTURE IN EUROPE* (Rod Morgan & Malcolm D. Evans eds., 2001); *PROTECTING PRISONERS: THE STANDARDS OF THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE IN CONTEXT* (Rod Morgan & Malcolm D. Evans eds., 1999).

plained 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.<sup>120</sup> 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. However, there is no systemic monitoring or reporting mechanism, and the Commissioner has 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 following the provision of 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 EU States 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 EU, 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.

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120. See Interview with Prof. Rainer Hofmann, at [http://www.coe.int/T/E/human\\_rights/minorities/5\\_5\\_anniversary/20031031\\_interv\\_hofmann.asp](http://www.coe.int/T/E/human_rights/minorities/5_5_anniversary/20031031_interv_hofmann.asp) (last visited Feb. 7, 2004).

## 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 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 ECJ 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 of the TEU following the Haider affair,<sup>121</sup> has been refined somewhat and indeed has begun to be invoked by civil society organizations 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.<sup>122</sup> 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 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.

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121. See Communication on Article 7, *supra* note 98.

122. See *supra* note 101 and accompanying text.

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 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.<sup>123</sup> 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 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 OMC 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 characterized the constitutional-level debate on the Charter. 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 full-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.

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123. See Matúš Minárik, *The Quality of Democracy: Learning from the Candidates?*, at [www.eumap.org/articles/content/91/915](http://www.eumap.org/articles/content/91/915) Nov. 6, 2002.