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The Road Not Taken: The EU as a Global Human Rights Actor

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THE ROAD NOT TAKEN: THE EU AS A GLOBAL HUMAN RIGHTS ACTOR

By Gráinne de Búrca*

Abstract

This paper challenges the traditional account of the EU's engagement with human rights. The classic narrative begins with the silence of the EEC Treaty in 1957 and depicts a gradual engagement with human rights over the decades, culminating in the establishment of a substantial EU human rights regime in recent years. The paper returns to the EU's origins in the 1950s and compares the ambitious but long-forgotten plans for European Community engagement with human rights drafted then with today's EU human rights framework. It argues that today's EU human rights system is less ambitious than that envisaged in the 1950s, and that the two main causes for criticism of today's EU system –the lack of a serious human rights mechanism, and the double-standard between internal and external human rights policies – have survived the changes introduced by the Lisbon Treaty and even been enshrined by those changes.

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A. Introduction

For many, the recent introduction by the European Union's Lisbon Treaty of a range of significant human rights provisions marks the coming of age of the EU as a human rights actor.[1] The Lisbon Treaty inaugurated the legally binding character of the EU Charter of Fundamental Rights, enshrined a commitment to accede to the European Convention on Human Rights, and identified human rights as a foundational value in Article 2 of the Treaty on European Union. These changes have already drawn comment as developments which "will change the face of the Union fundamentally" [2] and which take the protection of rights in the EU 'to a new level'.[3] The classic account of EU engagement with human rights depicts a long slow trajectory over more than fifty years from a limited economic Community in which considerations of human rights were deliberately delegated to the Community's 'sister' organization, the Council of Europe, to the emergence of a powerful political entity in which the protection and promotion of human rights has become a central commitment. The traditional narrative is thus one of linear progress beginning with the silence of the three founding European Community Treaties on the subject of human rights in the 1950s[4] and tracing the gradual emergence of a human rights regime over the ensuing decades.[5]

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[1] The Lisbon Treaty, whose provisions are largely based on those of the unratified Treaty establishing a Constitution for Europe, entered into force on December 1 2009.

[2] Ingolf Pernice, *The Treaty of Lisbon and Fundamental Rights*, *in* THE LISBON TREATY. EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY? (Stefan Griller & Jaques Ziller eds., 2008). He argues that "taken seriously, all three pillars: the Charter as a binding instrument, the accession to the European Convention of Human Rights and the reference to the general principles of law as established by the ECJ, together will change the face of the Union fundamentally."

[3] Karoline Mathisen, *The Impact of the Lisbon Treaty, in particular Article 6 TEU, on Member States' obligations with respect to the protection of fundamental rights*, University of Luxembourg, Law Working Paper Series Paper number 2010-01, p.4.

[4] These were the European Coal and Steel Community Treaty in 1952 (now expired), and the European Economic Community Treaty and the Atomic Energy Community Treaty in 1957.

[5] For early accounts, see Manfred A. Dauses, *The Protection of Fundamental Rights in the Community Legal Order* 10 EUR. L. REV. 398 (1985); Pierre Pescatore, *The Context and Significance of Fundamental Rights in the Law of the European Communities*, 2 HUM. RTS. L.J. 295 (1981); Ulrich Scheuner, *Fundamental Rights in European Community law and in National Constitutional Law*, 12 COMMON MKT. L. REV. 171 (1975). For more recent treatments see, e.g., Allan Rosas, *Fundamental Rights in the EU, with Special Emphasis on the Role of the European Court of Justice*, *in* INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS 579 (Gudmundur Alfredsson, Jonas Grimheden, Bertrand G. Ramcharan & Alfred de Zayas, eds., 2d ed. 2009); Koen Lenaerts & Eddy de

The aims of this article are twofold. The primary aim is to challenge aspects of the classic narrative and to provide a different account of the EU's trajectory by returning to its origins in the 1950s and comparing the ambitious but long-forgotten plans for European Community engagement with human rights drafted in the early 1950s with today's EU human rights framework. The second aim is to compare aspects of today's regime with that envisaged in the early 1950s, and to consider contemporary critiques of the EU human rights regime in the light of that comparison. The analysis concludes by reflecting on possible explanations for the differences in the conception and ambition of the EU's human rights role then and now, and the implications for the EU's aspirations as a 'global normative actor'.[6]

Drawing on archival material relating to the place of human rights in plans for the early Communities, notably in the draft European Political Community (EPC) Treaty of 1953, the article presents and discusses several proposals which were put forward at the time. An analysis of the draft EPC Treaty reveals that while it contained many of the elements present in the current EU constitutional framework for human rights protection, the EPC clauses were in several ways more ambitious than today's, yet they attracted the support of Member State governments at the time who were otherwise wary of supranational political integration. Moving

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Smijter, *A "Bill of Rights" for the European Union*, 38 COMMON MKT. L. REV. 273 (2001); Francis G. Jacobs, *Human Rights in the European Union: The Role of the Court of Justice*, 26 EUR. L. REV. 331 (2001); Samantha Besson, *The European Union and Human Rights : Towards a Post-National Human Rights Institution*, 6 HUM. RTS. L. REV. 323 (2006).

[6] For a sampling of the vast literature on the EU as a distinctive normative power, see Ian Manners, *Normative Power Europe: A Contradiction in Terms?*, 40 J. COMMON MKT. STUD. 235 (2002); Helene Sjursen, *The EU as a Normative Power: How Can This Be?*,13 J. EUR. PUB. POL'Y 235 (2006), Nathalie Tocci, *Who is a Normative Foreign Policy Actor? The European Union and its Global Partners*, CENTER FOR EUROPEAN POLICY STUDIES, BRUSSELS, (2008). For some official statements of the EU on its aspiration to include the promotion of human rights as a centerpiece of its international activites, see *Advancing Human Rights Worldwide: The EU Leading by Example*, EU FOCUS (Delegation of the Euro. Comm'n to the U.S.), May 2009, *available at* http://www.eurunion.org/News/eunewsletters/EUFocus/2009/EUFocus-HumRts-05-09.pdf; Delegation of the European Commission to the United States, EU Commitment to Promoting Human Rights and Democracy (Dec. 10, 2003), http://www.europa-eu-un.org/articles/en/article_3104_en.htm; *The European Union and Human Rights: A Global Commitment*, EU FOCUS (Delegation of the Euro. Comm'n to the U.S.), March 2006, *available at* http://www.eurunion.org/News/eunewsletters/EUFocus/2006/EUFocus-HumanRts.pdf; Delegation of the European Commission to the United States, The Enlarging European Union at the United Nations: Making Multilateralism Matter (May 1, 2004), http://www.europa-eu-un.org/articles/en/article_1008_en.htm.

on to the decision to omit any reference to human rights in the 1957 EEC and Euratom Treaties, the paper argues that the abandonment of the EPC Treaty after France's failure to ratify the European Defence Community (EDC) Treaty in 1954, and the move ahead with the deliberately more circumscribed Communities in 1957 did not necessarily entail a decision – either at that time or later - that human rights matters would henceforth be irrelevant to the new Communities, nor that such matters would be best left to Council of Europe. On the contrary, that strategy reflected a pragmatic and conscious decision that the project of supranational European integration should move cautiously, step-by-step, and should re-launch itself after the failure of the EDC by adhering in the first instance to a carefully-delimited set of economic concerns, rather than immediately pursuing an open-ended political agenda. While this may seem a minor distinction, there is a significant difference between opting for a strategy of step-by-step implementation of longer-term integration objectives on the one hand, and a definitive decision to outsource matters such as human rights protection in the new Communities entirely to a different organization such as the Council of Europe, on the other. One of the premises of my argument is that this has continuing implications for the way we understand and evaluate the EU's engagement with human rights today.

In questioning the general narrative of progress from an economic community in which rights played no role, to a regional organization which is, in the language of Article 3 TEU, "founded on" respect for human rights, I suggest that this narrative is somewhat misleading both as regards the origins of the EU and as regards its current constitutional framework. Research into the drafting of the EPC Treaty suggests that on the one hand, the six Member States of the European Community (then the Coal and Steel Community) in 1953 appeared willing, despite their objections to various other supranational features of the proposed EPC Treaty, to enact strong human rights protections as part of the new Community. On the other hand, today's EU human rights regime appears weaker in several key respects than the 1953 draft regime, and the changes recently introduced by the Lisbon Treaty arguably enshrine aspects of certain much-criticized weaknesses into the treaty framework. Of particular note is the fact that the regime for EU

human rights protection envisaged in the early 1950s would have addressed three of the recurrent criticisms of today's system, by ensuring a strong EU human rights mechanism, by incorporating human rights concerns equally within internal and external policies, and by integrating the Community human rights system firmly into the regional human rights system. Conversely, these criticisms of the current system – the absence of a serious EU human rights mechanism, the 'double-standard' as between internal and external policies, and the continuing emphasis on the autonomy of the EU's human rights regime – remain pertinent, and the limitations they address can even be said to have been written into the EU's constitutional framework by the changes introduced by the Lisbon Treaty.

To present this alternative account of the evolution of human rights protection in the EU, the article focuses closely on the brief but intense period in 1951-4 when the question of human rights protection was prominent on the agenda of the European integration process, before its abrupt disappearance from the agenda of the new European Communities in 1957. Two important drafting exercises took place during this time. The first resulted in the draft articles produced by the Comité d'études sur une constitution européene (CECE) in 1952, and the second – which built upon the first – produced the relevant provisions of the draft Treaty on a European Political Community (EPC) in 1952-3. The EU literature on human rights so far remains silent on this early attempt to define a role for the emerging European entity in the field of human rights protection. The reason for this neglect is at one level evident, since they did not ultimately bear fruit. As is well-known by students of EU law and politics, the failure of the European Defence Treaty in 1954 led to a significant scaling back of ambitions for European integration and for the very idea of a European political community. One of the consequences of this scaling back was that neither the European Atomic Energy Treaty nor the European Economic Community Treaty of 1957 mentioned any role for the EU in relation to human rights, and the earlier drafting attempts of the 1950s were consigned to history. Perhaps more surprisingly however, they were consigned to obscurity, since – despite a significant body of scholarship examining the failed European Defence Community and the provisions of the Treaty which

established it, there is a much smaller literature on the draft European Political Community Treaty, none of which appears to focus on the human rights provisions of that document.

The rescue of this fascinating piece of drafting history from obscurity provides both an opportunity to think afresh about the origins of human rights protection in the EU, and a different perspective from which to reflect on and to evaluate today's EU regime for human rights protection. For the purposes of the analysis, the stages of evolution of EU human rights law and policy have been divided into three broad periods. The first is the period prior to the creation of the European Communities when the human rights provisions of the draft European Political Community Treaty, and the Resolutions of the Comité d'études sur une constitution européene on which they were partly based, were drawn up in the early 1950s. The second covers the period from the disappearance of any overt reference to human rights matters from European Community discourse with the adoption of the EEC and Euratom Treaties in 1957, until their formal re-emergence through the 1970s and 1980s in judicial and political discourse. The third and final stage brings us up to the present day framework, covering the period from the adoption of the Maastricht Treaty in 1992 until the adoption of the Lisbon Treaty in late 2009.

B. Phase 1: The Background and Drafting of the European Political Community Treaty 1952-3:

The Comité d'études pour la constitution européenne (CECE) was set up in 1952 by members of the Mouvement europeén, an influential European movement – or rather a collection of movements - which had formally been established in 1948 to promote the cause of European unity and integration.[7] The CECE, which was officially labeled a 'study group' (comité d'études), was set up specifically with a view to contributing to the process of drafting a constitution ('statute') for a European political community. The CECE was established some

[7] For information about the history and founding of the European Movement, see http://www.europeanmovement.eu/index.php?id=6024

time before the special Ad Hoc Assembly (drawn in part from the Assembly of the European Coal and Steel Community) which was formally tasked with drafting the European Political Community Treaty had been constituted,[8] but the membership and aims of the study group and the subsequent Ad Hoc Assembly overlapped.[9] Notably, the CECE was chaired by Paul Henri Spaak, who had also been the first President of the Council of Europe (having subsequently resigned in frustration at the intergovernmental nature and limited aspirations of that organization), and who subsequently became chairman of the Ad Hoc Assembly established to draft the EPC Treaty. One of the consequences of the close relationship between the two bodies was that the draft articles and resolutions produced by the CECE were used by the Ad Hoc Assembly and its Constitutional Committee as a basis for drawing up the provisions of the draft European Political Community Treaty.

In addition to Paul Henri Spaak and Altiero Spinelli, the membership of the CECE was composed of a select group of legal experts including international legal academics and national parliamentarians.[10] The membership of the subsequent Ad Hoc Assembly was more broadly drawn and had significantly greater political legitimacy and representation. It was drawn from the newly formed Assembly of the European Coal and Steel Community, and supplemented with a number of additional members co-opted from France, Italy and Germany, to serve as a pre-constituent body for the European Political Community, at the same time as the European Defence Community Treaty was being drawn up.

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[8] For an early account of the drafting of the EPC, see Basil Karp, *The Draft Constitution for a European Political Community* 8 INT'L ORG. 181; A. H. Robertson, *The European Political Community* (1952) 29 BRIT. Y.B. INT'L L. 383, and more recently the book length treatment by RICHARD T. GRIFFITHS, EUROPE'S FIRST CONSTITUTION: THE EUROPEAN POLITICAL COMMUNITY 1952-54 (2005). *See also* Antonin Cohen, *Constitutionalism Without Constitution: Transnational Elites Between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s−1960s)*, 32 LAW & SOC. INQUIRY 109 (2007).

[9] For a discussion of this see Cohen, *supra* note 13, at 120-123 and Daniela Preda, *The Debate over the European Constituent Assembly: a Story of Drafts, Desires and Disappointments*, THE FEDERALIST, 2003, Vol. 1, at 12.

[10] For discussion of the significance of its composition see Cohen, *supra* note 8, at 120-122.

1. The work of the Comité d'études pour la constitution européenne (CECE) on human rights

The CECE began work early in 1952, and – perhaps unsurprisingly, given the number of prominent lawyers on the committee - the question of the place of human rights in the proposed new European polity was raised early on. In the third session of the Study Group on 24 May, Altiero Spinelli seems to have been the first person to remark that the committee should give attention to 'human rights and fundamental freedoms'.[11] Other members however, and in particular one of the influential German parliamentarians, Max Becker, countered that the issue of fundamental rights protection was better left to the nation states.

Despite these basic differences of view about the role of human rights in the new European construction, 'Human Rights' were assigned a separate chapter by the committee. Fernand Dehousse, the CECE rapporteur, raised a number of questions in this regard. He asked first what the source of inspiration for human rights protection in the proposed European Constitution should be: whether the Universal Declaration of Human Rights, the European Convention on Human Rights, or a synthesis of the national constitutional provisions; and secondly he asked whether it was necessary for these rights to be mentioned in the European Constitution itself, as opposed to being contained in the constitutions of the separate member states.[12] Ultimately, there was least resistance amongst the members of the CECE to relying on the ECHR as a source of human rights protection in the proposed European Constitution, despite the fact that the ECHR had not yet been ratified by the six member states of the European Coal and Steel Community.[13] The likelihood that using the ECHR would facilitate the accession of other countries in the future was mentioned.[14] Max Becker raised questions about the risk of divergent interpretations as between the Member States and asked a question which has continued to dominate debates today, namely who should be the final arbiter of those different interpretations

[11] *See* MOUVEMENT EUROPÉEN, PROJET DE STATUT DE LA COMMUNAUTE POLITIQUE EUROPEENNE: TRAVAUX PREPARATOIRES 18 (1952).
[12] *Id.* at 24, 31-32.
[13] Indeed, although five of the six member state had ratified the ECHR by 1955, France remained the 'awkward partner' in this instance and did not ratify the Convention until 1974.
[14] PROJET DE STATUT, n.11 at 46.

– whether the European Court of Human Rights, the 'Supreme Court' of the proposed new European Community or even the International Court of Justice. [15] The other – by now very familiar - question of possible clashes of jurisdiction in the field of human rights protection between the European Community Court and the European Court of Human Rights, despite the fact that at the time the latter had not yet begun to function, was also raised.[16] It was proposed by Fernand Dehousse that there be a separate chamber for dealing with human rights within the proposed European Community Court.[17] Finally, the possibility of Community accession to the ECHR was also raised.[18]

Ultimately, in the first of nine Resolutions which were adopted by the CECE as the product of its drafting work, the solution chosen was to declare 'protection of fundamental freedoms' to be one of the aims of the new Community, and to oblige the Member States of the Community to respect human rights as defined in the European Convention on Human Rights. The first of the nine Resolutions declared that a new and indissoluble European Community was to be created, with

> "the aim, through establishing a closer bond between the [peoples of the Member States], of guaranteeing the common well-being, existence and external security of the Member States and of protecting the constitutional order, democratic institutions and fundamental freedoms."

In other words, protection of fundamental freedoms within the new Community was to be one of its central aims. The recent experience of the second world war seems clear also in the references to the protection of constitutional order and democratic institutions. From this perspective, the interest of the new Europe in human rights protection was concentrated on the need to tame the potential excesses of or within member states. Paragraph 7 of the first CECE

[15] *Id.* at 33.
[16] See *id.* at 46 for the committee's discussion of the relevant report of Henry Frenay who had been Chairman of the European Union of Federalists.
[17] *Id* at 125-127.
[18] *Id.* at 207.

Resolution went on to outline a specific and substantial crisis-intervention role for the proposed European Community in relation to the protection of human rights.

> "7. Each Member State is held to respect human rights as they are defined in the Convention on Defence of Human Rights and Fundamental Liberties, signed in Rome on November, 4th, 1950 as well as in the supplementary Protocol signed in Paris on March, 20th, 1952.
>
> Should the Community be so requested by the constitutional authorities of a Member State, it will assist the latter with a view to maintaining the constitutional order, democratic institutions or man's fundamental liberties.
>
> Should the Community Government establish that, in one Member State, the constitutional order, democratic institutions or man's fundamental liberties have been seriously violated, without the constitutional authorities of this State being able or wishing to re-establish these, the Community may intervene in place of these authorities until such time as the situation is brought under control. In such a case, the measures taken by the Community Government would be submitted without delay for the approval of the Community Parliament."

Several aspects of the approach adopted here are worthy of note. The first is the unequivocal assumption – despite the objection of the German member noted above – of the desirability of a central role for the European Community in protecting and preserving human rights *within* the Member States, even though the Member States themselves were clearly expected to take primary responsibility for this task. Secondly, the objects of suspicion from the point of view of human rights protection were the Member States rather than the Community, since apart from the fact that the Community was assigned the general aim of protecting fundamental freedoms, only the Member States and not the Community institutions were to be specifically placed under an obligation to respect human rights. Thirdly, the source of the rights the Member States were held to respect was the European Convention on Human Rights, and express reference was not made to member state constitutions. Fourthly, the role of the Community was envisaged as a kind of strong-arm back-stop in the event of a serious failure on the part of a member state in

protecting human rights and fundamental freedoms. To that extent, section 7 paragraph 3 of the first Resolution bears a slight resemblance to the provision now contained in Article 7 of the Treaty on European Union,[19] albeit with a much more extensive enforcement role envisaged for the Community at the time. Coming not long after the end of the war and the experience of the Holocaust, and a time of dictatorship in Spain and Portugal, the primary concern from the point of view of human rights seems to have been the fear of totalitarianism or similar abuses by European member states, and the wish to confer power on the new Community to intervene in the event of such serious violations. Section 7 paragraph 2 of the Resolution provided a softer option than this direct intervention, under which a Member state's constitutional authorities could request the Community for assistance to maintain democratic institutions or fundamental liberties if these were threatened within the state.

In the CECE's Resolution 4, which dealt with the judicial power of the proposed European constitutional framework, no express jurisdiction was to be conferred on the new court over human rights issues, but it was specified that the new Community Supreme Court would be both a Constitutional Court and a Court of Appeal.[20] There was a clause similar to that which is

[19] Treaty on European Union art. 7, Feb. 7, 1992, 1992 O.J. (C 191) provides for a set of procedures whereby the Council may ultimately suspend the voting rights of a Member State where the European Council has determined the existence of a serious and persistent breach by that State of the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

[20] The relevant parts of the Fourth Resolution on the Community Judicial Power set out principles which provided:
1. The juridical functions of the Community are performed by a Supreme Court and by other Courts established by law.

2. The Supreme Court ensures that in the interpretation and application of the Statute and laws of the Community the law is observed.
It is at the same time a Constitutional Court and a Court of Appeal.

3. Consequently it is competent:
(a) in cases of conflict between the Statute and the laws or public acts of the Community;
(b) in cases of conflict between the Statute and the laws or public acts of the Member States;
(c) in cases of disputes between the Member States or disputes to which the Community is a party;
(d) in cases of violations of diplomatic prerogatives or immunities;
(e) it is finally competent in areas of civil, penal, and public law coming within the competence of the Community which are entrusted to it by law.

currently contained in Article 19 TEU[21] which provided that the Court was to ensure that "in the interpretation and application of the [Statute] and laws of the Community the law is observed", and perhaps most significantly, individual citizens were to be given a right to take action before the Court in cases of alleged conflict between the new Treaty and acts of the Community institutions or of the Member States.

In short, the draft articles produced by the CECE envisaged a European Community with a strong role in the field of human rights protection, the emphasis being on human rights protection within the European Community with a view to guarding against totalitarianism or other kinds of repression within member states. While the job of protecting human rights was to be the first-line responsibility of the Member States, the Community would have a powerful back-up intervention role, either with or without the consent of the member state in question, in the case of serious violation of fundamental rights and freedoms within or by a Member State. The European Convention on Human Rights was envisaged as the formal legal source for the rights to be protected, and – despite the lack of explicit provision for this - the new Community Court would apparently have had jurisdiction to entertain actions brought by individuals for violation of the fundamental rights guaranteed by the new Treaty.

2. The work of the Ad Hoc Assembly and its Constitutional Committee in drafting the EPC Treaty

As explained above, at the time that plans for a European Defence Community (EDC) were being developed, the idea of establishing a European Political Community was simultaneously promoted as a way of providing political leadership and a democratic basis for the defence community. Just after the Treaty establishing the EDC was signed in May 1952, the

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The Community Parliament will regulate by law the right to take action before the Court.
In cases (a) and (b), this right will be open to any injured citizen, Member State and Community organ or to a determined fraction of each of these.
Resolutions Adopted by the Study Committee for the European Constitution (November, 1952), *available at* http://www.ena.lu/resolutions_adopted_study_committee_european_constitution_brussels_november_1952-2-986.

[21] Treaty on European Union, *supra* note 24, art. 19 provides that "the Court of Justice of the European Union… shall ensure that in the interpretation and application of the Treaties the law is observed."

Consultative Assembly of the Council of Europe – the first of the organizations aiming at closer European cooperation to be established in the post-war period - asked the six governments to give the Common Assembly of the European Coal and Steel Community (ECSC) the responsibility for drawing up a plan for a European Political Community. [22] The Council of Europe – originally intended as the post-war forum for European integration - had already proved a disappointment to those with a stronger European federal vision,[23] since it had deliberately been restricted in both its methods and its goals, identifying itself clearly as an intergovernmental discussion and coordination forum, rather than as the engine room for European federation.[24] For this reason the smaller group of six ECSC states, not including states such as Denmark, Ireland, Norway, Sweden and the UK which were members of the Council of Europe and ambivalent about deeper integration, formed an assembly to pursue the goals of closer and deeper integration. So it was in this way, pursuant to Article 38 of the ECSC Treaty,[25] that the Ad Hoc Assembly was formally created by the Special Council of Ministers of the ECSC to draft the statute for a European Political Community.

Whereas the CECE was composed of a self-appointed if highly influential and elite group of enthusiasts for European integration, the Ad Hoc Assembly tasked with drafting the EPC Treaty was a much more politically grounded body whose establishment was requested by the six governments, and which was composed of 87 specially selected politicians from the six Member States of the European Community, with additional observer members from the Council of

[22] See Resolution 14 adopted on 30 May 1952 by the Consultative Assembly of the Council of Europe concerning the most appropriate means of drafting the Statute of the European political Community. The Resolution in fact proposed an assembly composed either of members of the ECSC Assembly or of Members of the Council of Europe Assembly corresponding to the number and allocation of seats in the future EDC Assembly.

[23] Spaak himself had resigned in frustration from his position as the first President of the Consultative Assembly of the Council of Europe in 1951 when the Assembly rejected his proposal to hold a conference to establish a European political authority.

[24] See Statute of the Council of Europe 1949, Articles 1 and Chapter IV, in particular.

[25] Article 38 of the European Defence Community Treaty provided for the ECSC Assembly to engage in further study to see what future European organs might be established "with a view to ensuring coordination within the framework of the federal or confederal structure".

Europe and associated non-Member States.[26] According to one commentator at the time of the drafting of the EPC Treaty "what gives this document special significance is that it was drawn up not by scholars or government technicians, but by politicians … at the formal request of the governments. These politicians included such prominent leaders as Spaak, now Foreign Minister of Belgium, a Socialist; Vice Premier Teitgen of France, head of the Popular Republican Party (MRP); Heinrich von Brentano, parliamentary floor leader of Chancellor Adenauer's Christian Democratic Union; and Italian Under Secretary for Foreign Affairs, Lodovico Benvenuti, a Christian Democrat. The constitution thus represents the thinking of an imposing group of parliamentarians as to the scope and character of political union that is workable and attainable today".[27] In other words, far from being the pipe-dream of a small group of federalists disconnected from the political mainstream at the time, the human rights provisions of the draft EPC Treaty – inspired in part by the CECE Resolutions which preceded them – were drawn up by a representative group of politicians carefully selected by the Member States and were intended to represent a real framework for what was politically possible and desirable at the time. Further, as indicated below, the sections of the draft EPC concerning human rights matters gained political approval within the Intergovernmental Conference on the draft EPC Treaty in 1953-54, even while other institutional aspects of the draft caused significant dissent and objection, in particular on the part of France.

The Ad Hoc Assembly, under Spaak's chairmanship, established a 26-member Constitutional Committee chaired by a German representative, Heinrich von Brentano, with a smaller working group and four subcommittees, to undertake the task of drafting.[28]

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[26] Apart from the Secretary General of the Council of Europe, observers with the right to speak but not to vote from Denmark, Greece, Iceland, Ireland, Norway, Sweden, Turkey and the UK, were present. See Resolution AA/CC (2) 5 adopted on 23 October 1952 by the Constitutional Committee of the Ad Hoc Assembly concerning the access of observer members.

[27] Basil Karp, *The Draft Constitution for a European Political Community*, *INTERNATIONAL ORGANIZATION* Vol 8: 181-202 (1954)

[28] These were the subcommittees on powers and competences, on political institutions, on judicial institutions and on liaison with other states and international organizations.

Despite being influenced by the CECE Resolutions, the human rights provisions eventually included in the EPC Treaty draft were different in several respects from the former. In common with the CECE Resolutions, Article 2 of the EPC Treaty declared that the Community would have the general aim of contributing towards the protection of human rights and fundamental freedoms in the Member States. Unlike in the earlier Resolutions however, the EPC Treaty stipulated that the provisions of the European Convention on Human Rights were to become an integral part of the new Community constitution (or Statute, as it was then called).[29]

A second difference is that the drafting committees of the Ad Hoc Assembly were focused explicitly on the risk of the Community itself becoming a potential violator of human rights. In other words, unlike the CECE, which seemed to conceive of the role of the Community primarily as a watchdog and enforcer which would intervene where Member States seriously failed to protect human rights, the drafting committees of the Ad Hoc Assembly expressly contemplated the prospect of the new Community itself being responsible for human rights violations. The Constitutional Committee was clearly concerned about this prospect, and discussed various possible ways of ensuring European Court of Human Rights jurisdiction over Community acts, including accession by the Community to the ECHR.[30] Even at this early stage, problems were envisaged in seeking to amend the Rome Convention establishing the European Convention on Human Rights. The Constitutional Committee however recommended that EC member states could be requested by the Community to bring proceedings against another member state before the ECHR where a violation was taking place; and further recommended that the statute of the Council of Europe be amended to permit the EC to take a member state directly before the ECHR.[31] Thus the problem of Member State violations and EC violations of the ECHR alike were in the mind of the Constitutional Committee.

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[29] Article 3 provides: The provisions of Part I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4th November 1950, together with those of the protocol signed in Paris on 20th March 1952, are an integral part of the present Statute.

[30] *See* Document AH 162, Historical Archives of the European Union, EUI, Florence.

[31] *Id.*

The eventual outcome of these discussions within the Constitutional Committee is to be found in the provisions of the draft Treaty in Article 45 concerning the role of the new Community Court. Article 45 explicitly envisaged that any dispute arising from action taken by one of the Community institutions which affected the rights guaranteed in the European Convention on Human Rights was to be referred to the Community Court, and such cases could be brought by natural or legal persons. In other words, the draft EPC treaty provided for a right of action before the Community Court by individuals against the Community institutions for violation of the ECHR.

Article 45 also contains interesting provisions – even if they are not altogether clear - on the relationship between the European Community Court when adjudicating on alleged violations of the ECHR (which was incorporated by Article 3 of the EPC Treaty) and the newly created European Court of Human rights.[32] These provisions reflect something of the extensive debates which took place during the process of drafting the EPC Treaty, in which the drafters considered not only the technical problems associated with the fact that the Community was not and could not easily become party to the Convention on Human Rights, but also the potential problems of conflicts between the two courts and the impact that rulings of the Community Court on the meaning of the ECHR could have on other states party to the ECHR but not party to the European Political Community Treaty. In essence, Article 45 provided for the Community Court to exercise jurisdiction but to 'relinquish' it to the European Court of Human Rights (once that Court began operating) in any case involving a question of principle of relevance to all the

[32] The relevant provisions of Article 45 provide: 1. Any dispute arising from a decision or measure taken by one of the Institutions of the Community, which affects the rights recognized in the Convention for the Protection of Human Rights and Fundamental Freedoms, shall be referred to the Court.
2. If an appeal is lodged with the Court under the conditions mentioned in the preceding paragraph by a natural or legal person, such appeal shall be deemed to be lodged in accordance with the terms of Article 26 of the Convention for the Protection of Human Rights and Fundamental Freedoms.
3. After the establishment of the legal machinery for which provision is made in the Convention for the Protection of Human Rights and Fundamental Freedoms, should any dispute arise which involves a question of principle as to the interpretation or extent of the obligations resulting from the said Convention and which consequently affects all the Parties thereto, the Court shall renounce judgment, if necessary, until the question of principle has been settled by the judicial organs for which provision is made in the Convention."

parties to the ECHR. This is an interesting and fairly nuanced position falling somewhere between that of those who felt that only the ECtHR should properly have jurisdiction over such disputes[33] and those who would have given full jurisdiction to the Community Court. The compromise is that Article 45 of the EPC treaty provides for initial jurisdiction, subject to relinquishment to the ECtHR under the conditions mentioned above.

Finally, like the CECE's Resolution 7, Article 104 of the EPC treaty provided for the possibility of intervention by the Community to maintain 'constitutional order and democratic institutions' within the territory of a Member State. Unlike the CECE resolution, however, which would have enabled the Community to intervene in the absence of a request and where a Member State was unwilling to act, Article 104 provided for such intervention only where the Member State in question requested such assistance.[34]

The various differences between the approach of the CECE drafters and that of the eventual EPC Treaty drafters to the problem of potential violations by the Community of human rights are interesting. The primary concern at the time the CECE Resolutions were drafted appears to have been to restrain potential human rights violations by the Member States, and to empower the European Community to intervene in the case of such violations. The drafters of the EPC Treaty on the other hand – which as indicated above was a larger body composed significantly of

[33] For example Max Becker, one of the German members of the Constitutional Committee expressed his concern about the broad and imprecise way in which the Community Court's jurisdiction over matters 'interior' to the Community, between member states of the Community or between a member state and the EC, to which the ECHR was applicable, was defined. He took the view that this was impinging on the jurisdiction of the European Court of Human Rights. He considered that it was inappropriate to make it compulsory for a dispute concerning human rights between EPC member states to be submitted first to the Community Court, and thought this was properly the job of the European Court of Human Rights. However, the constitutional committee seemed to see the Community court rather as a 'domestic tribunal' for the purposes of exhaustion of domestic remedies for the ECtHR, and envisaged that a dispute on which the Community Court ruled could be subsequently brought, by another means, before the ECtHR.

[34] Draft European Political Community Treaty art. 104, *supra* note 30 ("Member States may request the European Executive Council for assistance in maintaining constitutional order and democratic institutions within their territory. The European Executive Council, with the unanimous concurrence of the Council of National Ministers, shall lay down the conditions under which the Community shall be empowered to intervene on its own initiative. The relevant provisions shall take the form of a bill to be submitted to Parliament for approval within one year from the date of the coming into being of the Peoples' Chamber. They shall be enacted as legislation of the Community.").

national parliamentarians - adopted a more restrained approach to the Community, addressing the possibility that the Community institutions themselves could encroach through the exercise of their powers on human rights.[35] The draft EPC Treaty also clearly accorded a key role to the institutions of the ECHR in adjudicating on human rights violations, even while confronting the legal complexities of the fact that the Community could not itself become a party to the Convention on Human rights.

Ultimately, the draft treaty on a European Political Community prepared by the Constitutional Committee, which included these provisions on human rights protection, was accepted and adopted without difficulty by the full membership of the Ad Hoc Assembly at Strasbourg in March 1953 and was formally handed over to the foreign ministers of the six states on the 9th of that month.[36]

Over the course of the following year, the draft EPC Treaty was discussed at various meetings of the foreign ministers and deputy foreign ministers of the six Member States of the ECSC, meeting within the context of an intergovernmental Conference on the EPC. [37] There had been a change of government in France at the end of 1952 and the new government depended upon the support of the Gaullists, who were clearly opposed to many aspects of the project for closer European integration. During the meetings of the intergovernmental Conference it became evident that the French delegation in particular was unhappy with several of the institutional features of the EPC Treaty draft, in particular with the role envisaged for the Executive Council

[35] It was also proposed that the Community should be subject to the explicit requirement, along with the individual Member states, to respect human rights and fundamental freedoms, but such an obligation did not appear in these terms in the final text. The subcommittee on powers and competences of the constitutional committee of the Ad Hoc Assembly had proposed an article whereby the Community as well as the Member States would guarantee to everyone within their jurisdiction the rights and freedoms in the ECHR. See Document AH 114, Historical Archives of the European Union, EUI, Florence.

[36] INFORMATIONS ET DOCUMENTS OFFICIELS DE LA COMMISSION CONSTITUTIONNELLE, Project de Traité portent Statut de la Communauté Européene, Mars-Avril 1953

[37] For a developed account, see Richard Griffiths, n.8 above. See also Linda Risso, *The (Forgotten) European Political Community 1952-54*, available online at http://www2.lse.ac.uk/internationalRelations/centresandunits/EFPU/EFPUconferencepapers2004/Risso.doc

(which would have been broadly the equivalent of today's Commission), and with the composition of the second chamber of the bi-cameral Assembly proposed.[38] There were also marked differences of view about the nature of the economic cooperation envisaged under the EPC Treaty.[39]

What is notable, however, is that there is no evidence in the documents available from the IGC that the governments objected to any of the EPC Treaty provisions dealing with human rights, even while substantial objections were raised by France – which gradually won the support of four other Member States - against several of the institutional provisions. On the contrary, the foreign ministers of the six ECSC Member States, and the governmental Committee which they established during the 1953 Intergovernmental Conference to study the draft EPC Treaty, signaled their approval of the first part of the draft Treaty and appeared to accept the provisions concerning human rights and those dealing with the Court without any change other than two minor amendments to bolster them.[40] The first of these two suggested amendments was the proposal for an expulsion clause for a Member State whose internal system has 'fundamentally altered'.[41] The second concerned the EPC provisions on membership criteria. In this instance the suggestion made by the governmental committee was to change the terms of the draft EPC Treaty slightly to provide that any state which recognised and guaranteed fundamental human rights *and* which expressed its intention to join the Council of Europe was eligible to accede. Article 116 of the EPC Treaty had specified that any European state which adhered to the

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[38] See e.g. the exchange between members of the Ad Hoc Assembly Constitutional Committee and member state governmental representatives at the IGC in October 1953: Extraits du Compte Rendu de la Séance de la Conférence pour la Communauté politique européene, tenue a Rome le 2 octobre 1953 en presence du Groupe de Travail de la Commission constitutionnelle, Document 10, INFORMATIONS ET DOCUMENTS OFFICIELS DE LA COMMISSION CONSTITUTIONELLE , ASSEMBLÉE AD HOC CHARGÉE D'ELABORER UN PROJECT DE TRAITÉ INSTITUANT UNE COMMUNAUTÉ POLITIQUE EUROPÉENNE (March 1955).

[39] *Analyse du rapport adopté le 8 Mars 1954 par la Commission pour la Communauté politique européene,* INFORMATIONS ET DOCUMENTS OFFICIELS DE LA COMMISSION CONSTITUTIONNELLE , ASSEMBLÉE AD HOC CHARGÉE D'ELABORER UN PROJECT DE TRAITÉ INSTITUANT UNE COMMUNAUTÉ POLITIQUE EUROPÉENNE (March 1955), Document 15 ibid,Title III, part D

[40] Ibid, Document 15, Title 1, Title II D.

[41] Ibid, Title I: "l'exclusion d'un Etat Membre dont le systeme interne aurait subi des modifications essentielles"

principles in Article 3 EPC (concerning compliance with human rights and freedoms) was eligible, without requiring the intention to join the Council of Europe.[42]

Meetings of the governmental ministers and of the Committee they had established to discuss the draft EPC Treaty continued sporadically throughout 1953 and into the beginning of 1954, but political events in France and elsewhere slowed the pace of progress considerably. Eventually, the death-knell of the draft European Political Community Treaty was effectively sounded when the prospects for ratification of the European Defence Community Treaty collapsed in late August 1954,[43] leading instead to the conclusion of the Paris Accords establishing the Western European Union some months later. The EPC Treaty draft had been prepared on the basis of Article 38 of the EDC Treaty, and the demise of the latter in the political circumstances of the time clearly also indicated the end of the road for the former. Yet it is worth noting that the records of the drafting of the EPC Treaty and the inter-governmental Conference which followed it suggest that, despite objections to various other aspects of the draft EPC Treaty in particular from France, there was broad support across all of the Member States at the time for the creation of a European Community founded on respect for human rights, integrating the provisions of the ECHR, with a strong judicial enforcement role against both the Community and the Member States, and a significant role for the new Community in monitoring human rights matters within the Member States.

Nevertheless, the failure of the EDC Treaty brought the journey of the EPC Treaty to an end, and it was at this point that these ambitious early attempts to promote European political integration were abandoned in favour of a significantly more restrained and pragmatic strategy in the shape of the European Economic and Atomic Energy Communities which were established in 1957.

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[42] Note that the Assembly of the Council of Europe, when discussing the draft EPC Treaty, had proposed amending this same provision so that only states which were already members of the Council of Europe could join, thereby locking in its institutional significance and its formal relationship with the new supranational communities: See *Recommendation no. 45 of 11 May 1953 of the Consultative Assembly of the Council of Europe, relating to the draft Treaty embodying the Statute of the European Community adopted by the Ad Hoc Assembly*, para (a).

[43] For an interesting account see Renata Dwan, *Jean Monnet and the European Defence Community, 1950-54*, COLD WAR HISTORY, Apr. 2001, at 141.

With the abandonment of the wider political integration plans, the lively debates and blueprints for an ambitious European Community human rights system abruptly disappeared.

C. Phase 2: From the Rome Treaty to the Maastricht Treaty : the disappearance of human rights from the EC Treaty framework and their return

1. The silence of the 1957 EC Treaty framework on human rights

The silence of the European Economic Community Treaty and the accompanying European Atomic Energy Treaty in 1957 on the subject of human rights has often been noted and its implications discussed. Notably, there appears to be no evidence of any explicit decision being taken to exclude all references to human rights, or to rule out any role for human rights protection, in the two treaties establishing the new Communities. On the contrary, much was made at the time of establishing the 1957 communities of the fact that they were intended to serve a 'human ideal of brotherhood' shared by the six member states.[44] Nevertheless, what occurred in the aftermath of the destabilizing failure of the European Defence Community was that a decision was taken, following the mandate of the Messina conference which led to the establishment of the European Economic Community,[45] in order not to derail the new venture, to hew very closely to the terms of that mandate and to exclude discussion of any issues which were not expressly mentioned there. Paul Henri Spaak, by now the Belgian Minister for Foreign affairs, once again chaired the relevant committee (the Intergovernmental Committee on

[44] See Paul-Henri Spaak, Discourse, Rome, (March 25, 1957), Historical Archives of the Council of the European Union, Brussels, Rue de la Loi 175, Negotiations of the treaties instituting the EEC and the CECA (1955-1957), CM3, Conference of the foreign ministers and signature of the treaties of the EEC and the CECA, Rome, March 25, 1957, CM3/NEGO/098, *available at* http://www.ena.lu/discours-paul-henri-spaak-occasion-signature-traites-rome-rome-25-mars-1957-010000644.html.

[45] See the so-called Messina Resolution, to revive the process of European integration by focusing on economic integration and the establishment of a common market. Resolution Adopted by the Ministers of Foreign Affairs of the E.C.S.C. (June 1-3, 1955), *available at* http://www.ena.lu/resolution_adopted_foreign_ministers_ecsc_member_states_messina_june_1955-2-987. See also the earlier Benelux Memorandum of 18 May 1955, adopted by the foreign ministers of the three countries, making a similar proposal. Memorandum from the Benelux Countries to the Six Member States of the E.C.S.C. (May 18, 1955), *available at* http://www.ena.lu/memorandum_benelux_countries_member_states_ecsc_18_1955-2-24378 (official French version).

European Integration) and prepared the report which led ultimately to the drafting of the EEC Treaty,[46] Spaak insisted strongly on this strategy of adhering closely to the Messina mandate and avoiding any subjects which were not expressly mentioned in the foreign ministers' Resolution, as a way of avoiding the many controversial and political issues which arguably led to the downfall of the EDC and EPC treaties.[47] It is at least in part in this context that the silence of the 1957 treaties on the subject of human rights protection can be understood.

This is not to say that the topic of the possible impact of the new Communities on human rights protection was not raised at all during the drafting process. On the contrary, it seems that an attempt was made by the German delegation during the drafting of the EEC Treaty to have a kind of human rights 'reservation clause' (*Verfassungsvorbehalt*), similar to that contained in Article 3 of the European Defence Community Treaty, inserted into the new EEC Treaty. Article 3 of the EDC Treaty had begun with an articulation of the subsidiarity principle, and continued by indicating that the Defence Community would not take measures impinging on protected human rights and freedoms.[48] In other words, in the EDC Treaty reservation-clause, the fundamental human rights of the individual were posited as a notional bulwark against the exercise of power by the new Community and a constraint on the way in which the conferred powers were to be exercised. The German proposal for a similar clause in the EEC Treaty was however rejected by other delegations, apparently because of a perceived risk that member states might misuse a reservation clause of that kind to undermine Community goals, and that it would be difficult or impossible for the new Community to pay attention to all of the different sets of

[46] Now simply known as the Spaak Report, this was formally entitled The Brussels Report on the General Common Market, and was adopted in June ,1956. The Brussels Report on the General Common Market ("Spaak Report"), Intergovernmental Committee on European Integration (1956)

[47] See PAUL-HENRI SPAAK, THE CONTINUING BATTLE: MEMOIRS OF A EUROPEAN 1936-1966 (Henry Fox trans.) (1971). The travaux préparatoires also make this strategy evident.

[48] The express language of Article 3(1) of the EDC Treaty (translated into English) provide: "The Community shall accomplish the goals assigned to it by employing the least burdensome and most efficient methods. It shall intervene only to the extent necessary for the fulfillment of its mission and with due respect to public liberties and the fundamental rights of the individual." European Defense Community Treaty art. 3(1), May 27, 1952, *available* at http://www.ena.lu/treaty_instituting_european_defence_community_paris_27_1952-2-793 (original French version), *unofficial translation available at* http://aei.pitt.edu/5201/.

rights protected under the various Member State constitutions without subordinating Community laws and goals to these multiple and varying requirements. [49]

In other words, what we see by the time of the drafting of the Euratom and European Economic Community Treaties is that the vision of the new European system as one which would have a substantial political role involving the protection of human rights against abuse by or within the member states or even on the part of its own new institutions, and working alongside the looser and wider Council of Europe and European Convention system in order to assure this, had been set to one side. A new strategy of limited, functional, step-by-step progress towards closer European integration was adopted instead. The powers and ambitions of the new Communities were to be carefully determined by the common market mandate outlined in the Messina Resolution, and the issue of human rights protection was not to be addressed.

The German delegation's attempt to introduce a kind of liberal restraint on Community power, expressed in terms which included the fundamental rights of the individual, was rejected, but more because of the perceived risk of member state abuse of such a clause than because of any generally expressed objection to a human rights role for the new Community. However, it is evident that although the German vision of human rights as a negative constraint on the integration process, and a residual core requiring protection against the institutions of the new Community just as against any institutions of government, may have been temporarily dismissed, it returned to shape the way in which the question of EU human rights protection re-emerged over a decade later through judicial challenges brought by litigants from Germany before the European Court of Justice.

Beyond this pragmatic decision to rethink the optimal path towards closer European integration, and to choose a path of gradual sectoral integration instead of the single giant step towards

[49] See Manfred Zuleeg, *Fundamental Rights and the Law of the European Communities*, 8 COMMON MKT. L. REV. 446 (1971), citing E. WOHLFARTH ET AL., DIE EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT, KOMMENTAR ZUM VERTRAG (1960).

European political community, it seems mistaken to read much more into the silence of the 1957 treaties on the subject of human rights. Despite academic speculation to this effect, there seems to be no evidence of further attribution of significance to this silence, e.g. through a decision on the part of the drafters or the governments that human rights matters would be irrelevant to the functioning of the new Communities, or that the Council of Europe would be better placed to supervise questions of human rights in the new Communities and their Member States. On the contrary, it seems evident that from the time the character of the Council of Europe was firmly established as a forum for specific kinds of intergovernmental cooperation, the more integration-oriented states took the view that it was not the appropriate forum for closer European integration, and the two sets of European organizations were henceforth understood to be on different albeit parallel paths. The Council of Europe was established as a broader, pan-European organization for intergovernmental cooperation on a range of issues including human rights, cultural, educational, health and economic matters. The European Communities on the other hand were a vehicle for states to pursue closer and deeper integration through a system in which they conceded some of their sovereign powers and accepted a significant degree of supranational control and influence by the new organization. There is no indication that the looser monitoring and coordination mechanisms of the Council of European were seen as a substitute for some of the possible functions of the Communities, even in the field of human rights. On the contrary, the two organizations seem to have been understood to be moving in parallel, supporting one another and coordinating their activities where possible. The gradual strengthening of the European Convention and Court of Human Rights certainly bolstered the interest of the Communities in maintaining close links with the ECHR system, including its Court, and the question of EC accession to the ECHR was repeatedly considered, albeit always as a first step towards the Community developing its own policy on human rights.[50] But the question of the European Community's own engagement with human rights issues both

50 See in particular the 1979 Memorandum by the European Commission proposing EC accession to the ECHR - EC. Bull. Supp. 2/79. For a comment on this proposal, see Kim Economides and Joseph H. H. Weiler, *Accession of the Communities to the European Convention on Human Rights: Commission Memorandum,* Modern Law Review Vol. 42, No. 6 (1979) p 683.

internally and externally, and the desirability of establishing a more explicit Community human rights dimension continued to be raised at regular intervals throughout the early years and decades of the Communities' existence.[51]

More generally, the pragmatic decision to hew closely to the Messina Mandate and to avoid the derailment of the EEC Treaty did not necessarily imply that the newly established EEC had no aspirations for the Communities to develop into a broader and deeper political project. On the contary, it seems from a range of provisions such as the Preamble (*"*determined to lay the foundations of an ever closer union among the peoples of Europe*"*) and the provision for future direct elections to the European Parliament, that the aspiration to closer union and to a broader project of political integration was not abandoned in the EEC Treaty, but postponed.

2. The formal return of human rights into European Community law and discourse

The next part of the story, and that which has captured the greatest scholarly interest is the most familiar, in which repeated challenges from economic actors in Germany, premised on the understanding of domestically protected economic and liberty rights as a limitation on the regulatory powers of the Community, forced the issue which had been set to one side during the drafting process back onto the agenda, most notably onto the agenda of the Court of Justice. In *Stork*,[52] in which a coal wholesaler complained of a decision of the High Authority of the Economic Coal and Steel Community governing the sale of coal, the ECJ refused to consider the argument that the decision breached basic rights which were protected under German law. The ECJ, echoing both the refusal of other member state delegations to entertain the proposal of the German delegation for a human-rights reservation clause in the original EEC Treaty and also the reasoning underpinning that refusal,[53] ruled that 'the High Authority is not empowered to

[51] See e.g. the Bonn Conference and the Fouchet Plan of 1961, especially Article 2 of the draft: www.ena.lu/mce.swf?doc=999&lang=2, also the 1968 Commission Declaration on completion of the customs union, calling for the next steps forward towards political union based on a Europe of the peoples and concerned with human problems; and the 1970 Davignon report on political union.

[52] Case 1/ 58, Stork v. High Authority, 1959 E.C.R. 17.

[53] See n.49 above and text.

examine a ground of complaint which maintains that, when it adopted its decision, it infringed principles of German constitutional law'.[54] Subsequently in *Geitling*,[55] another case concerning a challenge by coal wholesalers to a High Authority decision which prevented them from selling coal directly, the Court not only rejected the relevance of a fundamental right in German constitutional law, but also dismissed the argument that Community law might independently protect such a right.[56] And in *Sgarlata*,[57] some five years later, the ECJ stated that it could not allow the express provisions of the Treaty to be overridden by a plea founded upon other principles, even if those were fundamental principles which were common to the legal systems of all the Member States.[58] Thus not only was the specific German vision of domestically protected fundamental rights as a constraint on Community powers rejected by the Court, but also the vision of human rights as general principles of European law which should guide and shape the interpretation of the EEC Treaty. Far from today's conventional picture of the Court of Justice as the hero of fundamental rights in Community law, these early cases present a less familiar picture of the ECJ refusing to acknowledge human rights as having any place in the European legal order.

Yet the persistence of the German vision, and the determination of litigants based in Germany to question the regulatory powers of the Community and the supremacy of Community law from the perspective of domestically protected constitutional rights led eventually to a change in the Court's approach and an adjustment seen initially in the *Stauder* case,[59] and elaborated upon in

[54] *Id.*, ¶ 4 (judgment).
[55] Cases 36, 37, 38, and 40/ 59, Geitling v. High Authority, 1960 E.C.R. 423.
[56] *Id*. at 438.
[57] Case 40/ 64, Sgarlata and others v. Commission, 1965 E.C.R. 215, 1966 C.M.L.R. 314.
[58] Note, however, that the Court did not deny the existence in Community law of any general principles of law other than those written in the Treaty: see Case 35/ 67, Van Eick v. Commission, 1968 E.C.R. 329, 342, where the Court held that the Disciplinary Board under the Community staff regulations was bound to exercise its powers in accordance with 'the fundamental principles of the law of procedure'. However, unlike in the case of *Sgarlata*, there was no question of these general principles overriding specific Treaty provisions.
[59] Case 29/69, Stauder v City of Ulm, 1969 E.C.R. 419.

the cases of *Internationale Handelsgesellschaft*[60] and *Nold*.[61] As is well known, this triptych of cases produced a new constitutional account by the ECJ of the role of human rights in the EC legal order. No longer were they to be treated as irrelevant or entirely peripheral to the common market project, but instead respect for fundamental rights – inspired by the common constitutional traditions of the Member States and international human rights treaties on which they collaborated - was declared to be part of the general principles of Community law, and the Court would henceforth entertain claims that such rights had been adversely affected by Community acts and policies.[62]

In this way a position close to that which was proposed by the German delegation during the drafting of the EEC Treaty eventually came to be accepted by the ECJ, even without the existence of an express reservation clause in the Treaty. Fundamental human rights would constitute a brake on Community policies, and if a Community act encroached on a protected right, the Court would ensure protection for the latter. The reason for the volte-face of the Court is widely accepted to be its concern to maintain the autonomy and supremacy of EC law, and to avoid claims that Community law must be subordinate to national constitutional rights. The difference between a reservation clause of the kind argued for in 1956 and the approach eventually adopted by the ECJ is that the Court of Justice insisted on the autonomous nature and source of the rights which were to be recognized and protected, so that they would be understood as genuinely European and not domestic in their origin.

The famous judicial about-turn in *Stauder* and *Nold* did not come out of the blue, but was preceded by heated political and legal debates in various European arenas about the implications of the doctrine of supremacy of EC law which the Court had pronounced shortly beforehand in

[60] Case 11/70, Internationale Handelsgesellschaft v Einfuhr und Vorratstelle für Getreide und Futtermittel, 1970 E.C.R. 1125.
[61] Case 4/73, Nold v. Commission, 1974 E.C.R. 491.
[62] For an excellent account of the role of the Court of Justice in the development of legal protection for fundamental rights in the EU, see Bruno de Witte, *The Past and Future role of the European court of Justice in the Protection of Human Rights*, *in* THE EU AND HUMAN RIGHTS, *supra* note 7, ch. 28.

Costa v Enel,[63] and more specifically about the consequent risk of subordinating or undermining human rights protected under domestic constitutions.[64] In this context, already some years before the ECJ's decision in *Stauder*, the President of the Commission had been arguing openly for an understanding of fundamental human rights as part of the 'general principles' of EC law, which although autonomous in source from national constitutions, nevertheless took into account the common legal conceptions of the Member States.[65] It can be said that once this account of the place of fundamental rights in the EC legal order was confirmed and validated by the ECJ in its trio of cases, the period of silence of the EC constitutional framework from 1957 until 1969, and the formal legal vacuum on the subject of human rights came to an end.[66] The constitutional framework of the Communities once again acknowledged as a source of European law the human rights which had been set to one side after the failure of the EDC and EPC Treaties onwards.[67] From this time on, the terms of the debate had changed and the question shifted from whether the sectoral European Communities could concern themselves with fundamental human rights protection to what exactly their role should be in this regard.

A growing concern with the external role and perception of the EU in the world at the same time, following the inauguration of 'European Political Cooperation' on foreign policy in 1970, led to the declaration by the European Council on European identity in 1973. This Declaration announced that respect for human rights – along with social justice, representative democracy and the rule of law – was a fundamental element of EU identity.[68] The 1978 Copenhagen

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[63] Case 6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 585.

[64] See report by Fernand Dehousse, who was by then a Belgian member of the European Parliament. *Report on the Supremacy of EC Law over National Law of the Member States,* EUR. PARL. DOC. 43 (1965-66), 1965 J.O. (2923) 14.

[65] *See* Remarks of Mr. Walter Hallstein, EUR. PARL. DEB. (79) 218 -222 (French Edition) (June 17, 1965) (discussing the *Dehousse Report*).

[66] There had also been a number of notable earlier attempts to bring human-rights related issues within the remit of the new Communities. These include the Bonn Conference and the Fouchet Plan of 1961, the 1968 Commission Declaration on completion of the customs union, and the 1970 Davignon report.

[67] For a sociological account of the invention of the 'myth' of the human rights foundation of the European Communities, see Andrew Williams , EU Human Rights Policies: A Study in Irony (2004) in particular pp. 137-161

[68] For an analysis of the symbolic significance of this move, see Andrew Williams , *id*, chapters 6-7.

Declaration first articulated the so-called political criteria for EU accession,[69] including respect for human rights as a condition of European Union membership. And the 1977 Joint Declaration of the European Parliament, Council and Commission on fundamental rights affirmed the earlier case law of the Court of Justice and asserted that the EC treaties were based on respect for the general principles of law, including fundamental rights as recognized in the constitutions of the Member States and under the ECHR, and that the institutions of the EC would respect these rights in the exercise of their powers.[70] Although a declaration has little practical effect and is not a legally binding instrument, the joint statement of the three political institutions had symbolic importance in indicating that these institutions supported the Court's 'derivation' of rights from the ECHR and from Member States' constitutional principles, and that they were willing in principle to respect these rights in the exercise of their powers. From this time on, the case law of the Court of Justice addressing human rights issues expanded, and various legal and political initiatives were taken to develop a more active role for human rights within EU law and policy.[71] But it was not until the early 1990s that the first distinct contours of a European Union constitutional framework for human rights protection began to emerge.[72]

[69] This may have been the first official and operational articulation of human rights and democracy conditions for accession to the European Community, but it was not the first attempt, since Article 116 of the abandoned European Political Community Treaty had specified that "accession to the Community shall be open to the Member States of the Council of Europe and to any other European State which guarantees the protection of human rights and fundamental freedoms mentioned in Article 3". Draft European Political Community Treaty art. 116, *supra* note 30.

[70] Joint Declaration of the Parliament, Council and Commission of the European Communities, 1977 O.J. (C103) 1.

[71] Amongst the institutional attempts to articulate a role for the EC in the area of human rights around this time and thereafter are the 1974 Paris Summit and the 1976 Tindemans Report, the 1976 Commission Report on human rights, the 1978 Declaration of the Council on democracy in Copenhagen, the 1984 Adonnino Committee on a People's Europe, the 1984 European Parliament draft treaty on a European Union and Spinelli report, the Single European Act of 1986, the 1989 European Parliament Declaration on Fundamental Rights and Freedoms, and the 1989 Community Charter of Fundamental Social Rights of Workers.

[72] For a timely article which argued for the need for a proper human rights policy for the European Community at the time, see Andrew Clapham, *A Human Rights Policy for the European Community*, 10 Y.B. EUR. L. 309 (1990).

D. Phase 3: From the Maastricht to the Lisbon Treaty: The Emergence of an EU Constitutional Framework for Human Rights Protection

It was in the Maastricht Treaty on European Union 1992 that formal treaty recognition was finally given to human rights as part of EU law.[73] This was followed in 1997 by the grant of treaty status to the "Copenhagen criteria" for EU accession in the Treaty of Amsterdam,[74] and the insertion of what was then Article 13 in the EC Treaty which conferred power on the EU to adopt legislation to combat discrimination across a range of grounds within the fields of existing EC competences.[75] At the same time, the Amsterdam Treaty introduced the 'suspension of rights' mechanism for any EU Member State which was found responsible for serious and persistent violation of human rights, and this was amended by the Nice Treaty a few years later – following the Haider affair[76] - to cover situations involving a risk rather than actual violation of rights.[77] Not long after the adoption of the Amsterdam Treaty, the EU Charter of Fundamental Rights and Freedoms was drafted and proclaimed in 2000. Following the adoption but non-ratification of the Treaty Establishing a Constitution for Europe in 2004-5,[78] the Charter was

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[73] The preamble to the Single European Act in 1987 had made mention of human rights in the following terms "Determined to work together to promote democracy on the basis of fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms, and the European Social Charter, notably freedom, equality and social justice". Single European Act, Feb. 17, 1986, 1987 O.J. (L 169).

[74] Article 49 TEU now provides: "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union" and Article 2 provides that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." Treaty on European Union, *supra* note 24, art. 49.

[75] Article 13 of the European Community (EC) Treaty is now Article 19 of the Treaty on the Functioning of the European Union. On the drafting of Article 13 EC, see MARK BELL, ANTI-DISCRIMINATION LAW AND THE EUROPEAN UNION (2002).

[76] *See, e.g.*, Michael Merlingen, Cass Mudde, & Ulrich Sedelmeier, *The Right and the Righteous? : European Norms, Domestic Politics and the Sanctions Against Austria*, 39 J. COMMON MKT. STUD. 59 (2001); Cecile Leconte, *The Fragility of the EU as a "Community of values" : Lessons from the Haider Affair*, 28 W. EUR. POL. 620 (2005).

[77] *See* Treaty on European Union, *supra* note 24, art. 7.

[78] For information on the drafting and attempted ratification of the Treaty Establishing a Constitution for Europe, see http://european-convention.eu.int/DraftTreaty.asp?lang=EN and http://www.consilium.europa.eu/cms3_applications/Applications/igc/doc_register.asp?content=DOC&lang=EN&cmsid=754

eventually given binding legal status by the Lisbon Treaty in 2009.[79] At the same time, the Lisbon Treaty introduced an obligation for the EU to accede to the European Convention on Human Rights.[80] This period of major constitutional change in the field of human rights also saw a number of other interesting institutional developments take place, such as the establishments of a network of experts on fundamental rights, a Personal Representative on human rights to advise the High Representative for Foreign and Security Policy and Council Secretary General, and finally the EU Fundamental Rights Agency[81] which replaced the previous Vienna Monitoring Centre against Racism and Xenophobia.

These moves formally marked the constitutional maturation of human rights within the EU legal and constitutional framework.[82] They gave official affirmation to the case law of the Court of Justice which declared fundamental rights, as derived from domestic constitutional traditions and from the ECHR, to be part of EU law, and they asserted that fundamental human rights were part of the values on which the EU was founded. They established compliance with human rights as a condition for EU membership and set up an ex-post membership mechanism for suspension of the rights of a Member State which was found to be violating such rights in a serious and persistent way. They saw the enactment of the EU's own Charter of Rights, and the establishment of a set of institutions to support and develop the EU's human rights policies. Such policies include the expansion of anti-discrimination law, the regular use of various forms of human rights conditionality and assistance in EU external relations,[83] and more generally a

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[79] *See* Treaty on European Union, *supra* note 24, art. 6(1). The full text of the Charter, which was originally adopted in 2000 and in slightly amended form in 2007 following the changes proposed in the unratified Constitutional treaty and the subsequent Lisbon Treaty, can be found in the Official Journal. 2007 O.J. (C 303) 01.

[80] Treaty on European Union, *supra* note 24, art. 6(2).

[81] Council Regulation 168/2007, 2007 O. J. (L 53) 1 (EC) (establishing a European Union Agency for Fundamental Rights).

[82] For a recent account, albeit before the enactment of the Lisbon Treaty, questioning whether the EU has evolved into a 'human rights organization', see Armin von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 COMMON MKT. L. REV. 1307 (2000).

[83] *See, e.g.*, LORAND BARTELS, HUMAN RIGHTS CONDITIONALITY IN THE EU'S EXTERNAL AGREEMENTS (2005); ELENA FIERRO, THE EU'S APPROACH TO HUMAN RIGHTS CONDITIONALITY IN PRACTICE (2003). Also, for a broader appraisal, see URFAN KHALIQ, ETHICAL DIMENSIONS OF THE FOREIGN POLICY OF THE EU: A LEGAL ANALYSIS (2009).

declared commitment by the EU to 'mainstream' human rights concerns throughout the field of external policies.[84] At the same time, the case law of the Court of Justice and the Court of First Instance touching on human rights matters has expanded and grown, not only in number but also in the range of subject matter areas in which such claims are arising. It is no longer the case that human rights claims before EU courts are concerned mainly with staff complaints or with procedural rights in EU competition cases. Instead, a variety of human-rights claims are regularly invoked in all kinds of subject matter fields from criminal justice[85] to data privacy[86] to family reunification[87] and anti-terrorist asset-freezing.[88] A significant body of scholarship analyzing these developments has also appeared, with extensive commentary on the Charter of Fundamental Rights,[89] the relationship between the EU and the ECHR systems,[90] as well as

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[84] See for an early statement the Council's ANNUAL REPORT ON HUMAN RIGHTS (2001), *available at* www.consilium.europa.eu/uedocs/cmsUpload/HR2001EN.pdf and more recently its ANNUAL REPORT ON HUMAN RIGHTS (2008), *available at* http://www.consilium.europa.eu/uedocs/cmsUpload/st14146-re02.en08.pdf. *See also* Document of the Political and Security Committee of the Council on "Mainstreaming human rights across CFSP and other EU Policies' No. 10076/06 of June 7, 2006, *available at* http://register.consilium.europa.eu/pdf/en/06/st10/st10076.en06.pdf.

[85] For discussion, see Olivier de Schutter, *The Promotion of Fundamental Rights by the Union as a contribution to the European Legal Space: Mutual Recognition and Mutual Trust in the Establishment of the Area of Freedom, Security and Justice*, (Reflexive Governance in the Pub. Interest, Working Paper REFGOV-FR-2), *available at* http://refgov.cpdr.ucl.ac.be/?go=publications&dc=f4d3720606c3fb7b34f3d9d56e17267cd8ee6805.

[86] *See, e.g.,* Case C-301/06, Ireland v. Council, 2009 E.C.R. I-0000, *available at* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-301/06.

[87] *See, e.g.,* Case C-540/03, Parliament v. Council, 2006 E.C.R. I-5769.

[88] The case law in this field is now voluminous. For discussion, see Panagiotis CHECK and Takis Tridimas, *Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order*, 34 EUR. L. REV. 103 (2009).

[89] For some of the collections of writing on the Charter, see 8 MAASTRICHT J. EUR. & COMP. L. 1 (2001); THE CHARTERING OF EUROPE (Erik Eriksen, John Erik Fossum, and Agustin Menéndez eds.) (2001); AN EU CHARTER OF FUNDAMENTAL RIGHTS: TEXT AND COMMENTARIES (Kim Feus ed.) (2000); *EU Network of Independent Experts on Fundamental Rights, Commentary on the Charter of Fundamental Rights of the European Union* (June 2006), *available at* http://ec.europa.eu/justice_home/doc_centre/rights/charter/docs/network_commentary_final%20_180706.pdf; JUSTUS SCHÖNLAU, DRAFTING THE EU CHARTER: RIGHTS, LEGITIMACY AND PROCESS (2005). For some individual essays on the Charter, see Sionaidh Douglas Scott, *The Charter of Fundamental Rights as a Constitutional Document*, 2004 EUR. HUM. RTS. L. REV. 37; Lord Goldsmith. *A Charter of Rights, Freedoms and Principles*, 38 COMMON MKT. L. REV. 1201 (2001); Lenaerts & de Smijter, *supra* note 10; Francisco Rubio Llorente. *A Charter of Dubious Utility*, 1 INT'L J. CONST. L. 405 (2003); Alison Young, *The Charter, Constitution and Human Rights: Is this the Beginning or the End for Human Rights Protections by Community Law?*, 11 EUR. PUB .L 219 (2005).

[90] *See, e.g.,* Kathrin Kuhnert, *Bosphorus – Double standards in European human rights protection?*, 2 UTRECHT L. REV. 177 (2006), and for a more approving assessment, see Cathryn Costello, *The Bosphorus Ruling of the ECtHR: Fundamental Rights and Blurred Boundaries in Europe*, 6 HUM. RTS. L. REV. 87 (2006); Leonard Besselink, *The EU and the European Convention of Human Rights After Lisbon: From 'Bosphorus' Sovereign Immunity to Full*

between the EU and the Council of Europe,[91] the suspension mechanism of Article 7 TEU[92] and most recently the Fundamental Rights Agency.[93] Last but not least, the growing case law of the Court of Justice touching on fundamental rights issues continues to attract scholarly interest.[94]

In short, the topic of human rights protection and promotion has come to occupy a significant place in EU law and policy over the past decade and a half, and the EU unquestionably now has a constitutional framework of kinds concerning human rights protection. The following section examines the ways in which this framework differs from the constitutional framework for human rights protection envisaged in the 1950s, when the CECE and the Ad Hoc committee were drafting proposals for the European Political Community.

Scrutiny, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1132788, and more generally Steven Greer & Andrew Williams, *Human Rights in the Council of Europe and the EU: Towards 'Individual, 'Constitutional' or 'Institutional' Justice?*, 15 EUR. L.J. 462 (2009); Frederic van den Berghe, *The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?*, 16 EUR. L.J. 112 (2010).

[91] Claire Salignat, *The Impact of the Emergence of the European Union as a Human Rights Actor on the Council of Europe*, 4 BALTIC Y.B. INT'L L. 55 (2004); Olivier de Schutter, *The Two Europes of Human Rights: The Emerging Division of Tasks Between the Council of Europe and the European Union in Promoting Human Rights in Europe*, 14 COLUM. J. EUR. L. 509 (2008); Tony Joris and Jan Vandenberghe, *The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?* 15 COLUM. J. EUR. L. 1 (2008-2009)

[92] *See, e.g.,* Merlingen, Mudde, & Sedelmeier, *supra* note 63; Andrew Williams, *The Indifferent Gesture: Article 7 TEU, the Fundamental Rights Agency and the UK's Invasion of Iraq*, 31 EUR. L. REV. 3 (2006); Wojciech Sadurski, *Adding a Bite to a Bark: A Story of Article 7, the EU Enlargement and Jörg Haider* (Univ. of Sydney Working Paper No. 10/01), *available at* http://ssrn.com/abstract=1531393.

[93] *See* Olivier de Schutter & Valérie Van Goethem, *The Fundamental Rights Agency: Towards an Active Fundamental Rights Policy of the Union*, 7 ERA FORUM 587 (2006); Armin Von Bogdandy & Jochin Von Bernstorff, *The EU Fundamental Rights Agency in the European and International Human Rights Architecture*, 46 COMMON MKT. L. REV. 1035 (2009); Gabriel Toggenburg, *The Role of the New EU Fundamental Rights Agency: Debating the Sex of Angels or Improving Europe's Human Rights Performance?*, 33 EUR. L. REV 385 (2008); Anthony Arnull, *Does Europe Need a Fundamental Rights Agency?*, 31 EUR. L. REV. 285 (2007). For a survey of human rights monitoring in the EU see MONITORING FUNDAMENTAL RIGHTS IN THE EU (Philip Alston & Olivier de Schutter eds.) (2005).

[94] *See e.g.,* Alicia Hinarejos, *Recent Human Rights Developments in the EU Courts: The Charter of Fundamental Rights*, 7 HUM. RTS. L. REV. 793 (2007).

E. Comparing the EU Constitutional Framework for Human Rights Protection As Drafted in the 1950s and Today

I suggest that there are three notable lines of difference between the constitutional framework drafted in the early 1950s, and ultimately approved by the Member State governments within the draft EPC Treaty, and that which has emerged over the last decade and a half in the EU. The first is that the 1950s model envisaged a strong monitoring, intervention and review role for the European Community with regard to human rights protection within the Member States, while the existing constitutional framework significantly limits and seeks to restrain the possibility of EU monitoring or review of human rights within Member States. Secondly, the 1950s constitutional model envisaged a closely entwined constitutional relationship between the European Community and the European Convention on Human Rights and their respective courts, and between the EC and the regional human rights system more generally. By comparison, despite the imminent prospect of EU accession to the ECHR, significant emphasis is placed in today's constitutional framework on the autonomy and separateness of the EU's own human rights regime. Thirdly, the model constitutional framework of the early 1950s was both outwardly and inwardly focused, aiming to promote human rights and to protect against human rights abuses equally in internal and external Community policies and relations. The existing post-Lisbon constitutional framework on the other hand, with the exception of anti-discrimination law, assigns a more circumscribed role to human rights within the context of internally focused EU policies, and the dominant focus is external, empowering and even obliging the EU to promote human rights actively in its international policies.

1. Human Rights Monitoring of EU Member States

We have seen above how the CECE resolutions envisaged a robust and interventionist role for the new European Community in monitoring Member State compliance with fundamental human rights. The draft EPC Treaty which followed also outlined a central role for the European Community in monitoring human rights protection within the Member States, even while its

provisions acknowledged the possibility that the new Community itself could be a source of abuse, The first of the aims of the Community listed in Article 2 of the EPC Treaty was "to contribute towards the protection of human rights and fundamental freedoms in Member States"[95] and Article 3 made the provisions of the ECHR an integral part of the EPC Treaty. Article 41 declared that the Court of Justice would have jurisdiction over any dispute arising between the Community and the Member States in relation to the application or interpretation of the treaty itself.[96] In other words, the draft EPC Treaty clearly envisaged that protection of human rights by the Member States would be a core concern of the Community, both through the provision for intervention in Article 104 and by allowing questions of compliance by Member States with the ECHR to be brought before the Community Court.

Under the current EU treaty framework, however, despite the regular invocation of human rights in official discourse and documents, there is great reluctance to specify any clear role for the EU in relation to the actions of Member States as far as human rights compliance is concerned. Despite the broad statement in Article 2 TEU that the Union is founded on respect for human rights, and more importantly the provision in Article 6 giving legal force to the Charter of Fundamental Rights, the fine print makes clear the continuing and determined resistance of the Member States to any role for the EU in scrutinizing or regulating their activities. Article 51 of the Charter famously limits its scope of application by providing that it is addressed to the institutions of the European Union, but to the Member States only when they are implementing EU law.[97] Even the clear potential of Article 7 TEU to become the basis for a serious monitoring mechanism for human rights compliance by EU Member States has been dampened.

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[95] Complementing this provision, Article 55 of the draft EPC Treaty provided that "The Community may make proposals to the Member States with the object of attaining the general aims defined in Article 2". Draft European Political Community Treaty art. 55, *available at* http://www.ena.lu/draft-treaty-embodying-statute-european-community-strasbourg-10-march-1953-020302241.html.

[96] *See* Draft European Political Community Treaty art. 41, *supra* note 30 ("1. The Court shall in its own right take cognizance of disputes arising out of the application or interpretation of the present Statute or of a law of the Community, to which the parties are either Member States among themselves or one or more Member States and the Community.")

[97] For a discussion of the drafting of Article 51 of the Charter, see Gráinne de Búrca, *The Drafting of the EU Charter of Fundamental Rights*, 26 EUR. L. REV. 214 (2001).

When Article 7 TEU was first included by the Amsterdam Treaty and subsequently revised in the Nice Treaty, it seemed that perhaps the objection of Member States to a monitoring role for the EU in relation to human rights within the territories of the Member States themselves had finally been overcome.[98] In what appears to have been a gesture prompted by the imminent future enlargement of the Union to include up to ten states from Central and Eastern Europe, the existing Member States decided that there should be a provision in Article 7 TEU for the suspension (though not expulsion) of the rights of a Member State found to be seriously and persistently violating human rights or democratic principles.[99] However, it was the subsequent "Haider affair" in Austria, during which fourteen of the then fifteen EU member States adopted diplomatic sanctions against Austria following the entry into coalition government of the far-right Freedom Party (the FPÖ), which revealed the clear interest of the EU in the existence of threats – whether current or future - to human rights and freedoms within its already existing Member States. The Haider affair led to Article 7 TEU being amended to provide a mechanism for intervention in the cases of a risk and not only in the case of actual occurrence of serious human rights violations.[100] Shortly afterwards, at the European Parliament's proposal,[101] a Network of Experts on Fundamental Rights was established which began regular monitoring of compliance with human rights in the EU member states, with a view to making the Article 7 mechanism operative.[102]. Yet although the Network produced excellent annual reports on human rights protection in the Member States, as well as a number of interesting thematic reports and opinions, it was replaced, when the Fundamental Rights Agency was established in 2007, by a similar network (FRALEX) which was prohibited from doing exactly what the earlier network had been established to do. In other words, the FRALEX network has no role in relation to

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[98] *See* Gráinne de Búrca, *Beyond the Charter: How Enlargement has Enlarged the Human Rights Policy of the EU*, 27 FORDHAM INT'L L.J. 679 (2004); *see also* Williams, *supra* note 77; Sadurski, *supra* note 77.

[99] For a suggestion that some of the Member States of Central and Eastern Europe had to downgrade their protection for certain human rights in the wake of accession to the EU, see Anneli Albi, *Ironies in Human Rights Protection in the EU : Pre-Accession Conditionality and Post-Accession Conundrums*, 15 EUR. L.J. 46 (2009).

[100] *See supra* note 92.

[101] This suggestion was made in 2001 in the *European Parliament Report on the Situation as Regards Fundamental Rights in the European Union* (2000), A5-02223/2001.

[102] *See* http://ec.europa.eu/justice_home/news/information_dossiers/cfr_cdf/index_en.htm (last visited, 27 April 2010)

Article 7 TEU,[103] and hence no formal role in monitoring the Member States in relation to human rights issues.[104] The mandate of the Agency instead is to "provide assistance and expertise relating to fundamental rights to the relevant Community institutions and its Member States when implementing Community law", to collect, publish and disseminate data and research, to provide relevant analysis and advice to the EU and the Member States, to raise public awareness and cooperate with civil society. Further, Article 3 of the Regulation establishing the Agency which defines the scope of its mandate contains a sentence similar to that in Article 51 of the Charter of Fundamental Rights, restricting the Agency's remit to: "fundamental rights issues in the European Union and in its Member States when implementing Union law", in another attempt to restrict the extent to which the Agency and its actors can concern themselves with human rights issues internal to the Member States.[105]

To conclude, what is evident in the current EU constitutional framework for human rights protection is an insistent emphasis by Member States on restricting the extent to which the EU and its institutions can scrutinize or monitor the policies of the Member States. Some of the clearest examples of this are in the provisions of the Charter of Fundamental Rights and the Fundamental Rights Agency which seek to restrict their respective scope of application and mandate to actions of the European Union, and to Member States only when 'implementing EU law'. It is of course possible that these restrictive provisions may ultimately prove unsuccessful

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103 The Council of Ministers did however issue a declaration to the effect that it may "seek the assistance of the Agency as an independent person if it finds it useful during a possible procedure under Article 7 TEU. The Agency will however not carry out systematic and permanent monitoring of Member State for the purposes of Article 7 TEU." European Commission, European Union Agency for Fundamental Rights, http://ec.europa.eu/justice_home/fsj/rights/fsj_rights_agency_en.htm.

104 Controversially, the mandate of the Fundamental Rights Agency was also restricted so that it had no role in relation to what was formerly the 'third pillar' of the EU, i.e. the areas of police and judicial cooperation in criminal matters, unless it was so requested by the EU or the Member States. Following the integration of the third pillar by the Lisbon Treaty, the FRA mandate may be extended to cover also police and criminal cooperation, if indeed any formal extension is considered necessary after the 'dissolution' of the third pillar. *See* Austrian Foreign Ministry, European Human Rights Agency, http://www.bmeia.gv.at/en/foreign-ministry/foreign-policy/human-rights/eu-human-rights-policy/fundamental-rights-agency.html (last visited Apr. 29, 2010). Finally, the Agency's role does not include examination of individual complaints, regulatory decision-making, or consideration of compliance by Member State with the Treaties.

105 Council Regulation 168/2007, *supra* note 68.

in their attempt to screen the actions of the states from EU scrutiny, given the various other activities of the Fundamental Rights Agency in cooperating with civil society actors and promoting human rights within the Union more generally, and given the potential of the Charter to be used by civil society actors and others as part of broader strategies of human rights promotion. Nevertheless, the contrast between the contemporary emphasis on minimizing the EU's role in monitoring or promoting human rights within the Member States, and the clear expectation during the drafting of the EPC Treaty that the European Community would have a central role in monitoring the activities of Member States in this field, is stark.

2. The autonomy of the EU human rights regime

A recurrent concern of the drafters in the 1950s was, as we have seen, the relationship between the new European Community and the European Convention on Human Rights. There was no suggestion that the European Community should have its own Charter of Rights, distinct from that of the fledgling regional human rights system – which was itself envisaged as a regional implementation of the emergent international human rights regime after the adoption of the Universal Declaration on Human Rights. Nor was European Community human rights law to be founded on the human rights provisions of Member State constitutions. Instead it was relatively quickly agreed that the ECHR would be the authoritative source for the new European Political Community's human rights system, and the provisions of the ECHR were incorporated by Article 3 of the EPC Treaty as an integral part of that Treaty. Further, both the CECE drafters and the EPC Treaty drafters contemplated the possibility of Community accession to the ECHR, but took the view that the requirement of amending the relevant Council of Europe statute complicated this option excessively at the time. Instead it was decided that a procedure would be established under the EPC Treaty whereby the European Community Court would relinquish jurisdiction to the European Court of Human Rights in human rights cases brought against the Community which raised a point of principle for all ECHR member states. In other words, the EU human rights system designed in the 1950s would have been integrally connected to the

European Convention on Human Rights system with a formal relationship being established between the two Courts.

Under today's constitutional framework, by comparison, despite the fact that the European Convention on Human Rights is mentioned in Article 6(3) TEU and treated by the Court of Justice as a source of 'special significance' for EU human rights law,[106] and despite the likelihood that the EU will shortly accede to the ECHR,[107] the willingness to establish a formal institutional link between the two Courts is much less evident than it was in the 1950s. [108] Currently the European Court of Human Rights exercises a kind of indirect jurisdiction over acts of the EU in certain circumstances, displaying great deference via a presumption that acts of the EU are in conformity with the ECHR.[109] But even if the EU becomes a party to the ECHR and the Court of Human Rights thereby gains jurisdiction to rule directly on whether the EU has violated provisions of the ECHR, such membership is currently envisaged as an external system of EU accountability to the regional human rights system. More specifically, it has repeatedly been said that EU accession to the ECHR will not affect the autonomy of the European Court of Justice, and will not formally subordinate the ECJ to the rulings of the European Court of Human Rights.[110] Thus it seems likely that the extent to which judgments of the European Court of

[106] For an argument that the ECHR should be understood as already formally binding on the EU, as a matter of EU law, even prior to EU accession to the ECHR, see Bruno de Witte, *Human Rights*, *in* BEYOND THE ESTABLISHED ORDERS: POLICY INTERCONNECTIONS BETWEEN THE EU AND THE REST OF THE WORLD (Panos Koutrakos ed,) (forthcoming 2011). He argues similarly that the EU has made the Geneva Convention Relating to the Status of Refugees binding upon itself in the context of its own asylum policy, via Article 78(1) TFEU.

[107] Accession has been made legally possible following the enactment by the Lisbon Treaty of Article 6(2) TEU to overcome the obstacle created by the Court of Justice in its Opinion 2/94 on EC Accession to the ECHR, 1996 E.C.R. I-1759, and following the ratification of Protocol 14 to the ECHR by all Member States of the Council of Europe. Article 17 of Protocol 14 declares that the ECHR is to be amended to provide that "The European Union may accede to this Convention".

[108] For a recent argument even against the need for EU accession to the ECHR, see Francis Jacobs, *The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice*, *available at* http://www.ecln.net/elements/conferences/book_berlin/jacobs.pdf (Jacobs is former Advocate General of the ECJ). Compare the contrary argument of van den Berghe, *supra* note 76.

[109] *See* Bosphorus v Ireland, App. No. 45036/98, 42 Eur. H. R. Rep. 1 (2005).

[110] For a recent pronouncement to this effect see the *Draft Report of the Committee on Institutional Affairs of the European Parliament, Institutional Aspects of Accession of the EU to the European Convention on Human Rights*, 2009/2241(INI) [hereinafter *Draft Report on Institutional Aspects of Accession*]: "accession will not in any way call into question the principle of the autonomy of Union law, as the Court of Justice will remain the sole supreme court

Human Rights will be binding on the ECJ, either in cases dealing with the EU or in other cases involving relevant legal principles, will remain to be worked out by the EU institutions themselves.[111] The direct mechanism envisaged in Article 45 of the EPC Treaty, on the other hand, was clearly intended to place the European Court of Justice in the position of having to comply directly with rulings of the European Court of Human Rights in cases arising before the Community Court concerning a claim of a human rights violation against the European Community.

Today's emphasis on the formal autonomy of the ECJ from the ECHR may seem a relatively minor point in practice, given that the European court of Justice seems inclined to follow most of the case law of the Court of Human Rights, at least in cases in which the result comports well with EU law.[112] Nonetheless, it is an interesting symbolic change from the system envisaged in the 1950s, and it could well prove to be of practical significance if cases arise in which – as is increasingly likely given the extension of the powers and competences of the EU - the interpretation given by the ECtHR to provisions of the ECHR would prejudice the application of a provision of EU law.[113]

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adjudicating on issues relating to EU law and the validity of the Union's acts, as the Court of Human Rights must be regarded not as a higher court but rather as having special jurisdiction in exercising external supervision over the Union's compliance with obligations under international law arising from its accession to the ECHR".

[111] The ECJ did suggest, in Opinion 1/91 concerning the European Economic Area Agreement, 1991 E.C.R. I-6079 that where an international agreement establishes a court with jurisdiction to settles disputes between parties to the Agreement, that the ECJ would be bound also by the decisions of that court, and this has been taken by some to mean that the ECJ will be bound by judgments of the ECtHR after accession of the EU to the ECtHR. *See* Tobias Lock, *The ECJ and the ECtHR: The Future Relationship between the Two European Courts*, 8 L. AND PRAC. OF INT'L CTS. & TRIBUNALS 375 (2009). Others, however, including Allan Rosas who is currently judge on the European Court of Justice, have cast doubt on whether the ECJ in Opinion 1/91 can really have meant this: *see* Allan Rosas, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, 1 EUR. J. LEGAL STUD. 1, nn. 43-44 and text (2007).

[112] On the interactions between the two courts, see Johan Callewaert, *The European Convention on Human Rights and European Union Law: A Long Way to Harmony*, 6 EUR. HUM. RTS. L. REV. 768 (2009). See also the recent ECJ Memo on Accession to the ECHR .

[113] The ECJ itself is clearly concerned about this prospect, and has recently argued, in a memo concerning the proposed accession to the ECHR, that "a mechanism must be available which is capable of ensuring that the question of the validity of a Union act can be brought effectively before the Court of Justice before the European Court of Human Rights rules on the compatibility of that act with the Convention": *Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European*

It seems clear that the decision to maintain and underscore the autonomy of the ECJ is a deliberate and conscious one. The debate which took place during the drafting of Article 52(3) of the EU Charter on Fundamental Rights, concerning the relationship between the Court of Justice and the Court of Human Rights, revealed a clear unwillingness to place the European Court of Justice in any kind of formally subordinate position vis-à-vis the ECtHR.[114] Ultimately, while Article 52(3) declares that the rights in the EU Charter of Rights which correspond to rights guaranteed by the ECHR are to have the same meaning and scope of as those laid down by the European Convention, no reference to the case law of Court of Human Rights is to be found in the provisions of the Charter.[115] The idea of a bridging mechanism between the two Courts such as that provided for in Article 45 of the EPC Treaty draft has not met with support in more recent times.[116] The EU preference clearly remains for an informal and mutually respectful arrangement such as exists at present between the two Courts. This arrangement has been described as a kind of 'common supranational diplomacy',[117] but one which nonetheless clearly maintains the autonomy and primacy of the European Court of Justice within the EU realm.

Convention for the Protection of Human Rights and Fundamental Freedoms, Luxembourg, 5 May, 2010. A former judge of the ECJ has also warned sharply of the implications of the ECJ being bound too closely to follow the rulings of the ECtHR: John Murray, *The Influence of the European Convention on Fundamental Rights on Community Law* 33 *FORDHAM INT'L L J* 1388 (2010)

[114] *See* Jonas Lüsberg, *Does the EU Charter of Fundamental Rights Threaten The Supremacy of Community Law* (The Jean Monnet Center for Int'l and Reg'l Econ. Law and Justice, Working Paper No. 4, 2001), *available at* http://centers.law.nyu.edu/jeanmonnet/papers/01/010401.html ("the drafting history…shows that several Member States strongly objected to any reference to the case law of the European Court of Human Rights in Article 53 or Article 52(3)").

[115] A reference was later made in the explanations to Article 52(3) of the Charter, which was subsequently prepared by the Charter's legal secretariat and given legal relevance by Article 52(7) of the Charter. *See* 2007 O.J. (C 303/33).

[116] *See Draft Report on Institutional Aspects of Accession*, *supra* note 110 above, that it, "Considers that it would be unwise to formalize relations between the Court of Justice and the European Court of Human Rights by establishing a preliminary ruling procedure before the latter or by creating a body or panel which would take decisions when one of the two courts intended to adopt an interpretation of the ECHR which differed from that adopted by the other; recalls in this context Declaration No 2 concerning Article 6(2) of the Treaty on European Union, which notes the existence of a regular dialogue between the Court of Justice and the European Court of Human Rights, which should be reinforced when the Union accedes to the ECHR."

[117] Laurent Scheeck, *The Supranational Diplomacy of the European Courts: A Mutually Reinforcing Relationship?*, *in* THE ECJ UNDER SIEGE: NEW CONSTITUTIONAL CHALLENGES FOR THE ECJ 172 (Giuseppe Martinico & Filippo Fontanelli eds.) (2009). *See also* Guy Harpaz, *The European Court of Justice and its Relations with the European*

This emphasis on the autonomy and primacy of the EU's system of human rights protection is evident not only in the political and legal discussions on the implications of EU accession to the ECHR, or in debates on the drafting of the EU Charter of Rights, but also in the recent case law of the European Court of Justice itself. The autonomy of the EU's human rights system was perhaps most famously emphasized in the *Kadi* case in which the Court of Justice ruled that certain EC Regulations implementing Security Council resolutions which had been adopted under Chapter VII of the UN Charter, violated fundamental rights protected under the European Community legal order.[118] The Court ruled that the provisions of the UN Charter themselves could not have primacy over fundamental rights which were part of EC law, and repeatedly emphasized the autonomy of the EU's constitutional framework for human rights protection: " the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement".[119] Much less dramatically, but notably for the language chosen by the Court, the ECJ in the case of *Elgafaji* was asked by the referring Dutch court for guidance on the meaning of subsidiary protection within Article 15 (c) of the EU Asylum Qualification Directive as compared with Article 3 of the ECHR as interpreted by the European Court of Human Rights in its case law.[120] While affirming that the right contained in Article 3 ECHR "forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order" the ECJ ruled that the particular subsection of the provision of the Directive which was at issue in the

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Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy, 46 COMMON MKT. L. REV. 105 (2009) .

[118] *See* Joined Cases C-402/05 P and C-415/05 P, Kadi & Al Barakaat Int'l Found. v. Council & Comm'n, 3 C.M.L.R. 41 (2008). See now the ruling of the General Court in the follow-up challenge brought by one of the applicants, Kadi, to the Commission's decision to re-list him: T-85/09, Kadi v Commission, judgment of 30 September 2010.

[119] *Id.*, ¶ 316.

[120] Case C-465/07, *Elgafaji* v *Staatssecretaris van Justitie,* Feb. 17, 2009, *available at* http://www.unhcr.org/refworld/docid/499aaee52.html.

case did not (unlike the preceding subsection) correspond directly with Article 3 ECHR. As a consequence, the interpretation of Article 15(c) had to be carried out "independently… although with due regard for fundamental rights, as they are guaranteed under the ECHR".[121] This insistence on the formal autonomy of the ECJ to interpret provisions of EU law, even while paying due regard to the ECHR and to the relevant case law of the ECtHR, is notable.

None of this is to suggest that the EU ignores or snubs international or regional human rights law, nor that the EU system is fundamentally disconnected from the regional and international systems.[122] Clearly that is not the case, as the EU continues to assert its commitment to the principles contained in the ECHR as well as in some other human rights treaties, and was a negotiator and signatory recently of the UN Disability Convention. On the other hand, the ECJ has been notoriously reluctant to cite and to rely on other international and regional human rights treaties apart from the ECHR, and the EU is not – with the exception of the mechanism set up by the UN Disability Convention to which the EU is party - subject to regional or international human rights monitoring at present.[123] This has led distinguished commentators to argue that the European Court of Justice, by focusing almost exclusively on the ECHR is "ignoring the range of other human rights treaties", and that the EU is "estranged from the universal human rights regimes established under the UN as well as other regional instruments".[124] It is not that the EU formally dismisses sources of human rights law deriving from outside the EU itself, but rather that the EU and the ECJ at best draw very sporadically and inconsistently on such international human rights sources, and insist on the ECJ as the final and authoritative arbiter of their meaning and impact within the EU. To conclude, this insistence on the constitutional autonomy and separateness of the EU human rights system is striking, and contrasts with the constitutional

[121] *Id.*, ¶ 28.
[122] See, e.g., Bruno de Witte, *supra* note 91, especially section 3, who looks beyond the question of judicial relations to the way EU human rights laws and policies are related to those of other regional and international systems. Nevertheless, he also concludes his chapter by cautioning the EU against moving to a 'splendid isolation' in the human rights field.
[123] *See* Olivier de Schutter & Israel Butler, *Binding the EU to International Human Rights Law*, 27 Y.B. EUR. L. 277 (2008).
[124] *Id.*

vision of the 1950s in which the Community was to be integrally connected to the emerging regional and international human rights system.

3. The external focus of the EU human rights regime today

The third significant difference between the constitutional framework for EU human rights protection drafted in the 1950s and that existing today is that while the 1950s framework was oriented as much towards internal as external spheres of EU activity, the dominant emphasis of the current EU constitutional framework for human rights protection is on external policies.

We have seen above how in the early 1950s the task of monitoring the human rights practices of Member States was envisaged as a central part of the new European Political Community's role. Further, protection of human rights within the Member States was explicitly declared to be one of the aims of the Community in both the CECE Resolutions and in Article 2 of the EPC Treaty, and the Community under Article 55 EPC was given the power to make proposals to further the aims of Article 2. In other words, protection of human rights within the Community and within the Member States was to be a core part of the Community's concern. At the same time, the EPC also outlined a significant external role for the new Community in which human rights had an important place. In the first place, Article 116 of the draft EPC Treaty articulated what are now known as the Copenhagen criteria for prospective member states, providing that "accession to the Community shall be open to the Member States of the Council of Europe and to any other European State which guarantees the protection of human rights and fundamental freedoms mentioned in Article 3". Secondly, Article 90 of the EPC Treaty provided that the Community could conclude association agreements "with such third States as guarantee the protection of the human rights and fundamental freedoms mentioned in Article 3". More generally, Article 2 as well as Chapter III of the EPC Treaty clearly envisaged an active role in international relations for the new European Political Community.[125]

[125] Following the protection of human rights, the second and third aims of the European Community listed in Article 2 EPC were "to co-operate with the other free nations in ensuring the security of Member States against all aggression" and "to ensure the co-ordination of the foreign policy of Member States in questions likely to involve

The major emphasis of the EU's constitutional regime of human rights protection today, however, is externally focused, setting up a distinct difference between external and internal policies. This is evident not just in the reluctance on the part of Member States to submit themselves to human rights monitoring by the EU, as discussed above, but more specifically in the contrast between the active assertion of human rights protection as a goal of EU foreign policy and the unwillingness to declare human rights protection to be a general goal or a cross-cutting objective of internal EU policies. On the contrary, any legal or constitutional discussion of human rights issues in the European Union today is invariably accompanied by assertions on the part of the Council and the Member States of the limited competences of the EU, and a narrow view is taken of the legitimate scope of human rights law and policy within the EU. This phenomenon of double-standards,[126] or rather of a clear difference between the importance accorded to human rights in EU external relations as compared with internal relations was first clearly identified in a collective research project on human rights in the EU in 1999,[127] but the 'bifurcated'[128] approach seems to have survived the enactment of the Charter of Fundamental Rights and to be retained the new constitutional framework.

A first indication of the distinction drawn between the role of human rights in the internal and the external policy realms can be seen in the comparison between Article 3(3) TEU, dealing with human rights within internal EU policies, and Article 3(5) dealing with human rights in external

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the existence, the security or the prosperity of the Community". Draft European Political Community Treaty art. 2, *supra* note 30. It should be noted, however, that although the Member State representatives within the context of the 1953/4 Conference on the EPC Treaty approved the initial human rights clauses of the draft Treaty including Articles 2 and 3, they deferred discussion of the international relations provisions of Chapter III. See *Analyse du rapport adopté le 8 Mars 1954 par la Commission pour la Communauté politique européene,* INFORMATIONS ET DOCUMENTS OFFICIELS DE LA COMMISSION CONSTITUTIONNELLE , ASSEMBLÉE AD HOC CHARGÉE D'ELABORER UN PROJECT DE TRAITÉ INSTITUANT UNE COMMUNAUTÉ POLITIQUE EUROPÉENNE (March 1955), Document 15, CHECK citation of exact para.

[126] *See* Frederic Van den Berghe, *The EU and the Protection of Minorities: How Real is the Alleged Double Standard?*, 22 Y.B. EUR. L. 155 (2003).

[127] *See* 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); Alston & Weiler, *supra* note 7.

[128] This is the term used by Williams, *supra* note 55, ch. 4.

relations. Article 2 TEU declares that the EU is "founded on" the value of respect for human rights and Article 3 declares that the Union's aims include the promotion of its values. Article 3(3) is then more specific in naming the major internal EU policy fields which are considered to implicate human rights-related objectives.[129] Article 3(3) declares that the Union "shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child". By comparison, Article 3(5) on external relations is broader and more general, and specifically identifies the protection of human rights worldwide as a goal: "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter." In other words, while the protection of human rights is asserted as an overarching objective in all EU external relations, in its internal policies the EU treats the proper sphere of human rights policy as being limited to those areas of EU power or competence which directly promote human rights – i.e. mainly anti-discrimination and social inclusion policy.[130] Thus the strategy has been to identify the fields of EU internal policy in which human rights concerns are considered relevant by reference to the precise scope of the EU's powers in fields such as social inclusion or anti-discrimination. [131] This strategy is not however used in the

[129] See also the listing on the EU's website of those areas of internal EU policy which are considered to implicate human rights (or 'fundamental rights', in EU discourse), http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/index_en.htm.

[130] Protection of the rights of the child is an interesting exception, since it has been asserted as an objective of internal EU policy even though the EU has no other expressly enumerated competence in the field of children's rights. The Commission began in 2006 to identify protection of children's rights as a major concern of the EU, publishing a paper "Towards an EU Strategy on the Rights of the Child". *Towards an EU Strategy on the Rights of the Child*, COM (2006) 0637 final (July 4, 2006). On its website the Commission declares "The EU Charter of Fundamental Rights provides a clear political mandate for action on children's rights even if it does not establish any new powers or tasks for the Community". http://ec.europa.eu/justice_home/fsj/children/fsj_children_intro_en.htm.

[131] For a similar criticism in relation to the EU's unwillingness to accede to human rights treaties other than in policy areas specifically covered by EU competences, see de Schutter & Butler, *supra* note 107: "Accession of the EU [to human rights treaties] should not be limited to treaties which have a direct overlap with areas of EU

external domain, in which human rights protection is treated as a cross-cutting goal relevant to all domains of EU external action.

Within the borders of the EU, the most important and expansive area of human rights activity is the EU regime of anti-discrimination law, which has been developed substantially since the adoption of Article 13 EC (now Article 18 TFEU) by the Amsterdam Treaty. The two discrimination directives adoption in 2000[132] have been supplemented by several pieces of gender equality legislation,[133] and most recently by a Framework Decision on Racism and Xenophobia,[134] and a proposal to expand the legislation prohibiting discrimination on grounds of age, disability, religion and sexual orientation to cover similar ground to the Race Discrimination Directive of 2000,[135] as well as by a series of action programs. In a notable move giving Treaty status to the expanding anti-discrimination regime, Article 10 TFEU was added by the Lisbon Treaty to declare that "in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". However, apart from the thriving field of anti-discrimination law and policy, the growing area of data-protection,[136] and a number of funding initiatives such as the

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competence. Human rights obligations affect the exercise of all public power since it is through the exercise of their authority that states or other entities violate or uphold human rights. In this sense human rights cut across all areas of EU competence".

[132] Council Directive 2000/43/EC, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180) 22; Council Directive 2000/78/EC, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16.

[133] Council Directive 2006/54/EC, Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation, 2006 O.J. (L 204) 23 (recast); Council Directive 2004/113/EC, Implementing the Principle of Equal Treatment Between Women and Men in the Access to and Supply of Goods and Services, 2004 O.J. (L 373) 40.

[134] Framework Decision 2008/913/JHA, Official Journal [2008] L328/55.

[135] *Commission Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation*, COM (2008) 426 final (July 2, 2008).

[136] *See* Directive 95/46, Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31; *Report of the Fundamental Rights Agency, Data Protection in the EU: The Role of National Data Protection Authorities - Strengthening the Fundamental Rights Architecture in the EU II* (2010), *available at* http://fra.europa.eu/fraWebsite/attachments/Data-protection_en.pdf.

Daphne[137] and Progress[138] programs concerning gender and child-related violence and social inclusion policies, human rights concerns do not figure significantly in internal EU laws or policies. Within important policy fields such the area of freedom, security and justice, including civil as well as criminal cooperation, activity is focused primarily on mutual recognition, aligning or coordinating laws to avoid transnational obstacles, and not on questions of the impact on human rights. Similarly in the fields of asylum and immigration, issues such as securing borders and managing migration rather than human rights protection have been given priority,[139] and many critics have argued that EU policies in these fields are having regressive effects on human rights.[140]

Even the enactment of the Charter of Fundamental Rights, whose existence would seem to refute the argument that human rights issues are relevant only to particular fields of internal EU power, is hedged about with restrictive clauses seeking to limit its influence on EU policy. Apart from the Lisbon Treaty Protocols dealing with the UK, Poland and the Czech Republic,[141] Article 51(2) declares that the Charter does not "modify powers and tasks as defined in the Treaties", and both Article 51 of the Charter and Article 6 TEU repeat that the provisions of the Charter shall not extend the competences, tasks or field of action of the EU in any way. One important development which has the potential to challenge these consistent moves by Member States to

[137] Daphne II Programme to combat violence against children, young people and women, http://ec.europa.eu/justice_home/funding/2004_2007/daphne/funding_daphne_en.htm.
[138] PROGRESS Programme, http://ec.europa.eu/social/main.jsp?catId=327&langId=en.
[139] *See, e.g.,* Jari Pirjola, *European Asylum Policy: Inclusions and Exclusions Under the Surface of Universal Human Rights Language*, 11 EUROPEAN J. MIGRATION & L. 347 (2009); Sarah H. Krieg, *Trafficking in Human Beings: The EU Approach Between Border Control, Law Enforcement and Human Rights*, 15 EUR. L.J. 775 (2009).
[140] *See, e.g.,* AMNESTY INTERNATIONAL, HUMAN RIGHTS DISSOLVING AT THE BORDERS? COUNTER-TERRORISM AND EU CRIMINAL LAW (2005); Catherine Teitgen-Colly, *The European Union and Asylum: An Illusion of Protection*, 43 COMMON MKT. L. REV. 1503 (2006). For a critique of the limited jurisdiction of the ECJ over the field of justice and home affairs, and its human rights implications, see Stephen Carruthers, *The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affairs*, 6 EUR. HUM. RTS. L. REV. 784 (2009).
[141] The Protocol on the Application of the Charter of Fundamental Rights of the EU to Poland and to the United Kingdom, 2007 O.J. (C 306) 156; The Protocol on the Application of the Charter of Fundamental Rights of the EU to the Czech Republic Attempt to Limit Aspects of the Application of the Charter to the UK, Poland and the Czech Republic. Conclusions of the European Council No. 15265/1/09 of 1 Dec. 2009, Annex I, *available at* http://register.consilium.europa.eu/pdf/en/09/st15/st15265-re01.en09.pdf (to be annexed to the Treaty on European Union when it is next amended).

enshrine a restricted role for internally-focused human rights protection within the EU constitutional framework, however, is the move by the Commission to develop some kind of meaningful human rights impact assessment by reference to the Charter.[142] There is a clear tension between the determination of the Member States when drafting the EU Treaties, the Charter of Fundamental Rights, and new institutions like the Fundamental Rights Agency (FRA), to limit the internal focus of EU human rights policies and powers, as compared with the practice of the Commission, the FRA and national human rights institutions and other actors in mobilizing the potential of the Charter within the EU on the other hand[143] It remains to be seen whether this tension unfolds in a productive way and leads to the gradual expansion of a robust and explicit internal EU human rights policy, or to a defensive reaction by Member States seeking to further limit its development.

In external EU policies and activities, by comparison, there is no hesitation on the part of the EU or the Member States in officially asserting and prescribing an unambiguous role for human rights protection and promotion, even if the actual practice has been inconsistent or politically strategic.[144] The EU unquestionably attempts to influence the conduct of many third states and regions as regards human rights protection. Human rights concerns feature centrally in EU development policy and in external trade, and they are promoted through instruments such as political dialogue, human rights clauses in bilateral agreements,[145] and trade preferences,[146] as

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[142] See *Commission Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights*, COM (2009) 205 final (Apr. 29, 2009) and its earlier communication, *Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals: Methodology for Systematic and Rigorous Monitoring*, COM (2005) 172 final (Apr. 27, 2005), together with the Voggenhuber Report and Resolution of the European Parliament, EUR. PARL. DOC. A6-0034/2007 (2007). Most recently COM(2010)573, Commission Communication on a Strategy for the Effective Implementation of the Charter of Fundamental Rights.

[143] For an account of the EU human rights regime that is premised on the second, expansive vision of the role of human rights within the EU polity, see Olivier de Schutter, *Fundamental Rights and the Transformation of Governance in the European Union* in Olivier de Schutter & Voleta Moreno Lax (eds), HUMAN RIGHTS IN THE WEB OF GOVERNANCE: TOWARDS A LEARNING-BASED FUNDAMENTAL RIGHTS POLICY FOR THE EUROPEAN UNION (2010).

[144] *See* Khaliq, *supra* note 69.

[145] *See supra* note 83.

[146] In 2010 the EU suspended trade preferences with Sri Lanka, citing human rights concerns. *See also* Jan Orbie & Lisa Tortell, *The New GSP+ Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings?*, 14 EUR.

well as in multilateral settings,[147] in EU neighbourhood policies,[148] and in the EU's human rights and democratisation programmes.[149]

Needless to say, the prominence of human rights in EU external policies does not mean that these policies have escaped critique.[150] Such criticisms include the claim that the EU's interest in human rights protection is often about promoting its own influence and strategic advantage internationally or is motivated by other political considerations.[151] Further, the EU has been accused of failing to show real leadership in addressing human rights violations internationally,[152] and of lacking the political will to address many pressing human rights problems.[153] Nevertheless, and despite the shortcomings of the EU's external human rights policies in practice, the formal constitutional framework established by the Treaties and developed in secondary EU instruments and policies clearly identify human rights protection as a prominent and cross-cutting dimension of the external activities of the EU, thus contrasting with the officially circumscribed role allocated to human rights matters within internal EU activities and policies.

FOREIGN AFF. REV. 663. For a more general analysis of the legality of the EU's GSP system, see Lorand Bartels, *The WTO Legality of the EU's GSP Arrangement*, 10 J. INT'L ECON. L. 869.

[147] For an appraisal, see Karen E. Smith, *Speaking with One Voice? European Union Coordination on Human Rights Issues at the United Nations*, 44 J. COMMON MKT. STUD. 113 (2006).

[148] *See Commission European Neighbourhood Policy Strategy Paper*, COM (2004) 373 final (May 12, 2004).

[149] *See* European Instrument for Democracy & Human Rights, http://ec.europa.eu/europeaid/how/finance/eidhr_en.htm.

[150] For a summary of some of the criticisms see PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT CASES AND MATERIALS ch. 11 (4th ed. 2008). For a powerful critical overview of the EU's engagement with human rights, with particular emphasis on the bifurcation between external and internal policies, see WILLIAMS, *supra* note 55.

[151] *See* Khaliq, *supra note* 69.

[152] *See, e.g.,* See RICHARD GOWAN & FRANZISKA BRANTNER, EUR. COUNCIL ON FOREIGN RELATIONS, A GLOBAL FORCE FOR HUMAN RIGHTS? AN AUDIT OF EU POWER AT THE UN (2008), *available at* http://ecfr.3cdn.net/c85a326a9956fc4ded_qhm6vaacc.pdf [hereinafter GLOBAL FORCE]; RICHARD GOWAN & FRANZISKA BRANTNER, EUR. COUNCIL ON FOREIGN RELATIONS, THE EU AND HUMAN RIGHTS AT THE UN: 2009 REVIEW (2009), *available at* http://ecfr.3cdn.net/30b67f149cd7aaa888_3xm6bq7ff.pdf [hereinafter EU AND HUMAN RIGHTS AT THE UN].

[153] AMNESTY INTERNATIONAL, THE EU AND HUMAN RIGHTS: MAKING THE IMPACT ON PEOPLE COUNT (2009).. EU AND HUMAN RIGHTS AT THE UN, *id*. *See also* Kenneth Roth, *Filling the Leadership Void: Where is the European Union?*, *in* HUMAN RIGHTS WATCH, WORLD REPORT 2007 1.

E. Conclusion

While the absence from the scholarly literature on European integration of any account of the ambitious EC human rights framework which was drafted only a few years before the 1957 Treaties has left us with only a partial history of the EU's engagement with human rights, that absence does not in itself present a puzzle. On the contrary, the elision of this period of intensive activity from the official history and scholarly record of EU engagement with human rights is understandable. The final form of the 1957 Economic and Atomic Energy Communities represented a deliberate change of strategy, and a move away from the ambitious one-step federalist approach to European integration represented by thinkers such as Aristide Briand[154] and Altiero Spinelli[155] to the less politicized, sector-by-sector functionalist approach advocated by David Mitrany in the international context[156] and by Jean Monnet in the European context.[157] The failure of the European Defence Community Treaty after its non-ratification by the French National Assembly, and with it the setting aside of the European Political Community project, resulted in the adoption of a more careful political strategy which limited the agenda for the next stage of integration to atomic energy and economic matters.[158] In retrospect, the more gradual,

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[154] See the *Briand Memorandum* of 1930, DOCUMENTS ON BRITISH FOREIGN POLICY 1919-1939, 2nd series, vol. I, pp. 314-21

[155] Altiero Spinelli and Ernesto Rossi's joint manifesto for European unity *Il Manifesto Di Ventotene, per un'Europa libera e unita* was published in 1941. It is available online at http://www.altierospinelli.org/manifesto/en/manifestoen_it.html. For recent discussions of the relevance and influence of Spinelli's ideas, see John Pinder *Altiero Spinelli's European Federal Odyssey* 42 *THE INT'L SPECTATOR* 571 (2007) and Andrew Glencross *Altiero Spinelli and the Idea of the US Constitution as a Model for Europe: The Promises and Pitfalls of an Analogy* 47 *J. COMMON MKT STUD.* 287 (2009). For a comparison between the Spinelli and the Monnet approaches to European integration, see Michael Burgess, FEDERALISM AND EUROPEAN UNION, Chap. 3 (1991).

[156] For his foundational collection of essays on the functionalist theory of international relations, see David Mitrany, A WORKING PEACE SYSTEM (1966). The essay of the same title as the collection *A Working Peace System* was first published in 1943, and contained a critique of federalism and the constitutional approach to international order, arguing instead for his functionalist approach.

[157] Many of Jean Monnet's animating ideas and principles are to be found in his MEMOIRS, (translated by Richard Mayne) (Doubleday and Co., 1978) For a recent appraisal of his contribution, see Karine de Souza Silva, *Pedagogy of Peace: The Contribution of Jean Monnet to the Construction of the European Union*, Jean Monnet/Robert Schuman Paper Series, Vol 9, no. 5, (2009) available online at http://www6.miami.edu/eucenter/publications/Silva-MonnetLong09edi.pdf.

[158] For discussion of the failure of the EDC Treaty, see nn. above and text.

step-by-step approach to integration which was mandated by the Messina Conference of 1955 and the ensuing Spaak report, and which led to the drafting and adoption of the European Economic Community Treaty in 1957, proved to be a wise and remarkably successful strategy.

Almost forty years later, however, the EU has evolved significantly, even if it has not quite come full circle. The adoption of the Treaty on European Union at Maastricht in 1993 represented a turning point, signaling a deliberate move away from the sectorally limited legal framework for an economic Community towards a more open project of political and constitutional integration. Ever since the Maastricht Treaty moment, the European integration project has been more vigorously contested, but also more openly political and ambitious in its goals. The Treaty on European Union ushered in not only economic and monetary union, but also a commitment to policy coordination in the most sensitive spheres of national control, including immigration, security and foreign policy. Given that the project of European integration had thus returned to embrace the idea of political union which had been put to one side in the 1950s, it might be expected that on the subject of EU engagement with human rights, the slow and gradual moves which had followed the initial silence of 1957 would be replaced by an ambitious human rights framework of the kind which had been drafted in the early 1950s, to match the expanding political ambit and powerful regulatory reach of the European Union today. Yet this is not what is to be found today. Instead, in spite of the many significant changes introduced over the past fifteen years, the EU's constitutional framework conveys a deeply ambivalent message about the EU's role in relation to human rights protection and promotion.

On the one hand, human rights have come to represent an important part of the 'normative-power' international identity which the European Union seeks to promote.[159] Values, including the promotion of democracy, human rights and the rule of law, have been allocated a central place in the constitutional framework and legal discourse of the EU following the Lisbon Treaty,

[159] See n.6 above.

and they feature prominently in the international self-representation of the EU.[160] Yet informed observers have questioned sharply whether the EU lives up to its professed commitments in the area of human rights. As far as internal policies are concerned, Amnesty International has argued that the EU has serious human rights problems which are not adequately addressed.[161] Amongst other examples Amnesty cites the situation of the Roma – which became a matter of public notoriety recently following France's mass expulsions,[162] the fields of immigration and asylum, sexual orientation discrimination, detention, and violence against women and children.[163] Amnesty argues further that the EU significantly damaged its credibility and abdicated its human rights responsibilities over issues such as renditions and torture during the 'war on terror', and that it lacks a serious internal human rights mechanism.[164] As far as external EU policies are concerned, the European Council on Foreign Relations for the past two years has consistently argued that the EU's influence on human rights matters has dramatically declined within UN fora, and suggested that "flaws in its reputation as a leader on human rights and multilateralism" have contributed to the crisis of credibility and influence facing the EU.[165] This bleak assessment is supported by academic work which suggests that the EU's influence within the UN Human Rights Council has been damaged by the EU's neglect of human rights in areas of policy which are important to its potential allies on human rights matters amongst developing countries, such as immigration and asylum.[166]

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[160] Ibid.

[161] AMNESTY INTERNATIONAL, THE EU AND HUMAN RIGHTS: MAKING THE IMPACT ON PEOPLE COUNT (2009).

[162] See Kristi Severance, *France's Expulsion of Roma Migrants: A Test Case for Europe*, *MIGRATION POLICY INSTITUTE* (2010), available online at http://www.migrationinformation.org/

[163] AMNESTY INTERNATIONAL, n.161.

[164] *Ibid.* For previous critiques of the EU's lack of leadership on human rights matters globally, see Kenneth Roth, *Filling the Leadership Void: Where is the European Union?*, *in* HUMAN RIGHTS WATCH, WORLD REPORT 2007 1.

[165] See RICHARD GOWAN & FRANZISKA BRANTNER, EUR. COUNCIL ON FOREIGN RELATIONS, A GLOBAL FORCE FOR HUMAN RIGHTS? AN AUDIT OF EU POWER AT THE UN (2008), *available at* http://ecfr.3cdn.net/c85a326a9956fc4ded_qhm6vaacc.pdf [hereinafter GLOBAL FORCE]; RICHARD GOWAN & FRANZISKA BRANTNER, EUR. COUNCIL ON FOREIGN RELATIONS, THE EU AND HUMAN RIGHTS AT THE UN: 2009 REVIEW (2009), *available at* http://ecfr.3cdn.net/30b67f149cd7aaa888_3xm6bq7ff.pdf [hereinafter EU AND HUMAN RIGHTS AT THE UN]. For previous critiques of the EU's lack of leadership on human rights matters globally, see Kenneth Roth, *Filling the Leadership Void: Where is the European Union?*, *in* HUMAN RIGHTS WATCH, WORLD REPORT 2007 1.

[166] Karen E. Smith, *The European Union at the Human Rights Council: Speaking with One Voice but Having Little Influence*, 17 J. EUR. PUB. POL'Y 224.

Yet despite the changes introduced by the Lisbon Treaty to strengthen the EU human rights framework, the two longstanding critiques of that framework – namely that it lacks a serious and coherent human rights policy and mechanism which applies also to its Member States, and that there is a double-standard existing as between internally-oriented and externally-oriented activities – have survived these constitutional changes and have to some extent been written into the Treaty framework. Notwithstanding the introduction of the EU Charter of Fundamental Rights, the EU Fundamental Rights Agency, and the suspension mechanism in Article 7 of the Treaty on European Union, the framework for human rights protection envisaged in the draft EPC Treaty was more comprehensive and ambitious than today's framework in several key respects.

Three main differences have been identified in this article. The first is that the framework of the early 1950s assumed that monitoring and responding to human rights abuses by or within Member States would be a core task of the European Community, while the current constitutional framework resists and seeks to limit any role for the EU in monitoring human rights within the Member States. The second is that the early 1950s framework envisaged a European Community system which would be integrally linked to the regional human rights system, with a formal relationship existing between the Community Court and the European Court of Human Rights. In contrast, the current constitutional framework, even with the prospect of EU accession to the ECHR, emphasizes the autonomy and separateness of the EU's human rights system. It envisions the ECHR as an external system of accountability, and pays little attention to the international human rights regime. The third difference lies in the fact the 1950s constitutional framework envisaged human rights protection as being equally central to internal and external EU policies and activities, while the role outlined for human rights within today's constitutional framework remains predominantly focused on the external relations of the EU.

Unlike in the early 1950s, EU Member States in their role as 'Masters of the Treaties'[167] have in recent times sought to restrict the development of a robust role for human rights protection and promotion within EU law and policy. They have shaped a European Union whose engagement with human rights is qualified and limited in a range of ways, with the aim of ensuring that they as states are as far as possible free from EU monitoring and scrutiny, that the EU's human rights activities are focused mainly outwardly rather than inwardly, and that the autonomy of the EU itself is not constrained by external and international institutions and norms. To that extent the constitutional framework for human rights in the EU today stands in marked contrast to the proposed EPC Treaty regime in the early 1950s.

What accounts for this difference in vision between the 1950s and today? Why were the founding Member States - who were clearly wary at that time about many aspects of supranational political integration - nonetheless willing to create a robust role for the new Community in the field of human rights protection and promotion, while the Member States today are significantly more ambivalent about the EU's human rights role?

In his analysis of the origins of the ECHR, Andrew Moravcsik argues that the willingness of states to establish and to join a strong and enforceable international human rights regime such as the ECHR is best explained by republican liberal theory.[168] On Moravcsik's account, neither secure, established democracies on the one hand, nor transitional or dictatorial regimes on the other hand, are likely to support such regimes, while newly established democracies would do so in order to enhance their credibility and stability vis-a-vis nondemocratic external and internal

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[167] 'Masters of the Treaties' (Herren der Verträge) is the iconic term which was used by the BundesVerfassungsGericht in its famous Maastricht judgment of Oct. 12, 1993, 89 BVerfGE 155, 190 to describe the Member States' ongoing control over the EU constitutional process, and specifically over the process of Treaty amendment. Brunner v. European Union Treaty, Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Oct. 12, 1993, 89 BVerfGE 155 (190) (F.R.G.).

[168] Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe* 54, INTERNATIONAL ORGANIZATION 217 (2002). For a full account of the origins of the ECHR and Britain's role in its creation, including the suggestion that the ECHR was intended in part as a gesture against communism during the Cold War, see A.W. Brian Simpson, HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION. (2001)

political threats. It is not easy to apply this theory either to the EU's approach to the ECHR, or to the EU's approach to the establishment of its own human rights regime more generally, because of the difficulty of coding the EU as a 'newly established democracy', stable democracy, or otherwise. In the early 1950s when only the Coal and Steel Community had come into being, and the European Defence and European Political Communities were being discussed, the question was what relationship the new *European Community* should have, rather than what relationship the Member States should have, with the regional human rights system. A second problem with applying Moravcsik's theory to the position of the EU and human rights is that, as he acknowledges, the theory is formulated to apply to the establishment of a new regime, and not to its evolution over time.[169]

Nonetheless, even if it is not directly transposable to the situation of the EU, some of the insights generated by Moravcsik's theory seem relevant to the changing approach of the EU as a supranational entity to the question of the desirability of a robust human rights framework. The European Community in the 1950s was a very recently established entity, even if not a 'democracy', and its member states had recently emerged from the second world war and were evidently concerned about the risk of one of the states sliding back into totalitarianism, fascism or some other threat to democracy. It is clear that this concern motivated the inclusion of several of the provisions agreed in the CECE Resolutions and in the EPC Treaty draft,[170] as well the sanctions clause proposed by the Member State governmental representatives during the IGC of 1953-54.[171] It is no coincidence, either, that the first significant moves towards the creation of a contemporary human rights mechanism for the EU came in 1997 with the introduction of a sanctions clause in Article 7 TEU by the Amsterdam Treaty, as an explicit part of the EU's preparations for eastwards enlargement. In other words, it was again the concern about potential instability within the recently established democracies of the candidate states that led the EU

[169] Id, at 246.
[170] See e.g. paragraph 7 of the first CECE Resolution, and Article 104 of the draft EPC Treaty.
[171] See n.41 above and text, referring to the proposed inclusion of an expulsion clause for a Member State whose internal system had undergone 'fundamental change'.

member states more recently to insert a human rights sanctions clause into the Treaties. Similarly it was anxiety about the rise of the far right within the existing EU Member States following the 'Haider affair' that led to the strengthening of that sanctions clause and the addition of an embryonic monitoring mechanism in Article 7 TEU by the Nice Treaty some years later.[172] Yet the perception of such risk and the fear of its materialization in the early 1950s clearly exercised a much greater influence over the drafters at that time than they do in recent years, and led to a significantly more robust set of mechanisms for responding to human rights violations within the European Community than the Member States today are willing to contemplate. As we have seen above, despite the introduction of the Article 7 TEU sanctions clause by the Amsterdam and Nice Treaties in the late 1990s, the Member States have been unwilling to give substance to the provision by establishing an ongoing monitoring mechanism, choosing instead to abolish the embryonic monitoring system which had been created some years previously at the initiative of the European Parliament.[173]

This difference between Member State perceptions of the risk to European democratic stability in 1953 and today may explain in part why the draft EPC Treaty regime for human rights protection was more robust in a number of ways. But there still remains something of a puzzle in the fact that the States have recently chosen to create a fairly elaborate EU human rights system, including the sanctions clause, the Charter of Rights, the Fundamental Rights Agency, and imminent accession to the ECHR – even while simultaneously neutering or limiting these initiatives in ways which impede their effectiveness in practice. One possible conclusion to be drawn is that since the Member States do not consider there to be any significant threat to democratic stability in the EU from within or without, the various constitutional protections for human rights that have been agreed over the past decade are motivated more by window-

[172] See n.76 and nn 98-102 above, and text.
[173] See nn.102-104 above.

dressing,[174] and by an interest in signalling the EU's credibility as an international actor[175] than in establishing a serious human rights mechanism or a coherent human rights policy.

Yet paradoxically it is precisely the credibility of the EU as an international actor that is currently undermined by the ambivalence of its constitutional framework on human rights, an ambivalence which also undermines the EU's professed aspirations to exercise global normative leadership.[176] The shortcomings and failures of EU international leadership in promoting human rights described above have been attributed in part to the incoherence at the heart of EU human rights policy, including the double-standard between internal and external policies, and the states' ambivalence about creating a serious and comprehensive human rights policy and mechanism.[177] For some, such exceptionalism will come as no surprise given the EU's status as an increasingly prominent international actor,[178] but what distinguishes the EU from many other similarly powerful actors and states is its publicly declared commitment to pursing a distinctive, normatively-oriented foreign policy.[179] The disjuncture between the EU's professed ambition

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[174] The term 'showcasing' was used to explain the reason for drafting the EU Charter of Fundamental Rights: see comments of the European Study Group on the drafting of the Charter: http://www.europarl.europa.eu/charter/civil/pdf/con260_en.pdf , and the warning of UK Prime Minister Tony Blair, Daily Telegraph, 1 August 2000, available online at http://www.telegraph.co.uk/news/worldnews/europe/1366967/Rights-charter-may-form-constitution-for-EU-superstate.html. See also Christopher McCrudden, *The Future of the EU Charter of Fundamental Rights*, Jean Monnet Working Paper 10/01, at n. 28, available online at http://centers.law.nyu.edu/jeanmonnet/papers/01/013001.html

[175] For a similar argument in relation to the UN Security Council's establishment of minimal due process for the imposition of targeted sanctions on individuals, see Cora True-Frost, *Signaling Credibility: The Development of Individual Standing in International Security* (2010) papers.ssrn.com/sol3/papers.cfm?abstract_id=1490701

[176] *See supra* notes 152-153. See also the Resolution on the Development of the UN Human Rights Council, Including the Role of the EU, EUR. PARL. DOC. 2008/2201(INI) (2009), in particular at paragraph 56.

[177] Karen E. Smith, *The European Union at the Human Rights Council: Speaking with One Voice but Having Little Influence*, 17 J. EUR. PUB. POL'Y 224.

[178] See Anu Bradford and Eric Posner, *Universal Exceptionalism in International Law*, UNIVERSITY OF CHICAGO PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 290, HARV. INT'L L J (2011, forthcoming). On the EU's particular brand of exceptionalism, see Magdalena Ličková, *European Exceptionalism in International Law*, 19 EUR. J. INT'L L. 463 (2008).

[179] N.6 above.

and self-image on the one hand, and the exceptionalism or double-standard which it practices on the other, lends particular sting to the contemporary critiques.[180]

Yet the EU's claim to maintaining a strong commitment to human rights both internally and externally is not entirely hollow. Notwithstanding resistance by Member States, there have been significant moves to develop a more robust human rights role for the EU. A range of initiatives has been led by actors within other EU institutions, including the European Parliament and the European Commission, as well as by civil society actors, to strengthen the effectiveness of the EU's human rights framework and policy. As in other fields of EU law, the framework formally established in today's EU Treaties and in primary legislation represents a particular vision of the European Union which is conceived and advanced largely by the States, but which is often at variance with the evolving practices of European governance.[181] Thus the attempt by the Member States through the Treaties, the Charter and the mandate of the Fundamental Rights Agency, to restrict or limit EU monitoring of Member State activities in the field of human rights, is at odds with the developing practices of the EU's anti-discrimination regime,[182] and more generally with the activities of the network of national human rights bodies and civil society actors which interact with the new Fundamental Rights Agency.[183] Equally, the official emphasis on the autonomy and distinctiveness of the EU's human rights regime is challenged by the existence of what has been described as a *de facto* 'overlapping consensus' and by the informal mutual monitoring of various national, regional and international human rights

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[180] Anecdotal support for this proposition can be drawn from recent comments by prominent political actors. Finnish Foreign Minister Alexander Stubb has argued that the EU should pursue a 'dignified' foreign policy and needs to attend to the double-standard critique: "To encourage others to follow our lead on human rights (or, for that matter, on free trade), we have to live up to our own standards." European Voice, 23 September 2010, online at http://www.europeanvoice.com/article/imported/adopting-a-dignified-foreign-policy/68986.aspx. Israeli Foreign Minister Avigdor Lieberman was quoted as stating that Europe should "fix its own problems before focusing on the middle East" *Europe Should Fix Itself First* BBC News, 11 October 2010, online at http://www.bbc.co.uk/news/world-middle-east-11514275.

[181] *See, e.g.,* de Búrca, *supra* note 98.

[182] *See, e.g.,* European Commission, Employment, Social Affairs and Equal Opportunities, Diversity & Non-Discrimination, http://ec.europa.eu/social/main.jsp?catId=781&langId=en; European Commission, Employment, Social Affairs and Equal Opportunities, Gender Equality, http://ec.europa.eu/social/main.jsp?langId=en&catId=418.

[183] For an overview, see Networking in Focus, http://fra.europa.eu/fraWebsite/networks/networks_en.htm.

regimes.[184] Similarly, the official reluctance to identify human rights protection and promotion as a cross-cutting objective of internal EU policy, as compared with external policies, could be undercut by the Commission's moves to develop a genuine practice of impact-assessment based on the Charter of Fundamental Rights.[185] These developments point towards a dynamic in the development of an EU human rights policy, with significant input by domestic and civil society actors as well as by supranational EU bodies.[186]

There is a clear tension between such organic and energetic development of the EU's human rights policies and activities on the one hand, and the reluctance of Member States to contemplate endorsing a serious and comprehensive EU human rights policy and mechanism on the other. Each move in the direction of a new human rights commitment has been met with a counter-move on the part of Member States to rein it in, with a view to limiting the impact of the change. Each time a significant new step has been taken, such as the enactment of the Article 7 suspension mechanism, the adoption of the Charter of Fundamental Rights, or the establishment of the Fundamental Rights Agency, this has been followed shortly afterwards by a Member State initiative to limit its effectiveness, by depriving the Article 7 mechanism of any monitoring system, by limiting the scope and reach of the Charter through the horizontal clauses, and by limiting the mandate of the new Agency. The result is an EU human rights system which, despite the energy and innovation which exists within the anti-discrimination regime, continues to lack coherence and credibility.

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[184] Charles F. Sabel & Oliver Gerstenberg, *Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order*, 16 Eur. L.J. (forthcoming 2010). On the possibility that EU practices could be monitored by international human rights organizations and treaty bodies even when the EU is not a signatory or member of the latter, see de Schutter & Butler, *supra* note 123.

[185] See most recently COM(2010)573, Commission Communication on a Strategy for the Effective Implementation of the Charter of Fundamental Rights And more generally, *see supra* note 142.

[186] For a recent account, see Olivier de Schutter, *Fundamental Rights and the Transformation of Governance in the European Union* in Olivier de Schutter & Voleta Moreno Lax (eds), HUMAN RIGHTS IN THE WEB OF GOVERNANCE: TOWARDS A LEARNING-BASED FUNDAMENTAL RIGHTS POLICY FOR THE EUROPEAN UNION (2010).

This article has revisited the classic account of the evolution of the EU's engagement with human rights, arguing that the story does not begin with the silence of the 1957 EEC and Euratom Treaties on the subject, but rather with the interesting and ambitious human rights framework envisaged in the draft European Political Community Treaty in 1953 I have offered an alternative explanation of the omission of human rights from the Treaties in 1957 as a pragmatic and strategic interim step, rather than as a deliberate decision to consign matters of human rights in the European Community henceforth to the Council of Europe. More controversially, I have suggested that despite the return to a fuller project of European political integration after 1992, the EU human rights regime which has been developed over the last two decades is less ambitious and less robust in several respects than the embryonic regime which drew the support of the founding Member States in the early 1950s. The article has suggested that two of the main contemporary criticisms of the EU's human rights system – namely that it lacks a serious human rights mechanism, and that there is a double-standard as between internal and external human rights policies – have survived and have even been written into some of the changes introduced by the Lisbon Treaty. Finally, the article has drawn on the analysis of a number of think-tanks,[187] NGOs[188] and academics,[189] supported by some of the comments of current political actors,[190] which suggest that the strength and effectiveness of the EU's role as a human rights actor is being hindered by the EU's double-standard, and by the ambivalence about EU engagement with human rights which is evident in its constitutional framework and its practices. The EU's aspiration to be taken seriously as a global normative actor will remain difficult to fulfil, as long as the EU and its Member States continue to place their own exemption from external control and scrutiny above the development of a coherent and genuine EU human rights policy. The fact that the EU has made this aspiration a central part of its international identity gives added sting to its 'exceptionalism'.

[187] N. 165 above.
[188] Nn. 161-164 above.
[189] N.166 above.
[190] N. 180