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**CHAPTER 4: MONITORING AND ENFORCING FUNDAMENTAL RIGHTS –
CAN THE EUROPEAN UNION MEASURE UP AGAINST OTHER
INTERNATIONAL ORGANISATIONS?**

*Rhona K.M.Smith**

INTRODUCTION

With literally hundreds of international, regional and national tabulations of human rights, it is perhaps unsurprising that the European Union (EU) now has its own instrument on fundamental rights. It is thus timely to be reminded that ‘human rights standards should not remain simply ‘law in books’ – just a beautiful promise’.¹ To realize this promise of rights, international organizations and states must create an adequate system for monitoring and enforcing rights. The EU is no exception. It has a growing rights focus, and indeed has recently signed a United Nations (UN) core human rights treaty, thus it now must ensure the necessary machinery is in place to protect and promote rights. The question this chapter poses is simple: does the present institutional framework of the EU support claims it is ‘a global player in the field of human rights’? If an effective institutional framework is in place for supranational monitoring of rights, then the claims gain credence; if the EU merely evinces rights as a policy objective,

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¹ Z. Kedzia, ‘United Nations Mechanisms to Promote and Protect Human Rights’, in J. Symonides (ed.), *Human Rights: International Protection, Monitoring, Enforcement*, Aldershot: Ashgate, 2003, p. 3.

without underpinning such policies with monitoring and enforcing mechanisms, claims to global recognition in the area lack foundation. First an outline of the key requirements of an effective institutional framework, followed by a brief historical account of the evolution of rights discourse and institutions within the EU. The institutional framework of the EU will then be considered in depth, with a focus on the Fundamental Rights Agency. A ‘global player’ or not, the EU faces serious competition from the Council of Europe with its unparalleled achievements in judicially monitoring human rights compliance. Some comments on the progress of the EU in monitoring and enforcing fundamental rights will conclude this chapter.

INTERNATIONAL INSTITUTIONS AND RIGHTS

It is axiomatic that the adequate protection of human rights demands a system for ensuring compliance with agreed norms of human rights. The European Union is now facing the implications of this as its Charter of Fundamental Rights (EU Charter), which binds Member States and the institutions of the organization itself,² imposes on the EU many of the same responsibilities to protect and promote human rights incumbent on states, while developing authority to monitor some aspects of human rights within states. In institutionalizing human rights, *Klabbers* identifies a fundamental problem: international organizations are created by states but are increasingly scrutinizing those states.³ Given he notes that the number of international organizations outnumbers that of

² Article 51 Charter of Fundamental Rights

³ J. Klabbers, *An Introduction to International Institutional Law*, 2nd ed., Cambridge: CUP, 2009, pp. 28-

states,⁴ the tension between sovereignty of states and powers of organizations shows no sign of dissipating. When addressing human rights, the situation is more politically charged as organizations encroach into commenting on matters hitherto deemed within the sovereignty of states and outwith even the traditional remit of international law. Therefore, a degree of friction permeates most international organizations in their monitoring of human rights, not least as political niceties and the requirements of diplomacy, or even economics, may demand a 'light touch'. For a supranational organization such as the EU, this adds a further dimension: the EU could actively protect rights within the territories of EU Member States should rights be directly effective.⁵

Nevertheless, securing a balance between the exercise of government power and individuals' rights is vital: constitutional guarantees are common but must be enforced. Thus, ombudspersons, public defenders, courts, commissions and a diversity of other mechanisms have evolved to ensure states (and organizations) discharge their obligations to protect and promote human rights, and individuals have avenues of recourse available should they consider their rights infringed. These structures work in conjunction with human rights awareness-raising initiatives⁶ for individuals,

⁴ Ibid., p. 1.

⁵ The doctrine of direct effect results in EU law producing legal effects for individuals within each Member State. These can be enforced in national courts. – Consolidated Version of the Treaty on the Functioning of the European Union 2009 (as amended by the Treaty of Lisbon 2007), hereinafter 'TFEU' Article 288

⁶ European Year of Citizenship, 2005 – European Year of Citizenship Through Education (EYCE), a joint initiative of the Council of Europe and the EU (see also U. Preuss, M. Everson, M. Koenig-Archibugi and E. Lefebvre, 'Traditions of Citizenship in the European Union', *Citizenship Studies*, 7(1), 2003, pp. 3-14);

parliamentarians, police, judges etc.. National Human Rights Institutions⁷ are emerging as a popular model for protecting and promoting human rights in states. At the international level, human rights are increasingly exerting influence during interactions between states, whether diplomatic, political or economic. Monitoring and enforcing human rights is integral to their promotion and protection as well as preventing violations. Any institutional framework must be able to monitor the extent to which a state or other entity complies with the rights' obligations it has accepted. Authority to force compliance with rights is ideal, but raises problems with respect to sovereignty, especially for international organizations. Promoting rights may be less threatening to sovereignty but to be effective, institutions must be pro-active rather than reactive or passive. Finally, adequately protecting rights demands interventions at the policy and law-making stages, with rights impact assessments etc. to ensure laws and policies adequately protect and promote rights. If these are some of the facets to monitoring and enforcing rights, how does the EU measure up?

HISTORICAL BACKGROUND: AN EVOLVING NEED FOR RIGHTS AND IMPLICATIONS FOR INSTITUTIONS

UN Decade for Human Rights Education, UN. Doc. A/51/506/Add.1, succeeded by the World Programme for Human Rights Education (ongoing) General Assembly Resolution 59/113 (2004).

⁷ Paris Principles, annexed to General Assembly Resolution 48/134 (1993); see B. Ramcharan, *The Protection Role of National Human Rights Institutions*, Nijhoff: The Hague, 2005; J. Marie, 'National Systems for the Protection of Human rights', in J. Symonides (ed.), *Human Rights: International Protection, Monitoring, Enforcement*, Aldershot: UNESCO and Ashgate, 2003, pp. 257-302.

In 1948, the United Nations adopted the Universal Declaration on Human Rights and tasked its then Commission on Human Rights with drafting a treaty thereon. At the Congress of Europe in the same year, the conference posited cooperation in culture, democracy and stability in a Europe decimated by two major international wars in thirty years, and discussed the establishment of a ‘United States of Europe’⁸ to exercise control over the armaments of war (steel and coal), the potential might of atomic energy and to plan and execute the rebuilding of economies.⁹ Thus emerged not only the Council of Europe, but also the European Coal and Steel Community¹⁰ and the subsequent European Economic Community and European Atomic Energy Community,¹¹ the latter three now fused into the EU.¹² Each organization had a distinct role in rebuilding Europe: the Council of Europe remains a different organization to the EU with different functions and Member States, as well as a distinct institutional framework.¹³ Pertinently, the initial six Members States¹⁴ of the Communities signed the Council of Europe’s Convention on Human Rights, as indeed did all subsequent

⁸ *Inter alia*, Winston Churchill’s famous speech in 1946 Switzerland – quoted in H. Young, *This Blessed Plot – Britain and Europe from Churchill to Blair*, London: Papermac, 1999, p. 16.

⁹ See in particular, the Economic and Social Resolution of the Congress, 1948, available: <www.ena.lu/> (accessed 10 July 2010).

¹⁰ Treaty of Paris 1951, expired 2002.

¹¹ Both Treaties of Rome 1957.

¹² The Communities are now known as the European Union, see TFEU.

¹³ Care must be taken not to confuse the Council of Europe and the EU, not least as certain institutions have similar-sounding names.

¹⁴ Belgium, France, Germany, Italy, Luxembourg and the Netherlands.

Member States prior to joining the Communities.¹⁵ While the Council of Europe established itself as an effective organization for protecting human rights with its incomparable system of adjudicating individual complaints against Contracting States, the EU gained competencies in an increasing number of fields. Inexorably, rights discourse has infiltrated its work as the EU places its citizens¹⁶ and other inhabitants at the forefront of its development. From tentative origins, the UN and the Council of Europe have developed comprehensive systems for monitoring, protecting and promoting human rights as have other regional organizations,¹⁷ albeit with various degrees of success. Some regional institutional frameworks allow individual complaints¹⁸ to be considered, others focus on standard-setting¹⁹ or simply awareness-raising and discussion.²⁰ Given the EU was not initially conceived of as a human rights protection mechanism, and the United Nations at the time was hostile to the establishment of regional human rights mechanisms,²¹ the economic focus of the then Communities was non-problematic in the global arena.²²

¹⁵ With a few exceptions (e.g. France), States had ratified the Convention prior to joining the communities.

¹⁶ European citizenship implemented by the Treaty of Maastricht 1992; see now Article 20(1) TFEU.

¹⁷ Organisation of American States (OAS), African Union (AU), League of Arab States (LAS), Association of South-East Asian Nations (ASEAN).

¹⁸ Especially the Council of Europe, OAS and AU.

¹⁹ OSCE, LAS, Council of Europe, AU, OAS.

²⁰ ASEAN.

²¹ First statement of unequivocal UN support was 1977 – General Assembly Resolution 32/127, 19 December 1977.

²² Cf. the Council of Europe preceding the UN in developing enforcing machinery for human rights.

The EU remained true to its initial focus on economies of the Member States. ‘In the beginning was silence’ with respect to rights.²³ Today it is more a cacophony of claims: freedom of movement of workers and associated equality provisions; justice, freedom and security issues (e.g. terrorism and asylum); and now potentially foreign and security policy issues. In light of some sixty years of an emerging rights framework in national, regional and international law, *de Schutter* argues for the mainstreaming of fundamental rights within all law and policy-making activities of the EU institutions.²⁴ Indeed, *Alston and Weiler* conceptualized the need for a human rights policy in the Union as early as 1999.²⁵ Contemporaneously, states, organizations and other bodies were embracing gender mainstreaming and embedding human rights. Human rights action plans and impact assessments are now relatively uncontroversial, if not always effective. Within the competencies of the EU (and formerly the Communities), rights discourse is frequently referenced and fundamental rights inform decision-making and policy processes, beyond accession agreements and external relations.²⁶

²³ A. Williams, ‘Respecting Fundamental Rights in the New Union: A Review’, in C. Barnard (ed.), *The Fundamentals of EU Law Revisited, assessing the impact of the constitutional debate*, Oxford: OUP, 2007, pp. 71-107 at p. 71.

²⁴ O. De Schutter, ‘Mainstreaming Human Rights in the European Union’, in P. Alston and O. de Schutter (eds), *Monitoring human rights in the EU, the contribution of the fundamental rights agency*, Oxford: Hart, 2005.

²⁵ P. Alston and J. Weiler, ‘An ‘ever closer union’ in need of a human rights policy’, introduction to P. Alston (ed.), *The EU and Human Rights*, Oxford: OUP, 1999.

²⁶ See e.g., E. Fierro, *The EU’s Approach to Human Rights Conditionality in Practice*, The Hague: Kluwer, 2003.

Notwithstanding the foregoing, there remains academic discussion on the role of rights *per se* within the EU.²⁷ Von Bogdandy,²⁸ writing in 2000, challenges the view expounded by Alston²⁹ the previous year that the Union should assume leadership in human rights policy matters. He concludes that human rights, ‘though important, should not be understood as the *raison d’etre* of the Union’ albeit a more ‘precise handling’ of human rights would be desirable.³⁰ Rights are ‘handled’ through the EU’s institutions. As for the EU Charter on Fundamental Rights, Nic Shuibhne concludes ‘[i]t is a comprehensive and contemporary expression of both substantive fundamental rights standards and “horizontal provisions” developed to manage the complex liaisons between national, European and international standards of protection’.³¹ The challenges posed by that complexity of relationships,³² as well as the dual application of horizontal and vertical provisions, stretches the proven capacity of the existing institutions. Having established that the EU has moved beyond mere discussion of rights, as tangential issues, to them being a clear policy objective, it remains to be considered whether the existing institutional framework is fit for this new purpose, hence reviewing the institutional framework as it is today.

²⁷ See also R. Burchill, Chapter 2 in this edited book.

²⁸ A.von Bogdandy, ‘The European Union as a Human Rights Organization? Human Rights and the Core of the European Union’, *Common Market Law Review* 37, 2000, pp. 1307-1338.

²⁹ Alston, *supra* n. 25.

³⁰ Von Bogdandy, *op. cit.*, p. 1338.

³¹ N. Nic Shuibhne, ‘Margins of appreciation: National values, fundamental rights and EC free movement law’, *European Law Review* 34, 2009, pp. 230-256 at p. 239.

³² See also M. Varju, Chapter 3 in this edited book.

INSTITUTIONAL STRUCTURE

Are there institutions capable of and actually promoting and protecting rights within the Union? Four principal institutions were established at the outset: Court of Justice, Council, Commission and Parliament.³³ The Council exercised inter-governmental control over the organization, with Member States being its constituent members; the Commission represented organizational interests; Parliament grew in power to actively represent the will of the people;³⁴ and the Court applied the law.³⁵ These institutions remain, assisted by a number of ancillary institutions and agencies, some of which (Court of Auditors, European Council and European Central Bank) are now formal institutions of the Union.³⁶ Almost every EU body has an actual or potential impact on rights yet none have functions defined in terms thereof. An obvious exception (considered below) is the recently created EU Agency for Fundamental Rights. Each institution derives its authority from the constituent treaties agreed by the Member

³³ The 1965 Merger Treaty and the 1986 Single European Act created and refined a single institutional structure for the then three communities. On the institutional framework, see K. Lenaerts, P. van Nuffel and R. Bray, *Constitutional Law of the European Union*, 3rd ed., London: Sweet and Maxwell, 2010 (forthcoming); J. Peterson and M. Shackleton, *The Institutions of the European Union*, Oxford: OUP, 2006; N. Nugent, *The Government and Politics of the European Union*, 6th ed., Basingstoke: Palgrave, 2006.

³⁴ In addition, national parliaments gain more influence under the new Treaty on the Functioning of the EU, Protocol 1.

³⁵ See generally, A. Arnulf, *The European Union and its Court of Justice*, Oxford: OUP, 2006.

³⁶ See Articles 223 et seq. TFEU.

States, with little, if any, mention of rights. Nevertheless, it is the Court³⁷ which has most dramatically progressed rights protection over the last fifty years, as the Advocates General and Judges grapple with proliferating claims of infringements of rights.³⁸ The supranational nature of EU law,³⁹ with direct effect of many of its provisions⁴⁰ before national courts, inevitably impacts on rights. Policies and laws adopted in pursuance of the free movement of workers and equality between citizens in Member States develops and augments anti-discrimination law.⁴¹ The European Court of Justice exerts considerable influence: the ‘transformation of the European legal system was orchestrated by the ECJ through bold interpretations asserting the direct effect and supremacy of European law over national law’.⁴² Rights were a major beneficiary.⁴³

³⁷ Articles 251 et seq. TFEU.

³⁸ For a more detailed discussion of the Court, see M Varju, Chapter 3 in this edited book.

³⁹ See, *inter alia*, Case 6/64 *Costa v ENEL* [1964] ECR 585 and subsequent jurisprudence.

⁴⁰ Article 288 TFEU; Case 43/75 *Defrenne v SABENA* [1976] ECR 455.

⁴¹ On positive discrimination, see e.g. Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051 and Case 409/95 *Marschall v Land-Nordrhein-Westfalen* [1997] ECR I-6363; using equal treatment provisions of EU law for pregnant workers, see e.g. Case 394/96 *Brown v Rentokil Ltd* [1998] ECR I-4185; generally on EU anti-discrimination law, see also J. Milner, Chapter 14 in this edited book.

⁴² K. Alter, *Establishing the Supremacy of European Law the Making of an International Rule of Law in Europe*, Oxford: OUP, 2001, p. 209.

⁴³ See, among others, J. Weiler and N. Lockhart, “‘Taking Rights Seriously’ The European Court of Justice and its fundamental rights jurisprudence”, *CMLRev* 32, 1995, p. 604; F. Jacobs, ‘Human rights in the European Union: the role of the Court of Justice’, *ELRev* 26, 2001, p. 337.

The Commission,⁴⁴ as initiator of most legislation and policies, encounters fundamental rights in many disparate areas though now enjoys access to the EU Agency for Fundamental Rights for advice on proposals. A rights impact assessment methodology has been trialled and implemented within the Commission.⁴⁵ Attention is undoubtedly paid to fundamental rights but, given the workload of the Commission and its traditional remit, rights are not the priority. However, the Commission does have responsibility for monitoring compliance of pre-accession states with the accession criteria, the so-called Copenhagen criteria adopted by the European Council in 1993, since modified,⁴⁶ which include criteria on human rights standards. The Commission also has responsibility for some external relations issues, including liaising with the Council of Europe and human rights discourse with third countries. This encompasses work on democracy building and human rights dialogues with various countries, including China, Uzbekistan and Sri Lanka. In addition, the Commission focuses on discrete issues impacting on human rights: human trafficking; indigenous peoples; and death penalty abolition for example.

⁴⁴ Articles 244 et seq. TFEU.

⁴⁵ See e.g. 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.

⁴⁶ Now COM (2009) 533 final for the Commission communication to the European Parliament and the Council on Enlargement Strategy and Minority Challenges 2009-2010; see various articles in *Journal on Ethnopolitics and Minority Issues in Europe* 4(1), 2003 – special edition on EU enlargement and minorities; J. Adrey, ‘Minority Language Rights Before and After the 2004 EU enlargement: the Copenhagen Criteria in the Baltic States’, *Journal of Multilingual and Multicultural Development* 26, 2005, pp. 453-468; M. Nowak, ‘Human Rights “Conditionality” in relation to entry to, and full participation in, the EU’, in P. Alston (ed.), *The EU and Human Rights*, Oxford: OUP, 1999, pp. 757-780.

Although primarily inter-governmental institutions, the Council⁴⁷ and – since the Single European Act 1986 – the European Council⁴⁸ impact on rights. The governments of all Member States are clearly obliged to comply with the European Convention on Human Rights at all times⁴⁹ and, when working within the competencies of the European Union, they must adhere to the EU Charter.⁵⁰ However, pragmatic balances have to be achieved when inter-governmental bodies are discussing rights’ policies. It has proven easier to reach agreement on issues surrounding rights in accession candidates and rights in third countries than to secure agreement on statements regarding issues *intra* Member States. The Council can, and has, agreed on sanctions against various countries for, *inter alia*, violations of human rights.⁵¹ It also agrees humanitarian aid following natural disasters and other emergencies, e.g. for Haiti following the major earthquake in January 2010. Parliament⁵² has, through the decades, enjoyed ever greater power in the decision-making process.⁵³ Staking its claim as the only democratically directly elected institution in Europe, Parliament has increasingly engaged with rights: a profusion of resolutions and discussions on the human rights situation in countries around the

⁴⁷ Article 237 et seq. TFEU.

⁴⁸ Article 235 et seq. TFEU.

⁴⁹ Article 1 European Convention on Human Rights.

⁵⁰ Note that Protocol 30 TFEU provides for Poland, the UK and the Czech Republic, on inclusion of the Czech Republic, see Presidency Conclusions of the Brussels European Council, Council Doc 15265/1/09 REV 1, Annexe 1, 1 December 2009

⁵¹ E.g. the renewal of sanctions against Zimbabwe - 2996th FOREIGN AFFAIRS Council meeting, Brussels, 22 February 2010.

⁵² Articles 223 et seq. TFEU.

⁵³ See now Article 293 TFEU.

world;⁵⁴ the controversial human rights (Sakharov) prize for freedom of thought;⁵⁵ and field trips and investigations by its sub-committee on human rights.⁵⁶ The power of Parliament *vis-a-vis* third-country affairs is primarily diplomatic and political. Nevertheless, such vocalising of human rights abuses has frequently prompted responses (the rhetoric rarely being positive) from states being criticized. Undoubtedly the traditional institutions of Council, Commission, Parliament and Court are now not only mindful of rights issues but proactive in promoting rights, not least in accession states and third countries. Rights discourse increasingly characterizes their public statements and is evident in several seminal judgments of the Court. However, it is in the work of the eponymous EU Agency for Fundamental Rights that EU rights discourse concentrates, not least because the existing institutional structure was never intended to be a system for monitoring human rights.

EU AGENCY FOR FUNDAMENTAL RIGHTS

In 2007, amid debate over the draft EU Constitutional Treaty, while the Charter on Fundamental Rights still remained a legally unenforceable anomaly, a new body was founded and charged with tasks related to the protection and promotion of fundamental rights in the Union – the EU Agency for Fundamental Rights (Fundamental Rights

⁵⁴ E.g. the resolution of 21 January 2010 on recent attacks across the globe on Christians – Document P7_TA(2010)0005, or Document P7_TA(2010)0016 of 10 February 2010 on Iran.

⁵⁵ Recently awarded to Hu Jia (2008) provoking a strong response from China; 2009 recipient was Russia's human rights group, Memorial.

⁵⁶ Committee of Foreign Affairs DROI sub-committee on Human Rights; also MEPs conduct election monitoring in countries such as DR Congo, Ukraine and El Salvador.

Agency - FRA). Nevertheless, its powers are not commensurate with those of other international human rights bodies. Established by Council Regulation (EC) 168/2007,⁵⁷ the Agency is to

provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.⁵⁸

The FRA is required to act ‘only within the scope of the application of Community law’,⁵⁹ a significant but arguably necessary limitation which carves a niche for the Agency distinct from the comprehensive machinery of the Council of Europe albeit the delineation of competencies is not entirely clear.⁶⁰ A multi-annual framework shapes the

⁵⁷ OJ L53/1 (22 February 2007).

⁵⁸ Council Regulation 168/2007, Article 2.

⁵⁹ *Ibid.*, recital 8.

⁶⁰ See *ibid.*, Article 3, and the comments by G. Toggenburg, ‘The role of the new EU Fundamental Rights Agency: Debating the “sex of angels” or improving Europe’s human rights performance?’, *ELRev* 33, 2008, pp. 385-398 at p. 391; A. von Bogdandy and J. von Bernstorff, ‘The EU Fundamental Rights Agency within the European and International Human Rights Architecture: the legal framework and some unsettled issues in a new field of administrative law’, *CMLRev* 46, 2009, pp. 1035-1068 at p. 1051 et seq.; O. de Schutter, ‘The EU Fundamental Rights Agency: Genesis and Potential’, in K. Boyle (ed.), *New Institutions For Human Rights Protection*, Oxford: OUP, 2009.

agenda of the FRA,⁶¹ and evinces an impressive range of thematic areas including child protection, asylum and immigration, access to justice and information rights, areas self-evidently outwith the original remit of the Communities, but nevertheless relevant.

However, care is taken to avoid overlap with other spheres of regional activity, hence documentary resources and activities of the OSCE and Council of Europe are taken into account.⁶² Racism, xenophobia and related intolerance, echoing the earlier EU Monitoring Centre, is a principal area of activity, but also general discrimination (in terms of the EU Charter) falls within the mandate. Undoubtedly the FRA has a generous and holistic mandate to address rights within the EU. However, does it have the necessary power to actually promote and protect fundamental rights? Moreover, how does its work compare with that of other international bodies and, if taking it as an institutional (comparable to national) body, the Paris Principles on National Human Rights Institutions?

Certainly, the Agency should fill ‘an important lacuna’, advising EU institutions on fundamental rights.⁶³ Engendering an awareness of fundamental rights at an early stage of any policy or decision making process is a positive step towards creating a Union aware of and responsive to rights, marking a change from the reactive and litigation-heavy approach which characterized the development of e.g. discrimination law. Rights can be promoted. A proactive rather than reactive approach would be in conformity with

⁶¹ Council Decision of 28 February 2008 implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012, OJ L63/14, 7 March 2008.

⁶² Regulation 168/2007, Article 6(2).

⁶³ De Schutter, in Boyle, *op. cit.*, at p. 116.

the UN Paris Principles⁶⁴ and is the partial result with the FRA effectively conducting fundamental rights impact assessments of legislation. From a human rights standpoint, this is real progress and indicates a sophistication of treatment of rights' issues.⁶⁵ Moreover, this is a significant role for national human rights institutions and thus important for the FRA in establishing its influence. Nevertheless, there remains outstanding the concepts evinced by the United Nations of actively monitoring rights through, for example, periodic reports of states (and in this instance, EU institutions) and of protection through receipt and consideration of individual or group communications. (The United Nations, in contrast, has individual communications under its core human rights treaties⁶⁶ albeit only from states explicitly permitting such and its special procedures can receive communications,⁶⁷ as, in specific circumstances, can the Human Rights Council.⁶⁸ Similarly the Council of Europe's bodies can receive individual complaints against all states under the European Convention, and more restrictively under the various Social Charters. Both organisations also can receive inter-state complaints.⁶⁹) *De Schutter* concludes an evaluation of the Agency with the view that it could, in time, constitute 'the primary lever' for fundamental rights within the Union with the potential to 'produce a powerful rejuvenating effect on the exercise by

⁶⁴ Paris Principles relating to the Status of National Institutions, op. cit.

⁶⁵ Though note the concerns voiced in P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question', *CMLRev* 39, 2002, pp. 945-994.

⁶⁶ Eg Optional Protocol to the International Covenant on International Civil and Political Rights 1966; Optional Protocol to the International Covenant on International Economic, Social and Cultural Rights 2009

⁶⁷ See Human Rights Council Resolution 5/2(2007) Annexe Code of Conduct for Special Procedures, Article 9

⁶⁸ See Human Rights Council Resolution 5/1(2007) Institution-building, Part IV

⁶⁹ Inter-state complaints are uncommon: UN has *Georgia v Russian Federation* (pending before the ICJ) <<http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=140>> and, in the Council of Europe, *Ireland v UK* Ser A, No 25 (1978) and *Cyprus v Turkey* Application no. 25781/94, ECHR 2001 IV

the Union of its competencies' in furtherance of fundamental rights.⁷⁰ Certainly the early indications are positive, not least following the EU's historical signing⁷¹ of the 2006 UN Convention on the Rights of Persons with Disabilities⁷² and the consequential discussions on the FRA as a coordinating mechanism thereunder. Admittedly this is the only UN human rights treaty currently permitting accession of regional organizations with transferred competencies from Member States. A statement on the division of competencies between the EU and states has been agreed.⁷³ This is a new concept for rights monitoring, but an important one in the evolution of the EU as a global human rights player, although one not imminently likely to be replicated.

Institutional and constitutional commentators diverge on the mechanisms best suited to protecting rights.⁷⁴ *Petersmann* differentiates institutional structures, noting 'human rights tend to be protected most effectively inside constitutional democracies'.⁷⁵ He considered the EU to have developed 'top-down structures of multilevel economic

⁷⁰ De Schutter, in Boyle, op. cit., at pp. 134-135.

⁷¹ Commission proposal 29 August 2008; Council Decision 2010/48/EC (OJ L23/35, 27 January 2010), following a request from Parliament.

⁷² Article 43 allows for 'formal confirmation by signatory regional integration organizations'.

⁷³ Annex 2, Council Decision 2010/48/EC (OJ L23/55).

⁷⁴ See generally, G. Oberleitner, *Global Human Rights Institutions*, Cambridge: Polity Press, 2007; Boyle (ed.), op.cit.; Symonides (ed.), op. cit.; G. Alfredsson, J. Grimheden, B. Ramcharan & A. de Zayas (eds), *International Human Rights Monitoring Mechanisms: Essays In Honour of Jakob Th. Möller*, 2nd ed., Leiden: Martinus Nijhoff Publishers, 2009.

⁷⁵ E.U. Petersmann, 'Multilevel Constitutionalism and Judicial Protection of Freedom and Justice in the International Economic Law of the EC', in A. Arnoll, P. Eeckhout & T. Tridimas (eds), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs*, Oxford: OUP, 2008, pp. 338-353 at p. 342.

constitutionalism' through adjudicating and legislating for the four economic freedoms,⁷⁶ with a resultant rights-based, decentralized enforcement of EU law by self-interested citizens and courts⁷⁷ with the initial *Kadi*⁷⁸ and *Yusuf*⁷⁹ decisions challenging a 'bottom-up structure of multilevel human rights constitutionalism'.⁸⁰ *Williams* argues that a simplistic answer to '[d]o we have an effective executive enforcing the law of human rights in the EU?' is misleading:⁸¹ the complexities of a supranational organization with a number of safeguards against misuse of administrative power and some elements of enforcement⁸² require a more sophisticated response. The EU is not an obvious contender for being a constitutional democracy, with its integral intergovernmental element. However, the emergence of a rights focus shifts the balance, with the FRA as a key entity. Early signs are encouraging and it appears that the EU is encompassing some monitoring and protection of rights within its institutional framework. However, it is difficult to argue that the Fundamental Rights Agency in its present form can discharge monitoring, protection and promotion roles common in NHRIs, or other treaty monitoring bodies under international or indeed regional

⁷⁶ See Articles 45 et seq (Title IV) TFEU. Free movement of workers, free movement of services, free movement of goods and free movement of capital are the cornerstones of the Union.

⁷⁷ *Ibid.*, p. 344.

⁷⁸ Case T-315/01 *Kadi v Council and Commission* 2005, accessible from <eur-lex.europa.eu> (accessed 10 July 2010); on this judgment, see also R. Burchill, Chapter 2 in this edited book.

⁷⁹ Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* 2005, accessible from <eur-lex.europa.eu> (accessed 10 July 2010).

⁸⁰ Petersmann, *op. cit.*, at p. 343.

⁸¹ *Williams*, in *Barnard*, *op. cit.*, at p. 95 et seq.

⁸² See also, M. Colvin and P. Noorlander, 'Human Rights and Accountability after the Treaty of Amsterdam', *EHRLRev* 2, 1998, pp. 191-203; Commission communiqué on promotion of fundamental rights COM (2003) 606 final.

organisations.⁸³ *Nowak* conceptualized two models for a putative EU human rights agency:⁸⁴ either a national human rights institution for the EU, drawing on the framework of the Paris Principles⁸⁵ or a forum for existing National Human Rights Institutions (NHRIs) to share ideas and coordinate activities as appropriate in furtherance of the promotion of fundamental rights in the EU, following more closely the model pioneered by the EU Monitoring Centre on Racism and Xenophobia (EUMC)⁸⁶ and, indeed, the model adopted in Southeast Asia.⁸⁷ Writing after the Agency was established, *von Bogdandy and von Bernstorff* conclude that it falls short of the standards propounded in the Paris Principles in several key aspects (the exclusion of the Third Pillar, *ex officio* pronouncements on legislative procedures and dependence on the Commission and Council), albeit the Lisbon treaty ameliorates the former.⁸⁸ To what extent then does it act as a forum for NHRIs? According to the International Coordinating Committee of National Human Rights Institutions, ten EU Member States currently⁸⁹ have A-accredited (i.e. in conformity with the Paris Principles) NHRIs.⁹⁰

⁸³ The African Union, Organization of American States and League of Arab States each have treaty competencies to receive individual/group communications.

⁸⁴ M. Nowak, 'The Agency and National Institutions for Promotion and Protection of Human Rights', in Alston and de Schutter (eds), *op. cit.*, pp. 91-92.

⁸⁵ Note Nowak's chapter was written while the (since abandoned) 2004 Treaty establishing a Constitution for Europe was open for signature. It is submitted that the salient aspects of the argument are relevant in light of the Treaty of Lisbon which effectively replaced the draft constitution.

⁸⁶ The EUMC worked with the national focal points the proposition was that the Agency would work with the national equivalents – the NHRIs.

⁸⁷ ASEAN Charter.

⁸⁸ Von Bogdandy and von Bernstorff, *op. cit.*, especially pp. 1056-1059.

⁸⁹ As of January 2010, available <<http://www.nhri.net/>> (accessed 10 July 2010).

Nowak's expression of hope that an EU agency would 'accelerate' the establishment of NHRIs in those Member States presently without such an organization⁹¹ perhaps seems optimistic. As for monitoring, *de Schutter* suggests that 'the Fundamental Rights Agency is not conceived of as entrusted mainly with a monitoring mission',⁹² a statement borne out by the mandate which explicitly precludes examination of individual complaints and monitoring of fundamental rights in individual Member States.⁹³ Similarly, the Agency has no quasi-judicial functions so cannot determine the legality of community actions etc. However, the FRA may exercise an advisory function should Member States implementing EU law, or the institutions, so request. A passive monitoring function was exercised by the former EU Network of Independent Experts on Fundamental Rights⁹⁴ which prepared annual reports on the position of fundamental rights within each state, and the Union itself. It also could advise the Commission, issuing opinions on aspects of fundamental rights within the Union on request. Nevertheless, it heralded an institutional cognizance of citizen's rights, as enshrined in the EU Charter. This latter function (advising) in effect was transferred to the FRA. Moreover, the Agency undertakes research and analysis and provides a

⁹⁰ Denmark, France, Germany, Greece, Ireland, Luxembourg, Poland, Portugal, Spain, Sweden and United Kingdom (including Northern Ireland's Human rights Commission). Sweden is technically suspended due to an internal institutional merger. Belgium, Austria and the Netherlands have accreditation applications pending.

⁹¹ Nowak, *op. cit.*, p. 105.

⁹² De Schutter, 'The EU Fundamental Rights Agency: Genesis and Potential', in Boyle, *op. cit.*, p. 117.

⁹³ Article 260 TFEU – Failure to comply with decision of the Court can result in penalties and fines.

⁹⁴ European Parliament, Resolution Document A5-0223/2001 (5 July 2001).

conduit for cooperation with governmental and inter-governmental organizations, civil society and NHRIs.

The geographical proximity to, and potential overlap of jurisdiction with, the Council of Europe adds to the complexity of evaluating the EU as a global player in human rights. It is in setting boundaries within which the fundamental rights of the EU operate, facilitating a clear delineation between two European organizations, that solutions could begin to emerge. However, the removal of legal difficulties surrounding the accession of the EU to the European Convention, an event now inevitable, arguably reinforces the supremacy of the Council of Europe globally rather than the EU.

TWO EUROPEAN ORGANIZATIONS WITH RIGHTS COMPETENCIES: OVERLAPS AND COMPLEMENTARITY

Issues under discussion with the intimated EU ratification of the UN Convention on the Rights of Persons with Disabilities have already been mentioned. Within Europe, however, the relationship between the EU and the Council of Europe remains unresolved, with the Lisbon treaty and the Protocol 14 amendments to the European Convention⁹⁵ making clear that the EU can accede to the Council of Europe's convention.⁹⁶ Unlike the UN treaty bodies which primarily monitor rights, the Council

⁹⁵ Article 6(2) Treaty on European Union and Protocol 8 to the TFEU, Article 59(2) of the European Convention on Human Rights, as amended by Protocol 14.

⁹⁶ This was not always clear – Opinion 2/94, *Accession by the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759; see P. Beaumont, 'The European Community Cannot Accede to the European Convention on Human Rights', *Edinburgh Law*

of Europe has an established Court with competency to admit individual complaints, albeit as *White* notes, the practical capacity of the Strasbourg Court is impeded by its backlog growing at a thousand cases a month.⁹⁷ A number of technical treaty law issues need consideration before accession can be effected,⁹⁸ not least addressing the issue of whether the ‘exhaustion of domestic remedies’⁹⁹ admissibility criteria for bringing complaints to the European Court of Human Rights will require involvement of EU institutions, adding time to proceedings. Moreover, as *Weiler* notes, incorporation of the ECHR in EU law has implications for dualist states who have not yet given effect to the Convention in national law,¹⁰⁰ with the spectre of direct effect potentially prioritizing the Convention over the EU Charter. Following any accession, the delineation of power between the two courts should be clarified. It is conceivable that the European Court of Human Rights will continue to exercise unique jurisdiction over individual complaints

Review 1, 1997, pp. 235-249; N. Burrows, ‘Question of Community Accession to the European Convention Determined’, *ELRev* 22, 1997, p. 58; L. Betten and N. Grief, *EU Law and Human Rights*, Harlow: Longman, 1998, pp. 111 et seq.

⁹⁷ R. White, ‘The Strasbourg Perspective and its Effect on the Court of Justice: Is Mutual Respect Enough?’, in A. Arnall, P. Eeckhout and T. Tridimas (eds), *Continuity and Change in EU Law, essays in honour of Sir Francis Jacobs*, Oxford: OUP, 2008, at p. 154.

⁹⁸ On treaty competence and EU generally, see D. Verwey, *The European Community, the European Union and the International Law of Treaties*, The Hague: Asser, 2004.

⁹⁹ Article 35(1) European Convention on Human Rights.

¹⁰⁰ J. Weiler, ‘Eurocracy and Distrust: some questions concerning the role of the European Court of Justice in the protection of fundamental human rights within the legal order of the European Communities’, *Washington Law Review* 61, 1986, pp. 1103-1142 at p. 1142. For a contrasting view, see also A. Drzemczewski, ‘The Domestic Application of the Human Rights Convention as European Community law’, *ICLQ* 30, 1981, p. 118.

raised against individual states¹⁰¹ while the Court of Justice of the EU may accord greater weight to Convention jurisprudence in matters brought before it. Arguably both courts exercise supervisory jurisdiction over national courts: the Strasbourg court is mandated to ‘ensure observance of engagements undertaken by’ contracting states,¹⁰² while the Union’s court in Luxembourg delivers much of its seminal jurisprudence through preliminary interpretations on the validity, application and determination of Union law within national law.¹⁰³ Consequently, both courts could have jurisdiction should EU law or policy engage a right of an EU citizen.

To date, care has been taken to ensure complementarity of EU and Council of Europe provisions with the different competencies of the two principal courts self-limiting the overlap.¹⁰⁴ Each Court has, on occasions, considered the competencies of the other organization¹⁰⁵ and decisions on comparable facts are often similar.¹⁰⁶ However, there

¹⁰¹ See Article 34 European Convention on Human Rights.

¹⁰² Article 19 European Convention on Human Rights.

¹⁰³ Article 267 TFEU.

¹⁰⁴ See e.g., *Matthews v UK* (Application No. 24833/94) (1999) on the ECHR, the implementation of which Spain challenged in ECJ, C-145/04 *Spain v UK* [2006] ECR I-7917, though admittedly the circumstances were unusual, relations between Spain and the UK being strained on the subject of Gibraltar.

¹⁰⁵ E.g., *Spain v UK*, *ibid.*, or *DH v Czech Republic* (Application No. 57325/00) (Grand Chamber 2007), paras. 81-91 on EU statistical information on Roma children and education rights.

¹⁰⁶ ECtHR, *Grant v UK* (Application No. 32570/03) (2006); and ECJ, C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR I-3585 on the pension status of post-operative transsexuals.

are some instances when the same set of facts produce different results.¹⁰⁷ Undoubtedly it is feasible to promulgate a reasonable argument that there is a growing human rights *acquis* between the two organizations and their respective courts,¹⁰⁸ though they remain two distinct organizations with different memberships and primary purposes.¹⁰⁹

Crucially, for the protection of rights, the Court of Justice of the EU still lacks a fundamental jurisdiction ground which the European Court of Human Rights enjoys – *viz* the power to hear individual complaints against Member States.¹¹⁰ Preliminary rulings allow the Court of Justice to consider questions of interpretation of national law in compliance with EU law; these are, however, references from national courts, not

¹⁰⁷ E.g. the clash of freedom of movement and human rights in Case C-159/90 *Society for the Protection of the Unborn Child (Ireland) Ltd v Grogan* [1991] ECR 4685, and *Open Door Counselling and Dublin Well Woman v Ireland* (1992) ECHR Series A, No 246; see also S. O’Leary, ‘Freedom of establishment and freedom to provide services: the Court of Justice as a reluctant constitutional adjudicator: an examination of the abortion information case’, *ELRev* 17, 1992, p. 138. Alternatively, see R. Smith, ‘Unveiling a role for the EU?: The “headscarf controversy” in European schools’, *Education and the Law* 19(2), 2007, pp. 111-130.

¹⁰⁸ See e.g., S. Douglas-Scott, ‘A tale of two courts: Luxembourg, Strasbourg and the growing European human rights *acquis*’, *CMLRev* 43, 2006, p. 629.

¹⁰⁹ D. Spielmann, ‘Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities’, in Alston (ed.), *op.cit.*, pp. 757-780; J. Callenwaert, ‘The European Convention on Human Rights and European Union Law: a Long Way to Harmony’, *EHRLRev.* 2009, pp. 768-783.

¹¹⁰ Noted in T. Hartley, *European Union Law in a Global Context - text, cases and materials*, Cambridge: CUP, 2004, pp. 3-4.

individuals themselves. However, if an individual considers the EU itself to have infringed a fundamental right in the EU Charter, then the Court has jurisdiction.¹¹¹

There is a possibility that accession of the EU to the Convention will reinforce the ‘final authority’ of the Strasbourg Court and ‘avoid any risk of conflict between EU law and the European Convention on Human Rights’.¹¹² In furtherance thereof, clarification on the scope and application of fundamental rights and their relationship to the often similarly phrased Council of Europe human rights is necessary now, even before accession of the European Union to the European Convention. Without detailed legal guidance on the interaction (if any) between the two instruments and the complementarity of the two principal courts, it is difficult to envisage positive progress being made on this issue. To an extent, it is luck more than design which has limited the number of opportunities in which both courts have considered similar issues. Following accession, there may be potential for *ex officio* EU judges to sit on the Court of Human Rights and *vice versa* as well as ongoing high-level dialogue and exchanges between the two organizations. As the Union roots its new and existing competencies in respect for fundamental rights, there is clear potential for additional preliminary rulings and individual complaints as European citizens, who after all should be the benefactors of a plurality of texts aimed at securing their core rights and freedoms, struggle to determine conflicting jurisdictional issues. It is unlikely national courts will prove uniformly able to render assistance: should a tangential EU issue be raised, the preliminary ruling system offers succour; should no EU law be invoked, exhaustion of domestic remedies

¹¹¹ Article 47 Charter of Fundamental Rights

¹¹² European Union Select Committee (House of Lords, UK Parliament) *The Treaty of Lisbon, an impact assessment*, Tenth report 2007-2008 HL 62-I at 5.118

and a higher threshold of admissibility¹¹³ face the individual seeking to challenge the application of national law before the European Court of Human Rights. Successful protection of human rights requires that an agreed set of rights and freedoms are applied reasonably uniformly by an entity which individuals have easy recourse to.

PROGRESS AND EVALUATION

Can the EU effectively protect and promote rights, and lay claim to being a global player in the field of human rights? The answer depends, in traditional legal fashion, on what rights are being enforced and which institution(s) is/are enforcing those rights. Moreover, it depends on who is evaluating its success and by what standards. These variables preclude a detailed analysis of the permutations which the question raises. As a unique organization, it is difficult to identify appropriate comparators for the purpose of quantifying success. At a national level, countries such as South Africa, with its post-apartheid rights-centred constitution, are a major success from a documentary standpoint, yet the failings of that country are well-documented and more pertinently, it is not particularly appropriate to compare the EU to a single national entity. At a pan-European level, it is difficult to argue that the EU surpasses the success and impact of the Council of Europe's Court of Human Rights or compares favourably globally to the UN's Human Rights Council with its Universal Periodic Review, or the treaty monitoring work of the UN treaty bodies (e.g. Human Rights Committee, Committee on Economic Social and Cultural Rights, Committee on the Rights of the Child etc.). Certainly, the EU is now a major 'donor' in terms of international (humanitarian) aid

¹¹³ Protocol 14 amends Article 35(3) ECHR.

and it is often a key player when economic sanctions are imposed, given its global strength in trade. However, surely when evaluating the impact of an organization such as the EU, it is the rights impact within its territorial boundaries which must be examined. Thus, the extent to which the EU institutional framework protects and promotes human rights within the Union is a key determinant. This is more difficult to quantify as success in international rankings of compliance with human rights and ‘development’¹¹⁴ could equally be attributed to the work of the Council of Europe or even the OSCE.

That the EU represents a new legal order is a moot point. Despite recent developments in Africa (the African Union), the EU remains the prime example of a supranational organization, unique in its consensual inter-governmental decision-making process (effectively preserved by the Treaty of Lisbon) and the fact that the organization is created by international law and operates at international level, as well as (through direct effect) giving enforceable rights to individuals. Naturally, the question of whether the EU can be effective as a human rights enforcement mechanism is tied to the question of whether there is a clear legally binding rights instrument which its institutions are empowered to enforce.¹¹⁵ Although the Court of Justice increasingly references the European Convention on Human Rights, the EU Charter will most likely play a more influential role in future cases. More broadly, it is to the Fundamental Rights Agency that one must look to evaluate EU-wide monitoring of rights.

¹¹⁴ E.g., the UNDP Human Rights Development Index – available at <hdr.undp.org/en/statistics/> (accessed 10 July 2010).

¹¹⁵ See, *inter alia*, J. Dutheil de la Rochere, ‘The EU Charter of Fundamental Rights, Not Binding but Influential: the Example of Good Administration’, in Arnall, Eeckhout, and Tridimas (eds), *op.cit.*

Undoubtedly, the twenty-first century European Union is a different organization than was initially envisaged by its founders. There are now twenty-seven Member States and further accessions under negotiation. In comparison to other international organizations, the EU has one significant advantage when addressing human rights: EU Member States have already agreed to a limitation of their sovereign rights.¹¹⁶ This obviates a common difficulty faced by other international organizations – *viz* countering claims that monitoring and enforcing human rights norms infringes the national sovereignty of states¹¹⁷ and thus is beyond the power of the institution. States reluctantly cede sovereignty. Although it could be argued that the EU should capitalize on this advantage, the argument is somewhat tempered given the primary function of the EU is not protection or promotion of rights; albeit respect for rights is an important guiding principle in its operation. Within its existing competences, the EU has clearly carved out a role in democratization and human rights development work in third countries. Adherence to human rights is a monitored and decisive accession criterion for applicant states.

In spite of the foregoing, rights rhetoric has infused many aspects of the work of the Union and thus filters into the work of not only its institutions but other Union entities. The European Court of Justice has made notable progress reconciling Union law with Member States' constitutional guarantees and with rights. This builds upon its early

¹¹⁶ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

¹¹⁷ UN Charter Article 2.

work articulating and developing social rights. The Union, through the work of the Court, retains pre-eminence in the field of social law and detailing the scope of discrimination. A variety of soft and hard mechanisms are deployed to monitor human rights and to remedy violations of rights.¹¹⁸ Organizations promoting and protecting rights take different forms with civil society and non-institutional modes becoming more influential. Institutions at the international and regional level are not infallible and there are many examples of failures, not least backlogs and delays in dealing with individual or inter-state complaints and the failure to prevent breaches of agreed rights. However, some form of institutional and independent protection of rights is a major step towards transforming the rhetoric of rights into a reality from which individuals derive benefit. The Union has generally been reactive, with the pioneering work of the Court undoubtedly contributing to the development of rights within many Member States. Individuals must be aware of their rights and the mechanisms to ensure their protection. However, courts, by their very nature, can only respond to the cases brought before them. Successful promotion and protection of human rights demands something more, something international institutions can deliver. As *Oberleitner* concludes

[a]dministering and managing human rights, dispersing them into diverse institutional formats and diffusing them in an ever wider array of governmental and human activities... is what it means to pursue a utopian aspiration [for improving the world] in a tight political and normative framework.¹¹⁹

¹¹⁸ D. Shelton, *Remedies in International Human Rights Law*, 2nd ed., Oxford: OUP, 2005.

¹¹⁹ Oberleitner, *op. cit.*, p. 191.

Within the treaty confines of the EU, undoubtedly considerable progress has been made.

The path towards genuine and meaningful respect for rights is long and strewn with obstacles. The European Union inevitably has had successes and failures along the way. Perhaps the question is not whether the EU is a true global player, but whether it needs to be a global player in human rights when the Council of Europe is so well established and accession of the Union to the European Convention on Human Rights is foreseeable. Quoting the Secretary General of the Council of Europe:

[the European Union's] accession to the Convention will in no way diminish its importance and influence, to the contrary. By accepting the same rules which are valid for everyone else in Europe it will gain in legitimacy and in its power of persuasion.¹²⁰

Such a strengthening of substantial rights supported by a mesh of institutions in the European Union and Council of Europe can only benefit individuals within the region although true protection of human rights does demand a system for ensuring compliance with agreed norms of human rights. Without doubt, the Union can claim to be a European player, contributing towards the mesh of rights' protection; but its global credentials for human rights are less discernible.

¹²⁰ Thorbjørn Jagland, Council of Europe Secretary General Brussels, 16 February 2010, European Policy Centre Policy Briefing 'Strengthening human rights across Europe'.