
The European Union and Human Rights: An International Law Perspective

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Abstract

The European Union has maintained that the obligations incumbent upon it in the area of human rights stem from its own internal legal order. Under this limited approach, the EU is merely under an obligation not to violate human rights when it acts (i.e. a negative obligation to respect human rights) and effectively only to respect those rights enumerated in the European Convention on Human Rights. This article explores how the EU may be subject to more extensive human rights obligations, incumbent on it by virtue of international law. As an intergovernmental organization and subject to international law, the EU can be said to be bound by customary international law, treaties to which it is a party, and human rights treaties entered into individually by Member States through the principle of succession or substitution. This would extend the range of applicable rights far beyond those in the ECHR to other obligations in, for instance, UN human rights treaties. It also implies that the EU must not merely refrain from violating human rights, but also that, within its spheres of competence, it should take positive measures to protect and fulfill human rights.

1 Introduction

Although express reference to human rights was not originally made in the Community treaties, the European Union (EU) has traditionally rooted its human rights obligations within its own legal order.¹ The pertinent feature of human rights protection in the EU, within the perspective of this article, is that human rights are protected as

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¹ The first reference to human rights in one of the Community treaties was the Single European Act, 1986 in its preamble (OJ 1987 L 169/1).

‘Community’ concepts arising from within the EU system itself. This article examines whether it might be possible to examine the question of the Community’s human rights obligations arising from the international legal system. Whilst existing EC law and cases are examined to decipher the ways in which the EU itself perceives or might perceive the application of international (human rights) law to its regime, the article also examines the relevant international legal principles which govern the application of human rights obligations to entities such as the EU. It further, briefly, examines the consequences of such an international law perspective for human rights protection by the EU. The application of international human rights law has at least two significant consequences. First, it raises the possibility of the EU protecting human rights which are not currently protected by the EU’s internal legal system. Secondly, it may require the EU to protect those human rights in ways beyond mere ‘negative’ protection. In other words, subjecting the EU to international law principles challenges the Community concepts and methods of protection of human rights.

This article explores several possible ways in which the EU’s human rights obligations can be grounded in international law. First, international law regards the EU as bound to guarantee human rights in so far as they exist in customary international law (CIL), and any EU (primary or secondary treaty-based) law conflicting with rules of *jus cogens* will be considered void. Secondly, there is the possibility that the EU could be given authority directly to accede to human rights treaties. Thirdly, the EU may have to adhere to human rights obligations indirectly through the prior obligations of its Member States. This rule is examined both from an EU perspective (Article 307 ECT, which requires Member States to abide by international duties which existed prior to their membership of the EU) and an international perspective (Article 103, United Nations Charter, which establishes the supremacy of the UN Charter over other international agreements). The obligations flowing from the Charter include the obligation to guarantee human rights as they are elaborated in subsequent UN-sponsored instruments such as the Universal Declaration of Human Rights, 1948 (UDHR), the International Covenant on Civil and Political Rights, 1966 (ICCPR), and the International Covenant on Economic Social and Cultural Rights, 1966 (ICESCR). Fourthly, the EU itself, quite apart from the obligations on its Member States, is also under the obligation to guarantee these human rights within its areas of competence (principally through the notion of ‘succession’ which applies more widely at international level than has been accepted by the European Court of Justice (ECJ)).

2 Community Law Relating to Human Rights²

The story of how the EU’s position changed from one ignoring human rights to one being ‘founded on . . . respect for human rights and fundamental freedoms’ is well

² If most of the examples used in this article relate to civil and political rights, rather than economic and social rights it is not because we wish to suggest that economic and social rights are not relevant to the EU. Rather it is because the ECJ has tended to look to the ECHR for inspiration, and most of the rights within that treaty are civil and political rights.

rehearsed.³ As it stands, the EU is obliged to respect human rights when it acts on its competences, and compliance with this is monitored by the ECJ insofar as the EU acts through the Community.⁴ This obligation is seen to derive from the internal legal order of the EU, initially through the 'general principles' developed by the ECJ⁵ and later in Article 6 of the Treaty on European Union (TEU). Despite the fact that Member States' human rights obligations were sourced in their domestic law and in treaties to which they were parties, notably the European Convention on Human Rights 1950 (ECHR),⁶ the ECJ chose to base the Community's obligation to respect human rights within the Community legal order. Particular human rights must be accepted as 'Community' human rights in order to receive protection from the Court. International (and domestic) law is relevant only in the sense that it provides guidance or inspiration for the substantive content of the 'general principles'.⁷ The position has been neatly stated by Advocate General van Gerven:

A feature of [the] . . . case-law [of the ECJ] is that it does not confer direct effect in the Community legal order on the provisions of . . . international treaties but regards those treaties,

³ Alston and Weiler, 'An Ever Closer Union in Need of a Human Rights Policy', *The European Union and Human Rights*, in P. Alston (ed.), *The EU and Human Rights* (1999), (also published as 'An Ever Closer Union in Need of a Human Rights Policy', 9 *EJIL* (1998) 658); M. Bell, *Anti-discrimination Law and the European Union* (2002); P. Craig and G. de Búrca, *EU Law, Text, Cases and Materials* (3rd edn., 2003), chs 8–9; De Búrca, 'Fundamental Rights and the Reach of EC Law', 13 *OJLS* (1993) 283; De Búrca, 'Convergence and Divergence in European Public Law: The Case of Human Rights', in P. Beaumont, C. Lyons, and N. Walker (eds), *Convergence and Divergence in European Public Law* (2002); S. Douglas-Scott, *Constitutional Law of the European Union* (2002), at 431–478; Everling, 'The Maastricht Judgment of the European Court and its Significance for the Development of the European Union', 14 *YEL* (1994) 1; Eicke, 'The European Charter of Fundamental Rights—Unique Opportunity or Unwelcome Distraction', 3 *European Human Rights Law Review* (2000) 280; Lord Goldsmith, 'A Charter of Fundamental Rights, Freedoms and Principles', 38 *CMLRev.* (2001) 1201; Heringa and Verhey, 'The EU Charter: Text & Structure', 8 *Maastricht Journal of European and Comparative Law* (2001) 11; Lenaerts, 'Fundamental Rights in the European Union', 25 *ELRev* (2000) 570; N. Neuwahl and A. Rosas, *The European Union and Human Rights* (1995); O'Leary, 'The Court of Justice as a Reluctant Constitutional Adjudicator: An Examination of the Abortion Case', 16 *ELRev.* (1992) 138; J. Shaw, *Law of the European Union* (3rd edn., 2000), ch. 9; Von Bogdandy, 'The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union', 37 *CMLRev.* (2000) 1307; Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision', 1 *ELJ* (1995) 219; Weiler and Fries, 'A Human Rights Policy for the European Community and Union: The Question of Competences', in Alston, *supra* note 3, at 147; Weiler and Lockhart, 'Taking Rights Seriously: The European Court and its Fundamental Rights Jurisprudence', 32 *CMLRev.* (1995) 51 (part I) and 579 (part II); Williams, 'Enlargement of the Union and Human Rights Conditionality: A Policy of Distinction?', 25 *ELRev.* (2000) 601.

⁴ Treaty on European Union (TEU) (OJ (2002) C 325/1), Art. 46(d).

⁵ Case 29/69, *Stauder v. Ulm* [1969] ECR 4119; Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125; Case 4/73, *Nold v. Commission* [1974] ECR 491; Case 36/75, *Rutili v. Minister for the Interior* [1975] ECR 1219; Case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727; Case 5/88, *Wachauf v. Germany* [1989] ECR 2609; Case C-13/94, *P v. S and Cornwall CC* [1996] ECR I-2143; Case C-36/02, *Omega* [2004] ECR I-9609. For further reading on general principles and human rights, see Craig and de Búrca, *supra* note 3, at ch. 8; T. Tridimas, *The General Principles of EC Law* (1999); J. Usher, *General Principles of EC Law* (1998).

⁶ CETS 5.

⁷ See *supra* note 5.

together with the constitutional traditions common to the Member States, as helping to determine the content of the general principles of Community law.⁸

Most frequently, in accordance also with Article 6 TEU, the ECJ has drawn on the provisions of the ECHR, though provisions of other treaties are not excluded.⁹ The special significance given to the ECHR¹⁰ is a positive step in the EU's recognition of the relevance of human rights principles outside the Community system to developments within the Community system. However, as mentioned, the EU is not bound to comply with the letter of the ECHR or case law of the European Court of Human Rights (ECtHR). The acceptance of any right as part of the 'general principles' of Community law is taken on a case-by-case basis.¹¹ The ECJ does refer to other international human rights instruments when considering the content of fundamental rights in EU law. Perhaps the most significant such treaty (from the point of view of its global reach and scope of rights) is the International Covenant on Civil and Political Rights (ICCPR).¹² However, it seems that Advocates General will not generally rely on the ICCPR without good reason,¹³ and although the ECJ occasionally

⁸ See para. 30 of the AG's Opinion, Case C-159/90, *SPUC v. Grogan* [1991] ECR I-4685. Similarly, AG Slynn has noted that 'the Convention provides guidelines for the Court in laying down those fundamental rules of law which are part of Community law, though the Convention does not bind, and is not part of the law of, the Community as such'. See Cases 60-61/84, *Cinéthèque SA and Others v. Fédération Nationale des Cinémas Français* [1986] 1 CMLR 365, at 379. The CFI made this express in Case T-347/94, *Maye-Mehnhof Kartongesellschaft mbH v. Commission* [1998] ECR II-1751, para. 311; Case T-112/98 *Mannesmannrohren-Werke v. Commission* [2001] ECR II-729, para. 59.

⁹ See, e.g., cases cited *supra* note 5.

¹⁰ See, e.g., Case C-94/2000, *Roquette Frères SA v. Directeur Général de la Concurrence, de la Consommation et de la Répression des Fraudes (Commission of The European Communities, Third party)* [2004] ICR 66, para. 23; Cases 46/87 & 227/88, *Hoechst AG v Commission* [1989] ECR 2859, para. 13.

¹¹ The following are some examples of rights which the ECJ has accepted as part of the Community's concept of fundamental rights: freedom of expression—Case C-274/99, *Connolly v. Commission* [2001] ECR I-1611, Case C-340/00, *Commission v. Kwik* [2001] ECR I-10269; freedom of religion—Case 130/75, *Prais v. Council* [1976] ECR 1589; freedom of assembly—*Stauder*, *supra* note 5, Case C-112/00, *Schmidberger* [2003] ECR I-5659; human dignity—*Omega*, *supra* note 5; privacy—Case C-404/92P, *X v. Commission* [1994] ECR I-4737; right to property—*Hauer*, *supra* note 5, Cases C-20/00 & C-64/00, *Booker Aquaculture Ltd and Hydro Seafood GSP Ltd v. The Scottish Ministers* [2003] ECR I-7411; equality—Case 149/77, *Defrenne III* [1978] ECR 1365; marriage—Case C-117/01, *K.B.*, Judgment of 7 Jan. 2004; family life—Case C-60/00, *Carpenter* [2002] ECR I-6279, Case C-413/99, *Baubast* [2002] ECR I-7091; right to a judicial remedy—Case 222/84 *Johnston v. Chief Constable of the RUC* [1986] ECR 1651.

¹² 999 UNTS 171. This is not to underestimate the International Covenant on Economic Social and Cultural Rights (ICESCR), 1966. Rather the ICCPR may be more relevant because it corresponds largely to the ECHR in the rights it enumerates, and so is more likely to be mentioned by the ECJ than the ICESCR.

¹³ E.g., Case C-168/91, *Konstantinidis v. Stadt-Altensteig* [1993] ECR I-1191, where AG Jacobs referred to the ICCPR because the ECHR had no specific rule on name changes (see para. 35 of the AG's Opinion). In Case C-337/91, *Van Gemert-Derks* [1993] ECR I-5435, AG Darmon considered the ICCPR because it was expressly raised by the national court questioning its request for a preliminary ruling (see para. 2 of AG's Opinion). This attitude towards the ICCPR as a treaty of second resort by the AGs may be changing. See, e.g., Opinion of AG Tizzano, para. 95, in Case C-397/03, *Archer Daniels Midland Company and Archer Daniels Midlands Ingredients Ltd v. Commission*, 7 June 2005, referring to ICCPR Art. 14(7); Opinion of AG Kokott, para. 41, in Case C-105/03, *Criminal proceedings against Maria Pupino*, 11 Nov. 2004.

acknowledges the existence of the ICCPR, it is difficult to find an example where it has actually relied on its provisions.¹⁴ From the ECJ's perspective, then, it is apparent that, apart from the ECHR, other international human rights treaties are not given a great deal of weight. Moreover, human rights treaties are considered only as useful guides to human rights protection within the EU. They are not directly legally binding upon the institutions.

The decision to ground the Communities' human rights obligations in the Community legal order itself, rather than finding that domestic or international law binds the Communities, seems like an obvious choice, as is recounted by commentators in the context of the struggle by the ECJ to assert the supremacy of Community law.¹⁵ In the early years of the Communities the ECJ was at pains to stress the self-contained nature of the 'new legal order' that reinvented the normal rules governing the status of international agreements.¹⁶ Traditionally, although states may not base a failure to observe their international obligations on duties under domestic law, each state reserves for itself the means according to which it implements those obligations.¹⁷ International law does not penetrate into national law unless the constitutional tradition of that state so provides.¹⁸ The ECJ determined that in order to allow for the uniform implementation of Community law, and in order to allow the Community to fulfil its aim of benefiting individuals as well as states, Community law should be deemed to penetrate directly into domestic law and take precedence over conflicting national law.¹⁹ In order to ensure acceptance by domestic courts of this interpretation of Community law, the ECJ felt obliged to assuage the concerns of certain jurisdictions that Community law should not threaten the protection of human rights.²⁰

¹⁴ For the most part where the ECJ does consider the ICCPR, it is as a prelude to finding that it is not relevant to the circumstances of the case: Case C-249/96, *Grant v. South West Trains Ltd* [1998] ECR I-621, para. 44 relating to ICCPR, Art. 2(1); Case C-60/92, *Otto BV v. Postbank NV* [1993] ECR I-5683, para. 11 relating to ICCPR, Art. 14; Case 374/87, *Orkem v. Commission* [1989] ECR 3283, para. 31 relating to ICCPR, Art. 14. The CFI has been more ready to rely on the ICCPR in recent cases. See further *infra*.

¹⁵ *Stauder*, *supra* note 5; *Internationale Handelsgesellschaft*, *supra* note 5; A. Cassese, A. Clapham, and J. Weiler, *Human Rights and the European Community, Vol. II: The Substantive Law* (1991), at 58; Everling, *supra* note 3; Weiler, *supra* note 3.

¹⁶ See, e.g., Case 26/62, *Van Gend en Loos* [1963] ECR 1; Case 6/64 *Costa v. ENEL* [1964] ECR 585; Opinion 1/91 (First EEA Opinion) [1991] ECR 6079. The EU also has its own system of state liability.

¹⁷ See Arts 27 and 46 of the Vienna Convention on the Law of Treaties, 1969 (63 *AJIL* (1969) 875).

¹⁸ For a discussion of the 'monist' and 'dualist' approaches see Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', 92 *RdC* (1957-II) 5, at 70-80.

¹⁹ Case 26/62, *Van Gend en Loos* [1963] ECR 1; Case 6/64, *Costa v. ENEL* [1964] ECR 585; Case 106/77, *Simmmenthal* [1978] ECR 629; Case 213/89, *Factortame I* [1990] ECR I-2433.

²⁰ Namely, the concerns of Germany and Italy. These have been expressed by the German Constitutional Court in *Solange I* [1974] 2 CMLR 540 and *Solange II* [1987] 3 CMLR 225 (Case C-69/85, *Wünsche* [1986] ECR 947). See also *Brunner v. European Union Treaty* [1994] 1 CMLR 57; *Bananas II* Judgment, Order of 7 June 2000, 2 BvL 1/97 or 53 *Neue Juristische Wochenschrift* (2000) 3124. Views from Italy have been made explicit in *Frontini v. Ministero delle Finanze* [1974] 2 CMLR 372; Dec. 170 of 8 June 1984 in *SpA Granital v. Amministrazione delle Finanze* and *SpA Fragd v. Amministrazione delle Finanze*, Dec. 232 of 21 Apr. 1989 (1989) 72 RDL.

3 The European Union Subject to International Law

While the question whether the EU is bound by the provisions of international human rights law directly has received consideration,²¹ most scholarship tends to focus on the extent to which the EU is bound to respect human rights by virtue of its internal rules. Where international law is discussed it is largely confined to the ECHR and the extent to which its provisions form part of the EU's internal legal order (via 'general principles of law' and Article 6 TEU) and the legal weight of the Charter of Fundamental Rights,²² rather than by virtue of any obligations which might be incumbent on the EU directly under international law.²³

An intergovernmental organization²⁴ (IGO) may derive obligations both from its internal constitution and international law more generally. Despite the ECJ's lack of reliance on international human rights law as a source of human right obligations, from the perspective of international law, the EU, as an IGO, is subject to international law. It is generally accepted in the decisions of international judicial bodies²⁵ and the writings of international lawyers that IGOs are subject to the rules of international law:²⁶

²¹ E.g., Lawson, 'The European Convention on Human Rights and the European Communities—Towards a Responsibility Regime relating to the Conduct of International Organisations', PhD thesis, University of Leiden, 1999, at 55–126; Pescatore, 'The Court of Justice of the Communities and the European Convention on Human Rights', in F. Matscher and H. Petzold (eds), *Protecting Human Rights: The European Dimension, Studies in Honour of Gerard J Wiarda* (1988); Schermers, 'The European Communities Bound by Fundamental Human Rights', 27 *CMLRev* (1990) 249.

²² See, e.g., Alston, *supra* note 3; A. Cassese, A. Clapham, and J. Weiler (eds), *Human Rights and the European Community, Vol. I* (1991); Cassese, Clapham, and Weiler, *supra* note 15; A. Clapham, *Human Rights and the European Community: A Critical Overview* (1991); De Búrca, 'Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union', 27 *Fordham International Law Journal* (2004) 679; Engel, 'The European Charter of Fundamental Rights, A Changed Political Opportunity Structure and its Normative Consequences', 7 *ELJ* (2001) 151; T. Hervey and J. Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights* (2003); De La Rochère and Dutheil, 'The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty', 41 *CMLRev* (2004) 345; Lenaerts, 'Fundamental Rights to be Included in a Community Catalogue', 16 *ELRev* (1991) 367; Peukert, 'The Importance of the European Convention on Human Rights for the European Union', in P. Mahoney *et al.* (eds.), *Protecting Human Rights: The European Perspective* (2000); Von Bogdandy, *supra* note 3.

²³ This is not to say that these commentators do not discuss international human rights law at all, but rather that they do not tend to discuss whether it imposes obligations directly upon the EU. It may be that scholarship has tended to concentrate more on this because the EU has progressively brought human rights into its internal regime, giving them a higher profile within the treaties (Arts 6 and 7 TEU) and with the Charter of Fundamental Rights.

²⁴ We use the term intergovernmental organization broadly to refer to an 'inter-state body created by multilateral treaty. . . [with] what may be called a constitution. . . [and] organs separate from its members': C. F. Amerasinghe, *Principles of Institutional Law of International Organizations* (2nd edn., 2005), at 9–10.

²⁵ ECJ, Case C–286/90, *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.* [1992] ECR I–6019, para. 9; Case C–162/96, *A. Racke* [1998] ECR I–3655, para. 45; International Court of Justice, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, [1980] ICJ Rep 73, at 89–90.

²⁶ Amerasinghe, *supra* note 24, at 399–406; M. Hirsch, *The Responsibility of International Organizations Toward Third Parties, Some Basic Principles* (1995), at 17; P. Sands and P. Klein, *Bowett's Law of International Institutions* (2001), at 456; H. Schermers and N. Blokker, *International Institutional Law, Unity Within Diversity* (4th edn., 2003), at §§ 1572–1591; K. Wellens, *Remedies against International Organisations*

International organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.²⁷

Similarly Wellens writes that 'it would be incorrect to assume that the conduct of international organisations escapes the governance of the international political and legal order altogether. . . . [There is] a growing awareness they have to account for their acts, actions and omissions.'²⁸ This position ensures that states are not able to avoid the application of international law simply by conducting their activities through IGOs. Given the large number of activities undertaken through IGOs, to hold otherwise would be to make international law increasingly superfluous. In relation to the UN, White notes that:

The legal bases upon which human rights are applicable to all UN activities can be derived first of all from the inherent nature of human rights. Human rights are part of being a human being and therefore such rights are automatically part of the legal framework applicable to those with power to affect the enjoyment of those rights. Secondly, there is a delegation by member states to the UN of their responsibilities under human rights law. States cannot set up an autonomous international actor that can obviate human rights standards that the states themselves are bound by.²⁹

It is also accepted that international legal obligations may derive from treaties to which IGOs have become party,³⁰ or from customary international law (CIL),³¹ including rules of *jus cogens* status which are capable of invalidating conflicting treaty rules.³²

(2002), at 1; N. White, *The Law of International Organisations* (2nd edn., 2005), at 216 ff; A. Clapham, *Human Rights Obligations of Non State Actors* (2006).

²⁷ WHO and Egypt Agreement, *supra* note 25, 89–90.

²⁸ Wellens, *supra* note 26, at 1–2.

²⁹ White, 'Towards a Strategy for Human Rights Protection in Post-Conflict Situations', in N. White and D. Klaasen (eds), *The UN, Human Rights and Post Conflict Situations* (2005), at 463, 464.

³⁰ Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986 (UN Doc. A. CONF. 129/15) (VCLT II). Although the VCLT II has not yet entered into force its provisions were merely intended to codify existing practice. See *Yearbook of the International Law Commission* (1982) Vol. II, Part Two, A/CN.4/SER.A/1982/Add.1 (Part 2), 12–17. See, e.g., ECT Arts 133, 174, 181, 181a, 300, and 310; TEU Art. 24.

³¹ Such as humanitarian law for peacekeeping action by the UN. See Glick, 'Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces', 17 *Michigan Journal of International Law* (1995–1996) 53, at 55–67; Hirsch, *supra* note 26, at 31–37; Murphy, 'United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?', 14 *Criminal Law Forum* (2003) 153; Tittmore, 'Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations', 33 *Stanford Journal of International Law* (1997) 61, at 97–100; White, *supra* note 26, at 216–219.

³² Art. 53 of both VCLT I and VCLT II; Hirsch, *supra* note 26, at 30–31; Schermers, *supra* note 21, at 250–251. The International Law Commission commentary on VCLT II, Art. 53 states: 'International organizations are created by treaties concluded between States. . . And it can hardly be maintained that States can avoid compliance with peremptory norms by creating an organisation.' See *Yearbook of the International Law Commission* (1982), Vol. II, Part Two, 56.

A Customary International Law

Customary international law is the body of international law binding on all States which derives from the practice and legal opinion (*opinio juris*) of states themselves.³³ Unlike legal obligations deriving from treaties, which states must accede to or ratify in order to be bound by their terms,³⁴ CIL may emerge without the express consent of every state to a particular rule.³⁵ As noted above, it is commonly accepted that IGOs are also subject to the rules of CIL.³⁶ The ECJ has itself expressly acknowledged the applicability of CIL to the actions of the EC and EU in their internal³⁷ and external relations.³⁸ However, the ECJ has yet to pronounce on the applicability of international human rights law to the EC and EU insofar as they form part of CIL.

Much of the debate over the status of human rights in CIL has centred on the status of the United Nations Universal Declaration of Human Rights, 1948.³⁹ Despite the

³³ 'Customary international law is created by State practice. State practice means any act or statement from which views about customary law can be inferred; it includes physical acts, claims, declarations *in abstracto* (such as General Assembly resolutions), national law, national judgments and omissions.' It must be accompanied by *opinio juris*—the belief by the state that the practice is obligatory under international law. Akehurst, 'Custom as a Source of International Law', 47 *BYbIL* (1974–75) 53. On the possibility of persistently objecting to being subject to a rule of CIL see Charney, 'The Persistent Objector Rule and the Development of Customary International Law', 56 *BYbIL* (1985) 1. See also Pentassuglia, who underlines the significance of persistent objection in international law: G. Pentassuglia, *La rilevanza dell'obiezione persistente nel diritto internazionale* (1996).

³⁴ VCLTI, Art. 34.

³⁵ Note, however, that it is possible for a rule embodied in a treaty which has gained 'very widespread and representative participation' (i.e. a high proportion of states have become party thereto) to become part of CIL, since membership of the treaty may be considered evidence of state practice and *opinio juris* of itself. See *North Sea Continental Shelf case (Federal Republic of Germany v. Denmark)* [1969] ICJ Rep 3, at 42.

³⁶ See *supra* note 31.

³⁷ In the *Woodpulp* case the ECJ specifically addressed the arguments of the applicants who contested that it would be contrary to international law to permit the Commission to regulate conduct taking place outside the EC which merely had effects within the EC. The ECJ replied that because the impugned agreements were implemented within the EC, 'the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law': Cases 89/85, 114/85, 116–117/85, 125–129/85, *Ahlström Osakeyhtio et al. v. Commission (Woodpulp)* [1988] ECR 5193, para. 18. See also Case C–327/91, *France v. Commission* [1994] ECR I–3641, at I–3674; Cases 21–24/72, *International Fruit Company v. Produktschap voor Groenten en Fruit* [1972] ECR 1219, at 1226–1227; Case 142/88 *Hoesch AG v. Bergkohl* [1989] ECR 3413, [1991] 2 CMLR 383, at 416.

³⁸ Case C–162/96, *Racke v. Hauptzollamt Mainz* [1998] ECR I–3655, para. 45: 'the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country.'

³⁹ UN GA Res. 217 (III). Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', 25 *Georgia Journal of International and Comparative Law* (1996) 287; Henkin, 'Human Rights and State "Sovereignty"', 25 *Georgia Journal of International and Comparative Law* (1996) 31; Kartashkin, 'Working Paper on the Observance of Human Rights by States Which Are Not Parties to United Nations Human Rights Conventions', Sub Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/1999/29; Kartashkin, 'Observance of Human Rights by States

uncertainties, there are at least some rights whose existence as part of CIL has been recognized by the International Court of Justice (ICJ): the right to self-determination;⁴⁰ the prohibition on genocide;⁴¹ freedom from racial discrimination including apartheid, and the prohibition on slavery;⁴² freedom from arbitrary detention and the right to physical integrity;⁴³ protection against denial of justice.⁴⁴

The ICJ has further found that the 'rules concerning the basic rights of the human person' in international law are *erga omnes* in nature. That is, they are considered to be 'the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection.'⁴⁵ Thus, where EU law conflicts with CIL on human rights,⁴⁶ even where these EU rules are meant to apply only as between the Member States, it will violate obligations towards all other (non-Member) States. Put otherwise, any breach by the EU of human rights in CIL, even if it does not necessarily disclose a violation of international law as between the Member States, will amount to a violation of international obligations owed to all other states.⁴⁷

Within CIL there also exists a category of rules that have achieved the status of *jus cogens* (or peremptory norms) which have the effect of invalidating conflicting rules of international law created by treaties, including rules derived from those treaties such as the acts of IGOs.⁴⁸ Article 53 of the Vienna Convention on the Law of Treaties (1969) defines a rule of *jus cogens* as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'. However, as might be expected, that body of human rights law which might be said to have attained the status of *jus cogens* is narrower still than that which has entered into CIL. Certain international judicial bodies have had occasion expressly to recognize that particular rights have achieved this status: the prohibition on

Which Are Not Parties to UN Human Rights Conventions', Sub Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2000/2; B. Ramcharan, *The Concept and Present Status of the International Protection of Human Rights, Forty Years after the Universal Declaration* (1989); O. Schachter, *International Law in Theory and Practice* (1991), at 335–345; Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States', 32 *American University Law Review* (1982) 1.

⁴⁰ *East Timor case (Portugal v. Australia)* [1995] ICJ Rep 90, at 101.

⁴¹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep 15, at 23.

⁴² *Barcelona Traction Light and Power Co. Ltd. (Belgium v. Spain)* [1970] ICJ Rep 3, at 32, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* [1971] ICJ Rep 16, at 57.

⁴³ *Diplomatic and Consular Staff in Tehran* [1980] ICJ Rep 3, at 42.

⁴⁴ *Barcelona Traction case*, *supra* note 42, at 47.

⁴⁵ *Ibid.*, at 32.

⁴⁶ For instance, significant under-representation of some racial groups in EU institutions, or in EU projects, may arguably violate protection against racial discrimination.

⁴⁷ See also Art. 48 of the ILC Draft Articles on State Responsibility and J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002), at 276–280. See further *infra*.

⁴⁸ According to Art. 64 VCLT I a norm of *jus cogens* will invalidate conflicting treaty provisions. See also R. Jennings and A. Watts (eds.), *Oppenheim's International Law, Vol. I Peace*, Parts 2 to 4 (9th edn., 1992), at 4 ff.; White and Klaasen, 'An Emerging Legal Regime', in White and Klaasen, *supra* note 29, 1, at 7.

torture;⁴⁹ the right to life;⁵⁰ the right to equality before the law and non-discrimination;⁵¹ and the prohibition on slavery.⁵²

Perhaps over-generously, the Court of First Instance (CFI) recently appeared to consider all human rights to have attained the status of *jus cogens* in international law. In its *Kadi*⁵³ and *Yusuf*⁵⁴ judgments, the CFI considered the legality of several regulations adopted by the EC in execution of measures mandated by the United Nations Security Council over the course of several resolutions adopted under Chapter VII of the UN Charter.⁵⁵ As part of measures adopted to combat terrorist activity, the Security Council required all states to implement a number of sanctions including the freezing of assets of named persons which the EU and EC implemented through Common Positions and Regulations.⁵⁶ *Kadi* and *Yusuf* sought annulment of the regulations insofar as they related to them on the grounds (among others) that they violated their human rights, namely the right to a fair hearing, right to property and right to effective judicial review.⁵⁷ The CFI considered that the obligation to protect human rights (with no more precision) formed a rule of *jus cogens* in international law, and any Security Council resolution and consequently any EU action taken to implement such resolution that violated human rights would be void in international law.⁵⁸ This of course raises the question of which human rights should be considered to fall within this category. The approach of the CFI in this regard was to resort to the UDHR and the ICCPR rather than the ECHR.⁵⁹ In doing so, the CFI did not engage in any analysis of CIL to assess whether the relevant rights were in fact ‘accepted and recognized by

⁴⁹ European Court of Human Rights: *Al-Adsani v. UK* (2001) 34 EHRR 273, para. 61. International Criminal Tribunal for the Former Yugoslavia: *Prosecutor v. Furundzija* Case IT-95-17/I-T, 38 ILM (1999) 317, para. 144.

⁵⁰ Inter-American Commission on Human Rights: *Victims of the Tugboat ‘13 de Marzo’ v. Cuba*, Report No. 47/96, Case 11.436, para. 79.

⁵¹ Inter-American Court of Human Rights: Advisory Opinion OC-18/03, 17 Sept. 2003, IACtHR Series A 18 (2003), para. 101.

⁵² Inter-American Court of Human Rights: *Aloeboetoe v Suriname*, IACtHR Series C No 15, 1.2 IHRR 208 (1994) para. 57.

⁵³ Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission* 21/9/05 [hereinafter *Kadi*].

⁵⁴ Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* 21/9/05 [hereinafter *Yusuf*].

⁵⁵ Art. 48 of the UN Charter imposes an obligation on all Members of the UN ‘directly and through their action in the appropriate international agencies of which they are members’ to implement decisions of the Security Council adopted to preserve international peace and security under Chapter VII of the Charter’.

⁵⁶ *Kadi*, *supra* note 53, at paras 10–36. *Yusuf*, *supra* note 54, at paras 10–41. See SC Resolutions: 1267 (1999), 15 Oct. 1999; 1333 (2000) 19 Dec. 2000; 1390 (2000), 16 Jan. 2002; 1452 (2002), 20 Dec. 2002; 1455 (2003), 17 Jan. 2003. See Common Positions: 1999/727/CFSP, 15 Nov. 1999 (OJ 1999 L 294/1); 2001/154/CFSP, 26 Feb. 2001 (OJ 2001 L 57/1); 2002/402/CFSP, 27 May 2002 (OJ 2002 L 139/4); 2003/140/CFSP, 27 Feb. 2003 (OJ 2003 L 53/62). Regulations: 337/2000 14 Feb. 2000 (OJ 2000 L 43/1); 467/2001, 6 Mar. 2001 (OJ 2001 L 67/1); 2062/2001, 19 Oct. 2001 (OJ 2001 L 277/25); 881/2002, 27 May 2002 (OJ 2002 L 139/9); 561/2003, 27 Mar. 2003 (OJ 2003 L 82/1).

⁵⁷ *Kadi*, *supra* note 53, at paras 37 and 59. *Yusuf*, *supra* note 54, at para. 284.

⁵⁸ *Kadi*, *supra* note 53, at paras 226–231. *Yusuf*, *supra* note 54, at paras 277–282.

⁵⁹ *Kadi*, *supra* note 53, at paras. 241, 287. *Yusuf*, *supra* note 54, at paras. 292, 342. As noted above, the ECJ has customarily relied more on the ECHR.

the international community of States' as peremptory norms. Rather, it seemed to assume that the rights in question were *jus cogens* in nature by virtue of their presence in these instruments. While such an assessment may be tantalizing for some human rights lawyers, the lack of any analysis does undermine the integrity of the finding that all human rights as featured in the UDHR or ICCPR can be classed as rules of *jus cogens*.

Regardless of the perspectives of EU judicial bodies, it is clear from the above that, in international law, the EU as an IGO is bound to respect rules of CIL. Any EU treaty provision or treaty-based secondary legislation that conflicts with CIL on human rights, while not automatically void, will violate obligations towards all third states because human rights are considered to be *erga omnes* in nature. Further, any rule created through the EU which conflicts with rules that are *jus cogens* in nature will be void. As well as being accepted in international law, these principles have been accepted by the EU itself through the CFI (although the ECJ itself has not elaborated on CIL and human rights, especially in relation to its *erga omnes* effects).

B Direct Treaty Obligations

While some treaties expressly provide for adherence by IGOs,⁶⁰ the principal regional and global human rights treaties presently make no such provision, thereby excluding the possibility of EU adherence.⁶¹ The ECJ has also found that, without amendment to the existing treaties, the EU itself would lack competence to do so.⁶² Because of this, the supervisory bodies established to monitor compliance by states parties with their obligations under particular human rights treaties are not competent to hear claims concerning violations by IGOs as such. However, this is not the end of the matter as far as international law is concerned. Instead, international supervisory bodies do hold states accountable for the actions of those IGOs of which they are members.⁶³ For example, the United Nations Committee on Economic, Social and Cultural Rights (responsible for supervising compliance with the International Covenant on Economic Social and Cultural Rights, 1966)⁶⁴ regularly 'encourages . . . [state

⁶⁰ E.g., 1982 United Nations Convention on the Law of the Sea (21 ILM (1982) 1261) is open to membership by states and IGOs. See VCLT II. See the EU's 'Agreement Database' for a list of treaties to which the EC is party, available at http://ue.eu.int/cms3_fo/showPage.asp?lang=en&id=252&mode=g&name, visited 6 Jan. 2006.

⁶¹ The Treaty Establishing a Constitution for Europe, 16 Dec. 2004, OJ 2004 C 310/01, Art. I-9(2) would oblige the EU to accede to the ECHR, Art. 17 of Protocol 14 to ECHR, Amending the Control System of the Convention, CETS No. 194, which will amend Art. 59 of the ECHR to permit the EU to accede. Note also that the EU is currently engaged in negotiations on the draft International Convention on the Promotion and Protection of the Rights and Dignity of Persons with Disabilities, to which it may become a party, given its competence in this area under Art. 13 ECT. See EU Annual Report on Human Rights 2005, 4.13, available at http://bookshop.eu.int/eubookshop/FileCache/PUBPDF/QCAA05001ENC/QCAA05001ENC_002.pdf, visited 29 Mar. 2006.

⁶² Opinion 2/94 *Accession by the Community to the European Convention on Human Rights* [1996] ECR I-1759, paras. 23-36.

⁶³ See White, *supra* note 26, at 219-224.

⁶⁴ 993 UNTS 3.

parties], as . . . member[s] of international organizations, including international financial institutions such as the International Monetary Fund and the World Bank, to do all [they] . . . can to ensure that the policies and decisions of those organizations are in conformity with the obligations of States parties under the Covenant'.⁶⁵ Similarly the former European Commission on Human Rights (ECnHR) and European Court of Human Rights (ECtHR) have entertained claims against states parties to the ECHR in relation to acts performed by IGOs themselves or by states in their execution of obligations derived from IGOs, such as the EU or EC, the European Patent Office and the International Monetary Fund.⁶⁶ The ECnHR and ECtHR have held that although the ECHR 'does not exclude the transfer of competences to international organisations', it is the responsibility of states parties to the ECHR to ensure that their human rights obligations 'will receive an equivalent protection' within the context of those IGOs to which they become party.⁶⁷ In this way, despite the transfer of certain competences from states to IGOs, human rights supervisory bodies will continue to hold states to account for the use of those powers, in order to prevent a 'loophole' in human rights protection:

The Contracting States' responsibility continues even after they assume international obligations subsequent to the entry into force of the Convention or its Protocols. It would be incompatible with the object and purpose of the Convention if the Contracting States, by assuming such obligations, were automatically absolved from their responsibility under the Convention.⁶⁸

Thus states remain responsible for breaches of the ECHR resulting from any acts or omissions required by the laws of the IGO. The ECtHR has indicated that this remains so irrespective of the degree of control exercised by the states in question over the impugned action:

In particular, the suggestion that the United Kingdom may not have effective control over the state of affairs complained of cannot affect the position, as the United Kingdom's responsibility

⁶⁵ Concluding Observations on Ireland, E/C.12/1/Add.77, 5 June 2002, para. 37. See also Concluding Observations on UK, E/C.12/1/Add.79, 5 June 2002, para. 26; Concluding Observations on Sweden, E/C.12/1/Add.70, 30 Nov. 2001, para. 24.

⁶⁶ See, e.g., ECnHR Decision *M & Co. v. Federal Republic of Germany*, App. No. 13258/87, 9 Feb. 1990; ECnHR Decision *Heinz v. the Contracting States party to the European Patent Convention insofar as they are High Contracting Parties to the European Convention on Human Rights*, App. No. 21090/92, 15 Oct. 1992; ECtHR *Senator Lines GmbH v. The Fifteen Member States of the EU*, App. No. 56672/00, 10 Mar. 2004; ECtHR *Emesa Sugar NV v. Netherlands*, App. No. 62023/00, 13 Jan. 2005; ECtHR *Case of Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, 30 June 2005; ECtHR *Case of Capital Bank Ad v. Bulgaria*, App. No. 49429/99, 24 Nov. 2005.

⁶⁷ *Heinz* Decision, *supra* note 66; ECtHR *Matthews v. UK*, App. No. 24833/94, 18 Feb. 1999, para. 32. The ECtHR seems to be prepared to offer a generous interpretation of 'equivalent protection'. For example in the *Bosphorus* case, *supra* note 66, at paras. 159–165, it found that the standing available to individuals to review the legality of EC law (in particular through Art. 230 (formerly 177) ECT) offered 'equivalent protection' to that available under the ECHR. This is a questionable finding given that the ECJ itself has impliedly indicated that the restrictions on individual standing in EC law probably do not conform with Art. 6 ECHR. See Case C–50/00, *Unión de Pequeños Agricultores v. Council* [2002] ECR I–6677, paras 39–45. For an analysis of the *Bosphorus* ruling, see Costello, 'The *Bosphorus* ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe', 6 *HRLR* (2006) 87.

⁶⁸ ECtHR *Case of Capital Bank Ad v. Bulgaria*, App. No. 49429/99, 24 Nov. 2005, para. 111; *Bosphorus* case, *supra* note 66, at para. 154.

derives from its having entered treaty commitments . . . namely the Maastricht Treaty taken together with its obligations under the Council Decision and the 1976 Act [which implemented this Council Decision].⁶⁹

Although the responsibility of the state continues despite the delegation of power, there is nothing to suggest that the IGO itself also does not incur responsibility under international law.⁷⁰ While the ECnHR and ECtHR lack competence to pronounce on alleged violations by the EU or other IGOs, this does not mean that as a matter of international law, the EU is not bound to some extent by the provisions of the ECHR or any other human rights treaty to which any of its Member States is party. In this sense, the ECtHR has not hesitated to evaluate the conformity of acts of EU and EC organs with provisions of the ECHR when determining the responsibility of its Member States:

Admittedly, these case-law principles laid down by the Convention institutions concern the domestic legislation of States party to the Convention. However, the Court cannot see any major obstacles to their application to the acts of an international legal order [i.e., the EC or EU], like the one concerned in the present case.⁷¹

That which prevents the ECtHR pronouncing on the responsibility of the EC or EU is the fact that, as an entity, the EC or EU is not subject to the ECtHR's jurisdiction.⁷² In view of the limitations of imposing direct legal obligations, the following section will consider (from the perspective of EU law and international law) the indirect legal effect for the EU of Member States' treaty commitments towards third states. In the first instance, it will examine how these obligations affect the Member States in order to establish the continuity or otherwise of international human rights obligations. That is, it will examine the legal position of Member States which have incurred treaty obligations towards third states that they are not able to execute, either because they have delegated the necessary power to the EU, or because they have conflicting obligations under EU law. In the second instance it will examine whether these same legal obligations towards third states may imply legal obligations on the EU itself. In essence, it considers whether the continuing commitments can also be transferred to the EU. In this way, the EU may be indirectly acquiring human rights treaty obligations.

C Indirect Treaty Obligations

The EC Treaty contains limited provision for dealing with how EU law should relate to international law generally. Article 307 expressly makes provision for the status of Member States' pre-existing obligations towards third states. However, the Treaty

⁶⁹ *Mathews case*, *supra* note 67, at para. 34. Similarly *Bosphorus case*, *supra* note 66, at para. 153.

⁷⁰ On the existence of joint liability for IGOs and their Member States see International Law Commission, Report on 56th Session, 2004, A/59/10, 99–103; Hirsch, *supra* note 26, at 64–65; Wellens, *supra* note 26, at 52–53; White, *supra* note 26, at 219–224.

⁷¹ ECnHR Decision *Segi and Gestoras Pro-Amnistía v. the Fifteen States of the EU App.* Nos. 6422/02; 9916/02, 23 May 2002; *Mathews case*, *supra* note 71.

⁷² The ECnHR and ECtHR have held that they are 'not competent *ratione personae* to examine the proceedings before or decisions of organs of the European Communities, the latter not being a Party to the European Convention'. *Heinz decision*, *supra* note 66. Similarly the ECtHR, *Mathews case*, *supra* note 67, at para. 32; *Bosphorus case*, *supra* note 66, at para. 152.

does not contain explicit rules on how such obligations affect the EU itself. Rather, these rules have been developed through the case law of the ECJ and CFI. This section will examine these two issues in turn.

1 The Legal Consequences for EU Member States of their Pre-existing Obligations towards Third States

Article 307 ECT provides that '[t]he rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding states, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty'. Article 307 is limited in application to those agreements concluded before 1958, or before accession of the relevant Member State.⁷³ In the *Burgoa* case, the ECJ clarified that Article 307 'is of general scope and it applies to any international agreement, irrespective of the subject-matter, which is capable of affecting the application of the Treaty'.⁷⁴ In terms of human rights, this would implicate two treaties relevant to the protection of human rights which were concluded before 1958: most obviously the ECHR, but also the United Nations Charter insofar as it imposes human rights obligations.⁷⁵ Article 307 will also affect those Member States that acceded subsequently to the EU with obligations under later human rights treaties, such as the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic Social and Cultural Rights, 1966 (to which all EU Member States are party).⁷⁶ The question of treaties entered into by Member States after becoming members of the EU will be addressed below.

It might be objected that Article 307 is of no relevance to most of the Member States' pre-accession human rights obligations because it applies only to obligations owed towards third states. Obligations imposed by most human rights treaties are, on the surface, of a purely internal and non-reciprocal nature because they implicate the relationship between a state and the individuals within its jurisdiction, rather than the relationship between states.⁷⁷ However, it should be remembered (as noted above)

⁷³ Art. 307 appears to replicate the rule established in the Vienna Convention on the Law of Treaties, Art. 30(4)(b) which provides that a later treaty cannot supervene an earlier treaty in relation to obligations owed towards third parties.

⁷⁴ Case 812/79, *Attorney-General v. Burgoa* [1980] ECR 2787, at para. 6.

⁷⁵ 557 UNTS 143, 638 UNTS 308, 892 UNTS 1119. See preamble, para. 2 and Arts 1(3), 55, 56, 13(1)(b), 62(2), and 68.

⁷⁶ There are, of course, several other UN-sponsored human rights treaties which, combined with the ICCPR, are considered to form the 'core' of universal human rights protection. Most or all of the EU Member States are also party to these instruments: the ICESCR (see *supra*), the Convention on the Elimination of All Forms of Racial Discrimination (660 UNTS 195), the Convention on the Elimination of Discrimination Against Women (1249 UNTS 13), the Convention Against Torture (1465 UNTS 85), and the Convention on the Rights of the Child (1577 UNTS 3).

⁷⁷ In this sense the UN Human Rights Committee has noted that human rights treaties 'are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place.' See General Comment 24, in 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies', HRI/GEN/1/

that human rights obligations, while seemingly ‘inward-looking’, are in fact considered to be *erga omnes* in nature.⁷⁸ Any obligations incurred through a human rights treaty are therefore owed towards all states party to that treaty and not merely to individuals within a state’s jurisdiction.⁷⁹ In this sense, the human rights obligations of Member States must be considered necessarily to implicate relations with third states where they derive from a treaty to which third states are also parties. Further, human rights treaties ‘between’ states do exist.⁸⁰ The ECJ has, however, confirmed that where Member States have concluded treaties only as between themselves (i.e. without involving third countries), even where these were created prior to their entry into the Communities, Community law must take priority by virtue of Article 10 of the ECT (formerly Article 5).⁸¹

The ECJ has interpreted Article 307 to mean that Member States may not withdraw from obligations towards third states by simple virtue of accession to the ECT:⁸²

in accordance with the principles of international law, [the] . . . application of the [EC] Treaty does not affect the commitment of the Member State concerned to respect the rights of non-member States under an earlier agreement and to comply with its corresponding obligations.⁸³

Article 307 allows Member States that are under obligations towards third states to adopt measures incompatible with their obligations under the ECT ‘only if they are necessary to ensure that the Member State concerned performs its obligations

Rev.7, 12 May 2004, 165, para. 17. The ECJ has also acknowledged that treaties conferring rights on individuals should still be considered inter-state in nature for the purposes of Art. 307. See, e.g., Case C-158/91, *Levy* [1993] ECR I-4287.

⁷⁸ In the *Barcelona Traction* case, *supra* note 42, at 32, the ICJ found that the ‘rules concerning the basic rights of the human person’ in international law were *erga omnes* in nature. Similarly the UN Human Rights Committee, responsible for monitoring the implementation of the ICCPR, has stated that ‘every State party has a legal interest in the performance by every other State party of its obligations’ under the ICCPR. See General Comment 31, in ‘Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’, HRI/GEN/1/Rev.7, 12 May 2004, 192, para. 2.

⁷⁹ See decisions of the ICJ in the *Barcelona Traction* case, *supra* note 42, at 32; *East Timor*, *supra* note 39, at 102. See also Art. 48 of the ILC Draft Articles on State Responsibility, and Crawford, *supra* note 47, 276–280.

⁸⁰ Several human rights treaties contain state complaint procedures where one party considers another to have breached any provisions therein. This is the case, for instance, with the ICCPR (Arts 41–43), the International Convention on Racial Discrimination (Arts 11–13, CAT (Art. 21), Convention on Migrant Workers (Art. 74), ECHR (Art. 33).

⁸¹ ‘Article 5 of the Treaty provides that the Member States must take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty. If, therefore, the application of a provision of Community law is liable to be impeded by a measure adopted pursuant to the implementation of a bilateral agreement, even where the agreement falls outside the field of application of the Treaty, every Member State is under a duty to facilitate the application of the provision and, to that end, to assist every other Member State which is under an obligation under Community law’: Case 235/87, *Annunziata Matteucci v. Communauté française of Belgium and Commissariat général aux relations internationales de la Communauté française de Belgique* [1988] ECR 5589, at para. 19.

⁸² *International Fruit Company* case, *supra* note 37, at paras 11–13.

⁸³ Case C-124/95, *Centro-Com* [1997] ECR I-81, at para. 56.

towards non-member countries under an agreement concluded prior to entry into force of the Treaty or prior to accession by that Member State'.⁸⁴ Thus Article 307 permits Member States to disregard EU law if their prior obligations to a third state so require. In sum, Member States' legal commitments continue to subsist even after they join the EU.⁸⁵

This approach was recently confirmed by the Court of First Instance, as applying to human rights, in relation to pre-existing obligations under the UN Charter in its *Kadi*⁸⁶ and *Yusuf*⁸⁷ judgments. In examining the relationship between the UN Charter and the ECT, the CFI affirmed that, in view of Article 103 of the UN Charter (which accords primacy to obligations created under the Charter *vis-à-vis* other international agreements)⁸⁸ together with the application of Article 307 ECT (since the Member States were already party to the Charter before becoming members of the EU), the UN Charter prevailed over EU law:

From the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty.⁸⁹

The CFI thus acknowledged the application of international legal principles in the EU context. The implication of this is that 'Member States may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the United Nations'.⁹⁰ The CFI accordingly found that the Member States were under an obligation to apply Security Council Resolutions even where these violated EU law.⁹¹ Thus Article 307 by itself permits states to breach EU law, but, read together with Article 103 of the Charter, it in fact obliges Member States to breach EU law where this conflicts with obligations generated in the context of the UN.

⁸⁴ *Ibid.*, at para. 61.

⁸⁵ It is arguable that this clause must be applied only exceptionally: see Azoulai, 'The Acquis of the European Union and International Organisations', 2 *ELJ* (2005) 196, at 211. Azoulai states that the flexibility in Art. 307 'must be the exception, rather than the rule'. This is especially so as at the same time Art. 307 further requires Member States to 'take all appropriate steps to eliminate' any incompatibilities which may have arisen in these circumstances. Thus by Art. 307 the ECT also expresses a clear preference for Member States to resolve conflicting obligations in favour of rules deriving from the EU where this is possible. This would suggest that some of the Member States' pre-existing international legal commitments may be absolved on account of EU law.

⁸⁶ *Kadi*, *supra* note 53.

⁸⁷ *Yusuf*, *supra* note 54.

⁸⁸ Art. 103 of the UN Charter reads: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

⁸⁹ *Kadi*, *supra* note 53, at para. 181. *Yusuf*, *supra* note 54, at para. 231.

⁹⁰ *Kadi*, *supra* note 53, at para. 190. *Yusuf*, *supra* note 54, at para. 240.

⁹¹ *Kadi*, *supra* note 53, at para. 224. *Yusuf*, *supra* note 54, at para. 254.

Thus the CFI considered the Member States of the EU to be bound by the terms of the UN Charter, and obliged to implement obligations deriving from the Charter above those deriving from the EU. In the circumstances, the CFI was primarily concerned with establishing that the Member States were bound to implement Security Council resolutions because of the supremacy of the Charter. Nevertheless, its approach could logically be extended to the obligation to promote respect for human rights established by the UN Charter, which would also oblige Member States to ignore any part of EU law that violated human rights as articulated through the UDHR or ICCPR as the expression of 'human rights' in the Charter.⁹² This interpretation is reinforced in the *Kadi* and *Yusuf* decisions. The CFI went on to find that, while Member States' obligations deriving from the Charter were superior to those emanating from the EU, at the top of this hierarchy of norms⁹³ was the obligation to respect human rights.⁹⁴ Thus, although a Security Council resolution might 'trump' obligations derived from the Community, or even the ECHR, such resolutions were themselves subject to compliance with human rights. The CFI found that this was because the protection of human rights is among the aims of the UN in Article 1(3) of the Charter. The view of the CFI was that '[t]hose principles are binding on the Members of the United Nations as well as on its bodies'.⁹⁵ The CFI did not distinguish its analysis of which human rights were protected as *jus cogens* (discussed above) in international law, and which were protected as being part of the principles and purposes of the UN, leaving the implication that any rights that feature in the UDHR and ICCPR (which were the two instruments it referred to) would fall within this category.⁹⁶

⁹² Art. 1(3) of the UN Charter states that among the purposes of the UN are to 'achieve international cooperation. . . in promoting and encouraging respect for human rights and for fundamental freedom for all'. The UN Charter's human rights provisions are phrased in terms of encouraging cooperation to promote human rights. Arts 55 and 56 of the Charter, for instance, provide that all Member States 'pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of . . . universal respect for, and observance of, human rights'. Over time this provision has been interpreted by the General Assembly of the United Nations to disclose a legal obligation on UN Member States to implement human rights guarantees domestically. The GA has frequently used this wording: 'all Member States have an obligation to promote and protect human rights and fundamental freedoms as stated in the Charter of the United Nations and elaborated in the Universal Declaration of Human Rights, the International Covenants on Human Rights and other applicable human rights instruments.' See, e.g., GA Resolutions addressed to Bosnia and Herzegovina, Croatia, Serbia-Montenegro (53/163, 25 Feb. 1999, 54/184, 29 Feb. 2000), Cuba (47/139, 18 Dec. 1992; 48/142, 20 Dec. 1993; 49/200, 23 Dec. 1994; 50/198, 22 Dec. 1995; 51/113, 12 Dec. 1996; 52/143, 6 Mar. 1998) Democratic Republic of Congo (53/160, 9 Feb. 1999; 55/117, 12 Mar. 2001; 56/173, 27 Feb. 2001) Iran (52/142, 6 Mar. 1998), Iraq (52/141, 6 Mar. 1998), Myanmar (16/132, 17 Dec. 1991; 47/144, 18 Dec. 1992; 48/150, 20 Dec. 1993; 49/197, 23 Dec. 1994; 50/194, 22 Dec. 1995; 51/117, 12 Dec. 1996; 52/137, 3 Mar. 1998; 53/162, 25 Feb. 1999; 54/186, 29 Feb. 2000; 55/112, 1 Mar. 2001; 56/231, 28 Feb. 2002), Nigeria (52/144, 6 Mar. 1998; 53/161, 25 Feb. 1999), Sudan (54/182, 28 Feb. 2000; 55/116, 12 Mar. 2001; 56/175, 28 Feb. 2002).

⁹³ On the theory of the hierarchy of norms see H. Kelsen, *Pure Theory of Law*, (transl. M. Knight, 1967).

⁹⁴ 'Those principles are binding on the Members of the United Nations as well as on its bodies.' *Kadi*, *supra* note 53, at paras 228–230; *Yusuf*, *supra* note 54, at paras 279–282.

⁹⁵ *Kadi*, *supra* note 53, at para. 229. *Yusuf*, *supra* note 54, at para. 280.

⁹⁶ *Kadi*, *supra* note 53, at paras 241, 287. *Yusuf*, *supra* note 54, at paras 292, 342.

2 *The Legal Consequences for the EU of Member States' Obligations towards Third States*

It follows from the above that Community law, by virtue of Article 307, cannot be considered to override any human rights obligations incurred by Member States before becoming members of the EU. While Article 307 provides guidance for Member States on the status of their pre-accession international obligations towards third states, it contains no provision on what effect Member States' pre-accession obligations towards third states may have on the EU itself. Article 307 does not of itself provide that those international agreements are binding on the EC.⁹⁷ In other words, Article 307 does not place any obligations on the EC to undertake the duties arising from those agreements. Furthermore it might be objected that while states incur international responsibility individually for breaching their obligations towards third states by delegating powers to an IGO in such a way that prevents them from fulfilling these obligations,⁹⁸ this does not imply that the IGO itself should be subject to these obligations.

Nevertheless, it is possible to argue that, although the EU has not become party to a human rights treaty itself, the obligations incurred by its Member States by virtue of their membership of such treaties might impose obligations on the EU per se. How does this occur and what are those obligations? Some writers suggest that wherever states transfer powers to an IGO, the IGO may 'succeed to' or be 'substituted' for these states insofar as the powers transferred by them are subject to existing international obligations.⁹⁹ Thus the IGO becomes directly bound by the obligations of Member States where they relate to powers transferred to the IGO. The possibility of the EU 'succeeding' to its Member States' obligations has been accepted both by commentators¹⁰⁰ and the ECJ itself. For instance, the ECJ has acknowledged that where the Community has been given competence over issues that were previously subject to obligations incurred by its Member States, the responsibilities of Member States under international agreements may be passed on to the Community itself. Once this succession is accepted, the EC considers itself bound by the provisions of the agreement in the same manner as if it had adopted the agreement itself. The ECJ first recognized this possibility with respect to the General Agreement on Trade and Tariffs in the context of the Common Commercial Policy,¹⁰¹ finding that the incremental increase in the competence of the EC on the

⁹⁷ Case 812/79 *Attorney-General v. Burgoa* [1980] ECR 2787, at 2808.

⁹⁸ As discussed above in relation to cases brought against EU Member States at the ECtHR.

⁹⁹ See Schermers and Blokker, *supra* note 26, at §1574.

¹⁰⁰ Cheyne, 'International Agreements and the European Community Legal System', 19 *ELR* (1994) 581, at 587; D. McGoldrick, *International Relations Law of the European Union* (1997), at 121–123; Kuyper, 'The Community and State Succession in Respect of Treaties', in D. Curtin and T. Heukels (eds.), *Institutional Dynamics of European Integration: Essays in Honour of H.G. Schermers* (1994), ii, 640; Schermers, *supra* note 21, 251–252.

¹⁰¹ *International Fruit Company* case, *supra* note 37, reaffirmed in Case 38/75, *Douaneagent der NV Nederlandse Spoorwegen v. Inspecteur der invoerrechten en Accijnzen* [1975] ECR 1439; Cases 267/81 & 269/81, *Amministrazione delle Finanze dello Stato v. SPI and SAMI* [1983] ECR 801, 55 UNTS 194. Replaced by the World Trade Organization in 1995. For general information see <http://www.wto.org>, visited 28 June 2005.

subject matter of agreements concluded individually by Member States resulted in the succession of the Community to those obligations:

in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the general agreement, the provisions of that agreement have the effect of binding the Community.¹⁰²

This applied only to those parts of the agreement within the EC's exclusive competence. Only once the EC's competence covered all the areas of the agreement, did a complete transfer take place. This has led former ECJ judge Pescatore to surmise that

wherever functions have been transferred by the Member States to the Community in the field of external relations, these functions have been transmitted, to use an expression familiar to civil lawyers, *cum onere et emolumento*. By transferring certain powers and responsibilities to the Community, the Member States could not free themselves from the observation of standards agreed to in relation to third States; respect for the stability of international agreements and good faith in international relations make it essential therefore to admit that the transfer of powers has *ipso jure* entailed a succession to certain treaty rights and obligations in relation to third States.¹⁰³

The ECJ has also accepted this position with regard to the Convention on the Nomenclature of Goods in Customs Tariffs,¹⁰⁴ and the North-East Atlantic Fisheries Convention.¹⁰⁵ In respect of both of these agreements, the Community again had acquired exclusive competence. More recently, the CFI has accepted succession with regard to the UN Charter in the context of shared competence:¹⁰⁶

[A]s far as the powers necessary for the performance of the Member States' obligations under the Charter of the United Nations have been transferred to the Community, the Member States have undertaken, pursuant to public international law, to ensure that the Community itself should exercise those powers to that end. . . [I]n so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community. . . [I]t must be held that . . . the Community . . . in the exercise of its powers . . . is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations.¹⁰⁷

As noted above, the ECJ has not approached the issue of the EU's human rights obligations through the vehicle of succession, but rather has rooted human rights protection within the Community's own internal legal order.¹⁰⁸ However, the case

¹⁰² *International Fruit Co.* case, *supra* note 37, at para. 18.

¹⁰³ Pescatore, 'External Relations in the Case-Law of the Court of Justice of the European Communities', 16 *CMLRev* (1979) 615, at 637–638.

¹⁰⁴ 347 UNTS 127. See also *Douaneagent* case, *supra* note 96, para 16, where the ECJ affirmed that 'so far as fulfilment of the commitments provided for by GATT is concerned, the Community has replaced the Member States'. At para. 21 it repeated this in relation to the Convention on Nomenclature.

¹⁰⁵ 486 UNTS 157. Replaced by the 1980 Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries, Cmnd 8474. Cases 3, 4, & 6–76 *Kramer* [1976] ECR 1279.

¹⁰⁶ *Kadi* and *Yusuf* cases, *supra* notes 53 and 54.

¹⁰⁷ *Kadi*, at paras 198, 203–204. *Yusuf*, at paras 248, 253–254.

¹⁰⁸ Meessen, 'The Application of Rules of Public international Law within Community Law', 13 *CMLRev* (1976) 484, at 489.

law of the ECJ and CFI admits the possibility of succession and there seems to be no legal impediment to this applying to Member States' commitments under human rights treaties, insofar as they have transferred powers to the EU. In finding that the Community is bound by the UN Charter, and in finding that the UN Charter imposes obligations to respect human rights on all its Member States and bodies, the CFI by implication accepts the principle of succession for the EU to international human rights obligations. The difficulty arises in relation to the circumstances in which the ECJ has recognized that succession may occur. The ECJ has accepted succession only in relation to matters which were considered to fall within the EC's exclusive competence. While the CFI has recognized succession in an area of shared competence, this position cannot be regarded as definitive in EU law without a more authoritative ruling from the ECJ. As the majority of the EU's powers lie in areas of shared competence, this potentially diminishes the significance of possible succession to human rights treaty obligations. A further problem is that in cases where succession has been recognized, there seems to have been an express rather than an implied case transfer of obligations by Member States and acceptance by the EU.¹⁰⁹

Nevertheless, regardless of the stance of the ECJ over the EU's internal legal order, it has been maintained, from an international law perspective, that succession occurs wherever power is transferred to an IGO,¹¹⁰ irrespective of whether the transfer of competence is exclusive or shared (which is in itself a relative question depending on how a subject area is delimited).¹¹¹ Thus, Schermers argues that because all of the Member States of the EU were already party to the ECHR when acceding to or creating the Communities, the EU itself is bound by obligations that it has 'inherited' from its members:

As no one can transfer more powers than he has, the Member States were not competent to transfer any powers conflicting with these treaties to the Communities when they were established. . . . All government power was restricted in the sense that it could not go beyond the lines drawn in the [European] Convention [on Human Rights]. . . . In transferring power to a newly established Community, the Member States could not grant the Community any possibility to infringe the rights guaranteed by the Convention. Any rules made by the Community contrary to the Convention are therefore void.¹¹²

Succession from an international law perspective is thus potentially wider than that currently accepted by the ECJ and would not be dependent upon the exercise of exclusive competence by the EU. Furthermore, the issue of succession should not depend on any express transfer or acceptance on behalf of the Member States or the EU. To hold otherwise would allow states to escape their obligations by transferring powers to IGOs and simply not giving this formal recognition. Schermers sensibly suggests that the transfer of obligations occurs inherently wherever powers are

¹⁰⁹ See, e.g., *International Fruit* case, *supra* note 37.

¹¹⁰ Meessen, *supra* note 108, at 490.

¹¹¹ See, e.g., Barber, 'The Limited Modesty of Subsidiarity', 11 *ELJ* (2005) 308 Dashwood, 'The Relationship between the Member States and the European Union/European Community', 41 *CMLRev* (2004) 335.

¹¹² Schermers, *supra* note 21, at 251–252.

granted that are subject to these limitations. Express acceptance by the IGO seems necessary as a practical consideration, rather than a legal necessity.

Thus, the question should be which human rights principles or instruments are relevant to this issue? The case law of the ECJ and CFI has contemplated the possibility of succession only in relation to agreements entered into by Member States before becoming parties to the EU. Schermers highlights the same factor for the ECHR.¹¹³ No international source provides a definitive answer to this question. However, if succession is possible only for treaty commitments entered into before states became members of the EU, this potentially obfuscates the scope of human rights obligations to which the EU could have succeeded. While all the major UN-sponsored human rights treaties were adopted after the creation of the Communities,¹¹⁴ many Member States have later acceded to the EU after becoming party to these treaties. It also raises concerns about the consequences for the EU where the majority, but not all, of its Member States were party to a human rights treaty before joining. This is the case, for instance, in relation to the ICCPR, to which 16 of the current Member States were party before acceding to the EU.¹¹⁵ Seven of the remaining nine Member States were all parties to the ICCPR by 1983, with Ireland and Greece acceding to the ICCPR in 1989 and 1997 respectively.¹¹⁶

The narrowest possible answer is that the EU is bound, within its field of competences, to guarantee human rights as specified in the ICCPR in relation to 16 Member States. Another possibility would be to argue that the principle of succession should be read widely, so that states are seen to transfer duties at the point that they transfer certain powers to, rather than at the point of becoming members of, the EU. Thus, because all but two Member States were party to the ICCPR by 1983, it can be argued that any competences created or expanded for the EU since that time were subject to obligations created by the ICCPR. Perhaps a more sensible approach would be that offered to us by the CFI. As noted above, in its *Kadi* and *Yusuf* judgments, the CFI considered the ICCPR in terms of being an expression of 'human rights' as they featured among the purposes and principles of the UN. This substantially simplifies matters, because all Member States of the EU were previously members of the UN Charter. Thus, the EU can be considered to have succeeded to its Member States' obligations to guarantee human rights within its spheres of competence, as these are elaborated in UN-sponsored treaties to which they subsequently became party, among which is the ICCPR.

This is not to say that human rights treaties have created a general competence for the EU in the area of human rights. Those cases where the ECJ has acknowledged succession have related to the exercise of powers which were transferred as a 'bundle'

¹¹³ Though a problem here is that France did not ratify the ECHR until 1974.

¹¹⁴ See *supra* note 75.

¹¹⁵ Austria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Slovakia, Slovenia, Spain, and Sweden.

¹¹⁶ See 'Multilateral Treaties Deposited with the Secretary-General' (ST/LEG/SER/E/19), available at <http://www.ohchr.org/english/countries/ratification/4.htm>, visited 9 Jan. 2006.

from Member States to the EU, such as the common commercial policy. This consequence is much wider than in the case of succession to human rights obligations. It is not the case that the EU possesses a human rights policy by which it succeeds to the entirety of its Member States' obligations in the area of human rights. Rather, what is suggested here is that wherever, across all its fields of competence, Member States have delegated power to the EU, the EU will be bound by its Member States' human rights obligations.¹¹⁷

In sum, there are several possible ways in which the EU's human rights obligations can be rooted in international law. According to international law, the EU is bound to guarantee human rights in so far as they exist in CIL, and any EU law (treaty-based or secondary law arising from the Treaty) conflicting with rules of *jus cogens* will be considered void.¹¹⁸ Were the EU given the relevant competence to accede, it could be bound by human rights treaties directly. Further, the Member States themselves are obliged to observe their duties under the UN Charter given both their prior membership (according to EU law under ECT Article 307) and the supremacy of the UN Charter over other international agreements (according to international law under UN Charter, Article 103). The obligations flowing from the Charter include the obligation to guarantee human rights as they are elaborated in subsequent UN-sponsored instruments such as the UDHR and ICCPR. Finally, the EU itself, quite apart from the obligations on its Member States, is also under the obligation to guarantee rights arising from international agreements within its areas of competence. This principle of succession has been recognized by the ECJ regarding a few agreements where Member States have transferred exclusive competence to the EU. However, some writers and the CFI suggest that under international law succession applies more widely to include areas of shared competence. It is beyond the scope of this article to consider the practical implications of all of these possible ways in which international law can affect the EU's human rights obligations. The following section will, as a brief illustration, consider the implications flowing from the principle of succession in international law.

4 Implications of an International Law Approach

Two factors will be examined here in respect of the practical import of the finding that the EU could well be said to have succeeded to the human rights obligations of its Member States. First, it raises the possibility that the EU might be bound by certain

¹¹⁷ In respect of shared competence it would appear to be a case of applying the concept of subsidiarity and the doctrine of pre-emption on a case-by-case basis, in order to assess precisely which powers Member States had delegated. See Barber, *supra* note 111, and Dashwood, *supra* note 111. On a recent example of the ECJ's consideration of a delimitation of competence see Press Release No 10/06 of 7 Feb. 2006 on Opinion 1/03 of the ECJ, available at <http://www.curia.eu.int/en/actu/communiqués/cp06/aff/cp060010en.pdf>, visited 30 Mar. 2006.

¹¹⁸ Although the CFI has extended this category of *jus cogens* to human rights generally, it is more likely to have a more limited scope. Nonetheless there are already a not inconsiderable number of rights that are acknowledged to exist in CIL and as rules of *jus cogens*.

rights that are not considered to form 'general principles' of Community law (widening the 'content' of the EU's list of human rights). Secondly, it raises the possibility that the EU might be bound to go beyond merely 'respecting' (not violating) human rights, and fall under an obligation to adopt positive measures for the promotion and protection of human rights (changing the EU's currently limited 'method' of protection). These two implications are only exploratory and exemplary of the type of possible consequences.

A Different Rights

Succession of the EU to the human rights obligations of its Member States would bring different human rights into the EU system. As noted above in Section 2, the ECJ has shown little interest in drawing on treaties other than the ECHR for inspiration in elucidating the content of the 'general principles'. This has hitherto potentially excluded from the community legal order those human rights not featuring in the ECHR but found in other human rights treaties to which the Member States are party. Even if one accepts that the EU Charter of Fundamental Rights is intended to enumerate the current range of rights already respected by the EU as based on Member States' constitutions, ECJ case law, the ECHR, the European Social Charter, and other international treaties, such as the ICCPR and the UN Convention on the Rights of the Child,¹¹⁹ there are still rights contained in the 'core' global treaties that are not protected. One such example is minority rights.¹²⁰ It is of course true that minorities benefit from human rights generally, and particularly from the rule of non-discrimination and certain rights such as freedom of worship. However, the ECHR, to which the ECJ primarily looks for guidance on human rights, is not possessed of a specific provision relating to minority protection, such as that found in Article 27 of the ICCPR and neither are minority rights mentioned in the Charter of Fundamental Rights.¹²¹ Article 27 provides minorities with 'the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religions, or to use their own language'. As Hailbronner points out, there is added value to specific minority rights provisions, which goes beyond the protection provided by general human rights.¹²²

¹¹⁹ See *Convent 49, Explanations Relating to the Charter of Fundamental Rights of the European Union*, CHAR-TER 4473/00, available at http://www.europa.eu.int/charter/pdf/04473_en.pdf, visited 30 June 2005. See also De La Rochere, 349; Lord Goldsmith, 'The Charter of Rights—A Brake Not an Accelerator' [2005] *European Human Rights Law Review* 473, at 474.

¹²⁰ The reference to minority rights is only exemplary. There may be other rights that fall outside the general principles of EU law, but would come into play, such as for instance some social or cultural rights that are not currently recognized as general principles of EU law.

¹²¹ Note, however, that the ECHR in Protocol 12 now secures the prohibition on discrimination as a free-standing right, rather than being parasitic on the enjoyment of other rights as was previously the case. Among the grounds (as in the original Art. 14 ECHR) is protection against discrimination on the basis of 'association with a national minority'. See Khaliq, 'Protocol 12 to the European Convention on Human Rights' [2001] *Public Law* 457.

¹²² '[T]he very existence of Article 27 indicated that ethnic, linguistic or religious minorities possess special rights in addition to other human rights . . . specific protective measures are indispensable according to the situation of every particular group. . . [E]very State is obliged to provide such groups with the legal foundations

Thus, the international law approach is such that the EU is legally bound to fulfil obligations towards minorities where minority concerns arise within the sphere of the EU's competence. This is a right which currently is not protected per se under the ECJ's catalogue of fundamental rights. One ramification of this is that there would be a duty on the EU not to adopt law that is inconsistent with minority rights. For instance, environmental law which places obligations on Member States to preserve the environment may be of such a nature that in order to fulfil it Member States must limit accommodation sites for traveller or Gypsy communities or restrict reindeer breeding or fishing rights of minority groups. This could amount to a failure to preserve minority cultural rights.

B Expanded Nature of the EU's Obligations

1 Present 'Negative' Approach

The nature of human rights protection within the EU is essentially 'negative'. That is, the EU is seen to be under a duty not to violate human rights when it takes steps to fulfil the obligations arising from the Treaty.¹²³ It is considered to be under a duty not to violate human rights whenever it takes action, but without any general competence to take positive action on human rights.¹²⁴ Thus, in the *Grant* case, the ECJ found that directives prohibiting discrimination during the course of employment on the grounds of gender¹²⁵ in execution of former Article 119 of the EC Treaty¹²⁶ (prohibiting sexual discrimination) did not violate the EU's human rights obligations for failing also to prohibit discrimination on the ground of sexual orientation:

[A]lthough respect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community.¹²⁷

to preserve their specific ethnic, religious and cultural identity': Hailbronner, 'The Legal Status of Population Groups in a Multinational State under Public International Law', in Y. Dinstein and M. Tabory (eds.), *The Protection of Minorities and Human Rights* (1992), 117, at 134. See also Pentassuglia, 'Minority Issues as a Challenge in the European Court of Human Rights: A Comparison with the Case Law of the UN Human Rights Committee' [2003] *German Yearbook of International Law* 401 and *idem*, 'Inside and Outside the European Convention: The Case of Minorities Compared', *Baltic Yearbook of International Law* (2006, forthcoming). See also General Comment 23 of the UN Human Rights Committee (HRC), responsible for monitoring correct implementation of the ICCPR, in *Compilation of General Comments and General Recommendations Adopted By Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev. 7, 12 May 2004.

¹²³ OJ 2002 C 325/1, OJ 2003 L 236/17.

¹²⁴ Opinion 2/94 *Accession by the Community to the European Convention on Human Rights* [1996] ECR I-1759, para. 27. Though note specific provisions on non-discrimination discussed *supra*.

¹²⁵ Council Directive 75/117/EEC of 10 Feb. 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45/19) and Council Directive 76/206/EEC of 9 Feb. 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions (OJ 1976 L 39/40).

¹²⁶ Current Art. 141 ECT.

¹²⁷ *Grant* case, *supra* note 14, at para. 45.

The approach of the ECJ to this question clearly highlights the limits of the manner in which the EU's competence is interpreted. The ECJ made clear that even if it had interpreted discrimination based on sex to include discrimination based on sexual orientation, the absence of a positive act of the EU which in fact did so discriminate meant that the directives implementing former Article 119 were not breaching human rights standards binding upon the EU. Even if Article 119 failed to prohibit discrimination on all those grounds mandated by human rights standards, there would be no breach of, or remedy under, the EU's internal law, because Article 119 expressed the limits of EU competence. If, on the other hand, Article 119 had mandated discriminatory treatment in a way that was inconsistent with human rights standards, then there would have been a violation of its obligations to respect human rights and the EU would be under an obligation to correct that. Thus the EU's internal human rights obligations would seem to be insufficient in general to impose positive obligations.¹²⁸ The EU's internal human rights regime is interpreted only to curtail positive acts by the EU institutions, not to mandate positive acts by them.

Weiler and Fries have suggested that such an assessment may understate the ECJ's positive obligations in relation to human rights.¹²⁹ Relying on *T Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung*¹³⁰ they argue that the EC may be responsible for its omissions, as well as its positive acts:

The Community Institutions are required to act in particular when the transition to the common organization of the market infringes certain traders' fundamental rights protected by Community law, such as the right to property and right to pursue a professional or trade activity.¹³¹

However, it is submitted that this cannot be seen as a true example of positive obligations. It is true that the EC was here required to take measures in order to ensure that individuals' rights were not violated. However, this obligation arose as a corrective measure incumbent on the EC only because it had itself already violated human rights through a positive act. Had its measures not violated those rights to begin with, there would have been no competence to take these 'positive' corrective measures. In this sense, the idea of positive measures described by Weiler and Fries is no more 'positive' than the payment of compensation or performance of other remedial action as may be ordered by the ECJ after finding a failure to respect human rights.

Furthermore, even though the European Commission may formulate policy in areas of EU competence, in other words, it may take positive action, the body responsible for verifying conformity of such policies with the EU's internal human rights obligations is the ECJ. As an adjudicatory body, the ECJ's jurisdiction is merely reactive. The ECJ may not oblige the Commission to initiate EU activities in the area of human rights or to formulate policy, unless the Commission's omission has violated human rights.

¹²⁸ *Ibid.*, at paras. 43–47.

¹²⁹ Weiler and Fries, *supra* note 3, 147, at 154 ff.

¹³⁰ Case C-68/95, [1996] ECR I-6065.

¹³¹ At para. 40.

2 Possible 'Positive' Approach

If the EU were bound by international human rights obligations, as the previous section has argued, then its duties to guarantee human rights can be conceived of in a tripartite classification currently employed by the UN's Committee on Economic Social and Cultural Rights (CESCR):

all human rights, impose . . . three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote.¹³²

The CESCR has advanced lucid interpretations of the nature of these duties.¹³³ The three obligations are dealt with separately in the ensuing discussion, even though it is appreciated that rights are complicated concepts and it is not always possible to single out such distinctive or independent elements. In General Comment No. 15, the CESCR stated that the obligation to *respect*:

requires that State Parties refrain from interfering directly or indirectly with the enjoyment of a right. This . . . includes . . . refraining from engaging in any practice or activity that denies or limits equal access to [the rights]; arbitrary interfering with customary or traditional arrangements.¹³⁴

Respect would include not preventing access to a right.¹³⁵ The obligation to 'respect' is on the state (or in this case, the EU) itself. The state (through its organs) must respect a right.¹³⁶ This duty is negative,¹³⁷ in other words it can be fulfilled by an authority simply refraining from action, without necessitating positive action by it.¹³⁸ 'The broad idea is not to worsen an individual's situation by depriving that person of the enjoyment of a declared right.'¹³⁹ As discussed earlier, the EU already accepts this element of human rights duties. The second component of human rights is the duty to provide. The stance taken by the CESCR is that the obligation to protect:

requires State parties to prevent third parties from interfering in any way with the enjoyment of the right . . . third parties include individual groups, corporations and other entities as well as agents acting under their authority.¹⁴⁰

¹³² CESCR, The Right to the Highest Attainable Standard of Health (Art. 12), General Comment 14, para. 33. See also CESCR, The Right to Education (Art. 13), General Comment 13, para. 46, CESCR, The Right to Adequate Food (Art. 11), General Comment 12, para. 15. See *Compilation of General Comments, supra* note 77.

¹³³ While they are now dealt with separately, there is often considerable overlap and fluidity between them.

¹³⁴ CESCR, The Right to Water, General Comment 15, para 21. See also the same views expressed in The Right to Adequate Food, General Comment 12, para 15; The Right to the Highest Attainable Standard of Health, General Comment 14, paras 33 and 34. See *Compilation of General Comments, supra* note 77.

¹³⁵ CESCR, General Comment 12, *supra* note 134.

¹³⁶ Steiner and Alston point out that for many, but not all, rights the duty to respect falls upon individuals and non-state actors: H. Steiner and P. Alston, *International Human Rights in Context, Law Politics and Morals* (2nd edn., 2000), at 182.

¹³⁷ De Witte, 'The European Community and its Minorities', in C. Brodmann *et al.* (eds), *Peoples and Minorities in International Law* (1993), 167, at 179.

¹³⁸ Nevertheless, it may require the existence of legal provisions in the first place obliging non-interference: see *X & Y v. Netherlands*, ECHR Series A No. 91 (1985) at 23, and resolutions of the CESCRs, cited in M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995), at 112.

¹³⁹ Steiner and Alston, *supra* note 136, at 182.

¹⁴⁰ E.g., CESCR, General Comment 15, para. 23, *supra* note 134.

This implies that there must be positive and targeted action from the authority in order to prevent third parties breaching the enjoyment of human rights.¹⁴¹ Such third parties refer to non-state actors such as private individuals and commercial enterprises.¹⁴² Protection of a right will involve the provision of preventive mechanisms (such as criminal or administrative sanctions for rights violating behaviour) as well as remedial mechanisms (such as an adequate investigation and recompensing of the victim) in the event of a breach.¹⁴³ This element of human rights duties goes beyond the EU's own understanding of its human rights duties.

Finally, the duty to 'fulfil' a right requires the state 'to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right'.¹⁴⁴

The CESCR provides clarification and guidance on how states ought to comply with this:

[t]he obligation to *fulfil* 'can be disaggregated into the obligations to facilitate, promote and provide. The obligation to facilitate requires the State to take positive measures to assist individuals and communities to enjoy the right. The obligation to promote obliges the State party to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastages. States parties are also obliged to fulfil (provide) the right when individuals or groups are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal'.¹⁴⁵

This final duty therefore has three components, which form a holistic approach to rights protection. It entails, much more centrally than for the previous two duties, positive action for the creation of the general conditions necessary for the achievement of the right¹⁴⁶ and commitment of state expenditure. States have a continual

¹⁴¹ 'There is a clear responsibility on states under international law, which extends beyond violations by those acting on behalf of the state and its organs, such as police officers, military personnel and security forces': Amnesty International, *Respect, Protect, Fulfil—Women's Human Rights, State Responsibility for Abuses by 'Non-State Actors'*, Sept. 2000, AI Index: IOR 50/01/00 at 2. In relation to the ECHR, Keir Starmer QC points to three theoretical bases for the acceptance of positive obligations (which would include actions to prevent breaches by third parties): Art. 1 ECHR requiring states to 'secure' a right; the principle that Convention rights must be practical and effective; and Art. 13 requiring effective remedies: K. Starmer, *European Human Rights Law* (1999), at ch. 5. The development of positive obligations by the ECtHR seems to be primarily justified by the need to make rights 'practical and effective': A. Mowbray, *The Development of Positive Obligations under the European Court of Human Rights* (2004), at 221.

¹⁴² Amnesty International, *supra* note 141, at 5.

¹⁴³ See HRC General Comment 31, para. 8 in *Compilation of General Comments, supra* note 77.

¹⁴⁴ CESCR General Comment 14, para. 33 in *Compilation of General Comments, supra* note 77.

¹⁴⁵ CESCR, General Comments 12, at para. 15, and 14, at paras 36–37, *supra* note 134 (emphasis in original).

¹⁴⁶ See for instance in relation to food, Art. 11(2) of the ICESCR, which reads: 'the States Parties to the present Covenant . . . shall take . . . the measures . . . which are needed . . . to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources . . . '.

duty progressively to realize the human right. International human rights law therefore regards fulfilment of ‘rights’ as a far-reaching notion. ‘To “promote” a right means to further it or advance it.’¹⁴⁷ Steiner and Alston further note that:

This state duty refers to bringing about changes in public consciousness or perception or understanding about a given problem or issue, with the purpose of alleviating the problem Unlike the duty of respect (do not worsen the situation of the rights-bearer), [the] duty to provide generally is meant to improve the situation of the rights-bearer.¹⁴⁸

It seems that this approach to classifying the content of human rights standards was first articulated by Asbjorn Eide as Special Rapporteur of the UN Commission on Human Rights on the right to food.¹⁴⁹ It was subsequently applied more widely to economic and social rights.¹⁵⁰ However, the CESCR has suggested that the classification applies to *all* human rights¹⁵¹ and it has now also been expressly adopted by the UN Committee on the Elimination of Discrimination against Women.¹⁵² Commentators now also seem agreed that this typology should not be limited to economic and social rights¹⁵³ and have begun to use it for human rights generally.¹⁵⁴

Although this typology has not been expressly adopted in international human rights case law, it is essentially consistent with the approach of bodies such as the ECtHR, the UN’s Human Rights Committee, and the Inter-American Court of Human Rights when supervising state compliance with their respective treaties.¹⁵⁵ Each of these treaties imposes a general duty on states to take those measures necessary at

¹⁴⁷ Budlender, ‘Justiciability of Socio-Economic Rights: Some South African Experiences’, in Y. Ghai and J. Cottrell, *Economic, Social and Cultural Rights in Practice* (2004), 33, at 37.

¹⁴⁸ Steiner and Alston, *supra* note 136, at 184. This necessarily implies a degree of public expenditure.

¹⁴⁹ Eide, ‘Asbjorn Report on the Right to Adequate Food as a Human Right’, UN Doc. E/CN.4/Sub.2/1987/23.

¹⁵⁰ Craven, *supra* note 138, at 109; Scott and Mecklem, ‘Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution’, 14 *Uni. Pennsylvania Law Rev.* (1992) 1, at 73–84; Budlender, ‘Justiciability of Socio-Economic Rights: Some South African Experiences’, in Ghai and Cottrell, *supra* note 147, at 33. H. Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (2nd edn., 1996), at 52–53; Van Hoof, ‘The Legal Nature of Economic, Social and Cultural Rights. A Rebuttal of Some Traditional Views’, in P. Alston and K. Tomasevski, *The Rights to Food* (1984), at 97, 106–107. It is currently applied by the UN’s Committee on Economic, Social and Cultural Rights (CESCR) in its work supervising the implementation of and elaborating on the meaning of the ICESCR 1966. See, e.g., CESCR General Comments 11–15, in *Compilation of General Comments, supra* note 77.

¹⁵¹ See *supra* note 127.

¹⁵² CEDAW General Comments 24 and 25, in *Compilation of General Comments, supra* note 77.

¹⁵³ The need to enumerate rights in this way has probably arisen with economic and social rights because of the perceived difficulty in quantifying the content of the obligations incumbent on the state. This typology has allowed the CESCR to be more explicit in enumerating state obligations to their fullest extent.

¹⁵⁴ E.g., Scott and Macklem state that ‘[o]ver the decades, the United Nations has invested considerable energy in developing the idea of a multilayered obligations structure that may potentially be generated for any right whether it be a civil liberty or a social right’: Scott and Mecklem, *supra* note 150, at 73. See also Alston and Steiner, *supra* note 136; Amnesty International, *supra* note 141; McCrudden, ‘Mainstreaming Human Rights’, in C. Harvey (ed.), *Human Rights in the Community, Rights as Agents for Change* (2005), at 9, 12, and 14. Craven, *supra* note 138, at 110; K. Tomasevski, *Women and Human Rights* (1993), at 107.

¹⁵⁵ For a review of the relevant ECtHR case law see Mowbray, *supra* note 141. For the HRC, see generally Joseph, Schultz, and Castan and General Comment 23, at paras 6.1–6.2, in *Compilation of General Comments, supra* note 77.

the national level to secure or ensure the rights protected by the relevant treaty.¹⁵⁶ For instance, in the case of *Nachova v Bulgaria*, where it was alleged that the Bulgarian police failed adequately to investigate the murder of an individual on racial grounds, the ECtHR underlined that '[c]ompliance with the State's positive obligations under Article 2 of the Convention requires that the domestic legal system must demonstrate its capacity to enforce criminal law against those who unlawfully took the life of another'¹⁵⁷ and further:

that effective implementation of the prohibition of discrimination requires the use of specific measures that take into account the difficulties involved in proving discrimination [such as] . . . anti-discrimination legislation, including evidentiary rules tailored to deal with the specific difficulties inherent in proving discrimination.¹⁵⁸

The Human Rights Committee has taken a similar view with regard to the rights of minorities protected by Article 27. For instance, Article 27 states that 'persons belonging to . . . minorities shall not be denied the right . . . to enjoy their own culture'. Despite the negative phrasing of this provision, the Human Rights Committee found that:

culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.¹⁵⁹

Similarly the Inter-American Court has affirmed that states parties are 'under the general obligation to adjust their domestic legislation to the provisions of the Convention itself, to thus guarantee the rights enshrined in the Convention. Domestic legal provisions to this end must be effective . . . which means that the State must adopt such measures as may be necessary for actual compliance with what is set forth in the Convention.'¹⁶⁰ In this spirit, the Inter-American Court has found that:

the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right of access to the conditions that guarantee a dignified existence. States have an obligation to guarantee the creation of the conditions required in order that violations of the basic right do not occur.¹⁶¹

Thus, in relation to the rights of the child the Inter-American Court has found that 'education and care for the health of children require various methods of protection

¹⁵⁶ The ECHR Art. 2 requires a state to 'secure everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention'. The American Convention on Human Rights Article 1 requires states 'to ensure to all persons subject to their jurisdiction the free and full exercise' of the rights listed in the Convention and Article 2 more explicitly requires states to carry out 'such legislative or other measures as may be necessary to give effect to those rights and freedoms'. The ICCPR essentially replicates this at Art. 2.

¹⁵⁷ *Nachova et al. v Bulgaria*, App. Nos. 43577/98 and 43579/98, 6 July 2005, para. 160.

¹⁵⁸ *Ibid.*

¹⁵⁹ HRC General Comment 23 in *Compilation of General Comments*, *supra* note 77, at para. 7.

¹⁶⁰ *Bulacio v. Argentina*, Series C No. 100, para. 142.

¹⁶¹ *Villagran Morales et al.* case (the 'Street Children' Case), Series C No. 63, para. 144.

and are the key pillars to ensure enjoyment of a decent life by children, who in view of their immaturity and vulnerability often lack adequate means to effectively defend their rights'.¹⁶²

The typology of 'respect, protect and fulfil' can be seen as a particular means of expressing and conceiving of existing human rights obligations. It is widely acknowledged that the EU institutions are already under a duty to respect human rights, that is, that they may not directly violate human rights when they act. It is argued here that, according to a generally accepted concept of international human rights law, the EU is also under a duty to protect and fulfil human rights which are inherent aspects of human rights guarantees. This is not to say that the EU is under a duty to formulate a general human rights policy by which it takes action to protect or fulfil human rights in a comprehensive manner. What is argued, rather, is that in those areas where the EC and EU have competence, not only are their institutions under an obligation to refrain from actively violating human rights, but that they are also under the obligation to protect and fulfil human rights in those areas.¹⁶³ Such action cannot be considered as an expansion of the EU's or EC's existing competence precisely because each time the Member States have transferred competences to the EC and EU, they have transferred the duties incumbent on them. Just as Member States were required to 'respect, protect and fulfil' those rights when they possessed competence in the relevant areas, so is the EU. Of course, the extent of the EU's and EC's duty to act will vary according to the degree of competence in a given area and the principle of subsidiarity. The clearest example of the EU's responsibility is where there is exclusive competence, and where the obligations arising from that competence cannot be adequately performed by the Member States and can be better performed through collective action by the EU, as per Article 5 ECT.¹⁶⁴ Since the EU is thus taking action instead of the Member States, it becomes responsible for overseeing that human rights are protected. Where there is shared competence and subsidiarity requires that action is taken both at the EU level and the Member States level, then the EU is responsible for human rights only in those areas in which it is acting.

5 Conclusion

This article has reviewed the possible ways in which the EU might be subject to international human rights law, according to international rules. Four avenues were

¹⁶² Juridical Condition and Human Rights of the Child, Advisory Opinion 17, OC-17/2002, para. 86.

¹⁶³ See, e.g., Weiler and Alston, *supra* note 3, at 23–24: 'it is clear that within carefully delineated boundaries, the Community and the Union do enjoy the necessary jurisdiction to enact a comprehensive and meaningful policy . . . [C]onsider some of the areas in which the Community has assumed exclusive competence, such as major aspects of the Common Commercial Policy, of the Common Agricultural Policy (which often implicate rights to property), or of the Single Market concerning the free movement of labour. It seems self-evident that in those areas it is only the Community which could reasonably be considered to be the custodian of human rights—in the same way that the Member States are custodians of human rights in the vast areas of state jurisdiction, like criminal law, which are largely outside Community jurisdiction.'

¹⁶⁴ *Ibid.*, at 27.

explored, which all rely upon the EU's status as an IGO with duties and responsibilities in international law. As an IGO, the EU is bound by CIL; it can also directly accede to human rights treaties (although this has not yet occurred); it may also acquire indirect treaty obligations from Member States' pre-existing human rights commitments; or it may have succeeded to the international human rights obligations incurred by its Member States subsequent to the creation of the EU. In the case of succession, international legal rules admit a wider range of agreements than the present nature of succession according to EU jurisprudence. This wider range of agreements can include human rights treaties, such as the ECHR and the ICCPR. While some of these conclusions are not derived from concrete legal sources or jurisprudence, they serve as an important means of ensuring the observance of human rights by IGOs which often exercise powers of relevance to human rights protection. As stated above, Member States cannot absolve themselves of their responsibilities towards protecting the human rights of their populations by transferring powers to entities such as the EU. Neither is the EU the appropriate actor to decide upon which human rights obligations it will impose on itself (as Article 6 TEU currently does). If the international law of succession is applied, the EU's human rights commitments change in at least two ways. The EU is under a duty not only to respect classical civil and political human rights (such a duty being recognized in EU law through the notion of general principles of EU law) but also to respect other rights, including minority rights, and to protect and fulfil all such rights. The obligations on the EU are, of course, constrained by the extent of Community competence and subsidiarity, but nevertheless, on this reading, such obligations, founded in general international law, reach further than current EU law understandings of the EU's human rights obligations.

If it is possible to accept that the EU is under direct obligations as a result of international law, one still has to consider the issue of enforcement. As noted above, currently the ECtHR and other monitoring bodies, such as the UN Human Rights Committee have no jurisdiction to hear claims against the EU as such, but only against Member States. This may be resolved if the relevant part of the constitutional treaty acquires legal force allowing the EU to accede to the ECHR. At the same time, it is clear that the CFI is willing to contemplate violations of international law by the EU as grounds for review under Articles 230¹⁶⁵ and 234.¹⁶⁶ Unfortunately though, such an approach might be hampered by the ECJ's apparent reluctance to rely on human rights treaties beyond the ECHR. Might the ECJ, the font of human rights protection within the EU, be willing to lead further development in the EU's approach to human rights protection beyond mere respect for the 'general principles'?

¹⁶⁵ E.g., *Yusuf and Kadi* cases, *supra* notes 53 and 54.

¹⁶⁶ *International Fruit* case, *supra* note 37.