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The Protection of Human Rights in the EU and the International Legal Orders: Interactions, Integration and Conflicts

Professor
Roberto Virzo

SUPERVISOR

Matr. 082742
Sara Nicoletti

CANDIDATE

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Contents

INTRODUCTION

"The European Court of Justice and the International Court of Justice are both courts born of war, established by interstate treaties and having their seats in European cities. The relationship between Luxembourg and Strasbourg has been well explored, and has developed over the years. The major issue today seems to be one of the coherence of human rights protection in Europe"[1].

This opening of a work by Judge Higgins is the starting point of our dissertation. Both the United Nations and the European Union are products of the willingness not to repeat the atrocities of the Second World War. Thus, given their common goal, we might expect a high degree of dialogue and cooperation between the institutions of these two legal orders when it comes to the recognition and protection of human rights. Whereas this cooperation has always been formally declared, it has sometimes been hard to put it in practice, especially due to the reluctance of the European Union to give up to part of its autonomy in order to fully comply with the standards imposed by the United Nations.

The aim of this work is thus to explore the several implications produced by the interactions between the two legal orders, both considered champions of human rights protection and development worldwide, and the consequences of their reluctance to integrate. In order to do so, the first chapter will be entirely devoted to analyse how human rights have developed and have been protected within the United Nations system, including the deficiencies this system presents. In the second chapter we will try to accomplish the same result with the European Union, focusing also on the relationship between the Union and another important instrument of human rights protection present in Europe, namely the Council of Europe. This is because it is within the Council of Europe that the first European protection mechanism, the European Convention on Human Rights, was born, with its European Court of Human Rights.

Both chapters, which are quite independent from one another, contain special focuses on the development of their respective human rights laws through the jurisprudence of their main Courts. In particular, the focus in the first chapter is on the International Court of Justice, while in the second is on the European Court of Justice. In fact, both Courts have had a pivotal role in developing standards of protection and the creation and recognition of new rights. After these first two chapters, we will attempt to explore how the two legal orders interact, or do not interact, and what are the consequences of this intricate relationship. We will also hint at some possible ways to enhance cooperation, explaining why this would be desirable. The attempt is the one of providing a new perspective from which we can look at the question of fragmentation of international law, since "Only a few scholars have examined the issue in this integrated fashion and this constitutes a blind spot in contemporary legal analysis of the European legal order"[2].

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[1] R. HIGGINS, *The ICJ, The ICJ and the Integrity of International Law*, in *International and Comparative Law Quarterly*, 2003, LII n.1, p.1.

[2] S. BESSON, *European Legal Pluralism After Kadi*, in *European Constitutional Law Review*, 2009, V n.2, p.239.

CHAPTER 1: HUMAN RIGHTS IN THE UN SYSTEM AND THE JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE

1.1 The Evolution of Human Rights in the United Nations System

1.1.1 The UN Charter

It is useful to the purposes of our analysis to start our discussion over the protection of human rights in Europe from the legal instruments provided by the United Nations system. Despite the problematic relation that the European Union engages with the international legal order, it is nevertheless worth noting that all the Member States of the European Union are in fact members of the United Nations[3], thus bound by its founding Charter. This legal relation is confirmed, though with some cautions, by article 351 TFEU (former article 307 EC Treaty), according to which EU Member States remain bound to the legal obligations subscribed before their accession into the Union, and this involves the UN Charter and many other UN legal instruments, as highlighted by Ahmed and de Jesús Butler in their article for the 2006 European Journal of International Law[4]. The authors also point out the broad scope given to the interpretation of article 307 by the CJEU in the *Burgoa* case, in which it is stated that the application of the above-mentioned article refers to "any international agreement, irrespective of the subject-matter"[5]. This formulation allows us to infer that the article applies also to all those aspects of the Charter which relate to human rights issues.

Before 1945, the year of the foundation of the United Nations during the San Francisco Conference, human rights protection was considered mainly a national competence of States. However, subsequently to the horrors of the Second World War and the related Nuremberg and Tokyo trials, the protection of human rights became an international concern, given the newly born fear that States were not the proper bodies to accomplish this task.

For this reason, already in its first article, the UN Charter declares that: "The Purposes of the United Nations are (...) to achieve international cooperation in (...) promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion"[6]. The competence of the United Nations in this field are further clarified in article 55, which restates the promoting role of the Organization, and articles 13 and 62, which give respectively to the General Assembly and the Economic and Social Council (ECOSOC) the competence to issue Recommendations for the purpose of promoting human rights.

The presence of these provisions in the Charter marked, according to many, the progressive erosion of national sovereignty in matters traditionally perceived as exclusive competences of States. Following professor Marchesi's reasoning in his book *Diritti umani e Nazioni Unite*, this perception stems from the widely spread belief that the division of competences between the international and national orders is a

[3] Information taken from *un.org*, accessed 14 March 2019.
[4] T. AHMED and I. DE JESÙS BUTLER, *The European Union and Human Rights: an International Law Perspective*, in *The European Journal of International Law*, 2006, XVII n.4, p.784.
[5] Judgement of the European Court of Justice of 14 October 1980, Case 812/79, *Attorney-General* v *Burgoa*, para. 6.
[6] Art.1 par.3, UN Charter.

horizontal one, i.e. a division according to the subject-matter. He argues instead that such division should be seen as a vertical one, which focuses not on the subject-matter but on the type of relationship that is being disciplined[7]. According to this view, there would not occur any erosion of national sovereignty without the consent of the given State. Furthermore, the Charter itself presents a provision that reasserts the prominent role of sovereign States in the protection of human rights, namely article 56: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55"[8]. From here it is clear that the burden of action relies primarily on States, which shall act in cooperation with the UN in a complementary manner.

1.1.2 The Universal Declaration of Human Rights

Article 68 of the Charter envisages the possibility for the ECOSOC to establish commissions for, among other fields, the promotion of human rights. And it was precisely one of these commissions, the Human Rights Commission, replaced in 2006 with the Human Rights Council, which was charged to draft an International Bill of Rights. In 1948, the Commission presented to the General Assembly the Universal Declaration of Human Rights ("UDHR"). Given the composition of the UN at the time and the international panorama, the Declaration reflects the political landscape of that period, as underlined by Marchesi[9]. In particular, it expressed the political will of democratic States, traditionally France and the USA, to transpose their own set of rights at the international level. This provoked a discontent from socialist States, who claimed for the insertion of social rights along with the civil and political ones. This is an issue that will be addressed some years later, but it is not the object of this paragraph. Therefore, for now it suffices to say that many socialist States abstained when the UDHR was presented to the General Assembly. Furthermore, some issues are addressed with caution in the Declaration, due to their being sensitive for some of the States parties.

Nevertheless, the most relevant aspect of the UDHR is the very fact that it is a declaration. As pointed out by J. Morsink, the original mandate by the ECOSOC entailed also an implementation machinery for what should be a covenant instead of a mere declaration. The reason why in the end the declaration form was chosen was the strong opposition by the US and the USSR in the complex context of the Cold War[10].

All these shortcomings and complexities, however, should not lead us to think at the UDHR as a useless instrument. On the contrary, "The fact that the Declaration itself is not intertwined with any piece of this machinery of implementation gave it from the start an independent moral status in world affairs and law. More than fifty years after its adoption it now is the moral backbone and source of inspiration of a whole new branch of international law"[11].

[7] A. MARCHESI, *Diritti umani e Nazioni Unite. Diritti, obblighi e garanzie,* Milan, 2007, p.23-24.
[8] Art 56, UN Charter.
[9] A. MARCHESI, *op.cit.,* p.14.
[10] J. MORSINK, *The Universal Declaration of Human Rights. Origin, Drafting and Intent*, Philadelphia, 1999, p. 13-20.
[11] J. MORSINK, *op. cit.,* p.20.

Therefore, though not strictly binding, the Declaration is highly authoritative from a moral point of view, and it inspired not only the drafting of several binding covenants, but also national Constitutions. In addition, there are several legal considerations that have made the rights of the Declaration legally enforceable. First of all, it is now acknowledged that almost all of them are to be considered general principles of International Law, thus binding on all States parties. Secondly, it has been recognized by the International Court of Justice, as we will see later, that basic human rights constitute obligations *erga omnes*, regardless of a given State's subscription of any international covenant[12]. Finally, the great majority of the rights enunciated in the Declaration is part of that corpus of International Law commonly referred to as *jus cogens*, i.e. "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"[13]. Therefore, if a norm of whatever kind is not compatible with a human right expressed in the Declaration and recognized as *jus cogens*, according to article 64 of the Vienna Convention on the Law of Treaties ("VCLT"), that norm must be declared void. All these considerations give a greater power to the Declaration, but still the necessity of more effective instruments, equipped with an implementation machinery, was felt since the first years after its drafting.

1.1.3 Binding legal instruments: the two Covenants of 1966

"1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations"[14].

This provision is the common Article 1 of the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Social, Economic and Cultural Rights ("ICESCR"), both ratified in 1966 and entered into force in 1976. Already from the long period that it took to eventually make these Covenants enter into force, the enhanced difficulty that covenants entail, compared to declarations, is evident. According to Marchesi, this difficulty is the result of both the delicate international relations at the time, which made the General Assembly an arena for an ideological war, and the reluctance of both parties to the fight to seriously commit to binding instruments[15].

[12] Judgement of the International Court of Justice of 5 January 1970, *Case concerning Barcelona Traction, Light and Power Co, Ltd (Belgium* v *Spain)*, p.32.
[13] Art.53, Vienna Convention on the Law of Treaties.
[14] Art.1, International Convention on Civil and Political Rights and International Convention on Social, Economic and Cultural Rights.
[15] A. MARCHESI, *op. cit.*, p.30.

The Covenants contain a series of obligations, directed to States, which reflect the tripartite classification made in the context of case-law and commentaries, in particular regarding the ICESCR, in obligation to "respect, protect and fulfil"[16] human rights. Therefore, obligations stemming from the Covenants are very complex in nature, since the obligation to respect entails a negative duty to refrain from obstaculating the enjoyment of a right. The obligation to promote envisages the duty to prevent third parties from interfering in the enjoyment of a right. Finally, the obligation to fulfil requires a positive duty to adopt all the necessary measures to ensure that a particular right can be enjoyed[17].

This suggests that the Covenants contain both negative and positive obligations, a characteristic which is in stark contrast, as we will see later, with the EU protection system. Nevertheless, all the Union Member States are parties to the Covenants. In this regard, Ahmed and de Jesús Butler in their article raised the issue of succession. This is because the theory of succession is generally accepted for those agreements concluded by Member States before their accession to the EU, but for the ICCPR this is problematic, since only 16 States acceded to the Union after ratifying the ICCPR. Therefore, would EU succession still be in place? The answer is, according to the authors, yes: "Wherever, across all its fields of competence, Member States have delegate power to the EU, the EU will be bound by its Member States' human rights obligations"[18]. To reinforce the power of the Covenants on the EU Member States, the Human Rights Council has also stated that it is not possible for them to apply Article 351(2) TFEU[19] to the ICCPR, thus impeding withdrawal from or denunciation of it[20].

Going back to the characteristics of the Covenants, their division has given rise not only to different implementation mechanisms, but also to a misbelief that there might be a hierarchy between the two, and thus that the rights contained in one may be sacrificed in favour of the protection of the rights contained in the other. As highlighted by Marchesi, the 1993 Final Act of the Vienna Convention on Human Rights has proclaimed the indivisibility and interdependence of all human rights, definitely discarding the hierarchical conception[21].

1.1.4 Thematic treaties

Before concluding this section, it is important to acknowledge the existence of several UN human rights treaties that are concerned with more specific violations or vulnerable groups, ratified in order to go beyond the general provisions of the Covenants. These treaties are: the International Convention on the Elimination of All Forms of Racial Discrimination (1969), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1987), the Convention on the Rights of the Child (1990), the International Convention

[16] General Comment No.14 of the CESCR of 2000, The right to the highest attainable standard of health (Art.12), par.33.
[17] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *The European Union and International Human Rights Law*, 2011, p.14-16.
[18] T. AHMED and I. DE JESÚS BUTLER, *op. cit.*, p.792.
[19] "To the extent that such agreements are not compatible with the Treaties, the Member State or States shall,where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude".
[20] General Comment No.26 of the Human Rights Council of 1997 on Continuity of Obligations, paras.1-2.
[21] A. MARCHESI, *op. cit.*, p.31.

on the Protection of the Rights of All Migrant Workers and Members of Their Families (2003), the International Convention on the Rights of Persons with Disabilities ("CRPD") (2008), and the International Convention for the Protection of All Persons from Enforced Disappearance (2010).

The first four treaties were signed by all EU Member States, the CRPD was signed also by the Union as such, while interestingly the Convention on Migrant Workers was not signed by any EU member, and the one on Protection from Enforced Disappearance by only some of them.

We will come back on these treaties in the next section, which is specifically concerned with their mechanisms of implementation.

1.2 The Protection of Human Rights in the United Nations System

1.2.1 Political Controls

In the previous section, we have explored how the notion of human rights has evolved and expanded in the UN system. Nowadays, however, in Norberto Bobbio's words "Regarding human rights, the biggest problem of our times [is] not founding but protecting them (...) It is not about knowing which and how many these rights are (...) but what is the safest way to guarantee them, to impede that despite solemn declarations they are constantly violated"[22].

To this purpose, ECOSOC Resolutions 1235 (XLII) of 1967[23] and 1503 (XLVIII) of 1970[24] gave to the Human Rights Commission the competence to start procedures, respectively public and confidential, to discuss alleged violations of human rights in a given country and to produce resolutions. The first one deals with complaints issued by other States, while the second addresses individual complaints. They were both revised after the substitution of the Human Rights Commission with the Human Rights Council in 2006.

The introduction of a Human Rights Council was proposed already in 2005 by Secretary-General Kofi Annan in his report *In a Larger Freedom*, and after complex negotiations it was finally created through the General Assembly Resolution 60/251 of 15 March 2006[25] [26]. The main differences with the Commission are its reduced membership, the fact that it is a branch of the General Assembly and not of the ECOSOC, and the higher frequency of its meetings. From a substantial point of view, little regard is given to the two procedures previously mentioned, in favour of another kind of procedure that was considered more effective, the special procedures. These mechanisms, already envisaged within the competences of the Commission, are thematic or country-specific procedures, which "undertake country visits; act on individual cases of alleged violations and concerns of a broader, structural nature by sending communications to States; conduct

[22] N. BOBBIO, *L'età dei diritti*, Turin, 1997, p.17-18. Quoted in V. SCIARABBA, *Tra Fonti e Corti. Diritti e principi fondamentali in Europa: profili costituzionali e comparati degli sviluppi sovranazionali*, Padua, 2008, p.XXVIII. My translation from Italian.

[23] Resolution 1235 (XLII) of the United Nations Economic and Social Council, of 6 June 1967, regarding the question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories.

[24] Resolution 1503 (XLVIII) of the United Nations Economic and Social Council, of 27 May 1970, regarding the procedure for dealing with communications relating to violations of human rights and fundamental freedoms.

[25] A. MARCHESI, *op. cit.*, p.97-98.

[26] Resolution 60/251 of the United Nations General Assembly, of 15 March 2006, regarding the Human Rights Council.

thematic studies and convene expert consultations, contributing to the development of international human rights standards; engage in advocacy and raise public awareness; and provide advice for technical cooperation. Special Procedures report annually to the Human Rights Council and the majority of the mandates also report to the General Assembly"[27].

Moreover, the above-mentioned Resolution previews the establishment of a Universal Periodic Review ("UPR"), which gives the possibility to the Council to produce a review on the situation of human rights in the territories of all Member States, in relation to all the main UN human rights instruments, involving both the State reviewed and other three States ("*troika*") that support the work of the Council. Reviews are organized in cycles of 4 years and a half, in order to have the time to review all the 193 States. The current cycle started in 2017 and will end in 2021[28].

1.2.2 Treaty Bodies

Each of the "core" UN human rights treaty has a mechanism of implementation that consists in what is commonly referred to as a "treaty body", i.e. "Eighteen experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as of the principal legal systems"[29].

At the moment there are ten treaty bodies, one for each of the nine human rights treaties plus one for the Optional Protocol of the Convention against Torture (2006)[30].

The main function of the Treaty Bodies is the one of receiving periodic State reports that all Member States are required to submit between every two to five years. The object of reports is the measures of implementation of the provisions of the treaty put in place (or not) in the territory of each State. State parties must ensure a comprehensive review, the adequacy of available data, the use of benchmarks to track progress, sufficient publicity and engagement of stakeholders, and a State representatives' status that would allow them to answer questions in the Committee[31]. After the initial submission, the Committee will engage in a dialogue with the reporting State, requesting further information to it or to competent NGOs[32].

If on the one hand this mechanism guarantees a minimum control, the fact that States are the ones who are in charge of reporting their own faults makes it not always effective. However, the development of precise guidelines on how to write reports and the action of NGOs have buffered the problem[33].

Whereas this procedure is mandatory, there are some facultative ones, based on State or individual communications. While the first one has not proven to be very effective, due to some political considerations, the second is regarded as extremely incisive. Not only does it provide an instrument for

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[27] Information taken from *ohchr.org*, accessed 18 March 2019.
[28] Information taken from *ohchr.org*, accessed 20 March 2019.
[29] Art.8, International Convention on the Elimination of all forms of Racial Discrimination ("ICERD"). Similar definitions are given also in the other Treaties.
[30] Information taken from *ohchr.org*, accessed 20 March 2019.
[31] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.38.
[32] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.37.
[33] A. MARCHESI, *op. cit.*, p.116.

individuals to have a damage repaired (they have to prove personal concern in order to issue a communication), but it also overcomes the main shortcoming of State reports, since in this case there are no State interests to be preserved by the reporting subject[34].

The last possibility that treaty bodies have to exercise control is the issuing of general comments and recommendations, or the launch of inquiries *proprio motu*. This mechanism was introduced by the Convention against Torture, at the condition that the Committee gets hold of reliable information on an alleged violation of human rights in a given country. Given the independence of members of Committees, this mechanism is widely appraised[35].

The mechanisms described above are used by Committees in a complementary manner, and their bindingness derive both from Article 2(2) UN Charter[36] and from the obligation to provide an effective remedy stemming from Article 8 UDHR[37]. The treaties themselves also contain provisions affirming this obligation, e.g. Article 2(3) ICCPR, Article 2(c) Convention on the Elimination of all forms of Discrimination Against Women ("CEDAW")[38].

In Chapter 3, we will deal with how the European Union engages with the mechanisms provided for by the treaty bodies.

1.2.3 Other Guarantees

After talking about the main international guarantees, the first consideration to be made at this point is that, given the overarching principle of national sovereignty, the primary burden of the protection of human rights lies within State organs in their internal administration. This is evident in the wording of international obligations, which mainly appeal to national legislative and judicial bodies to implement an effective human rights protection. In this perspective, international norms must be considered subsidiary guarantees[39], to which it is necessary to recur to only in those cases where internal mechanisms are absent or not sufficient.

Marchesi calls a *de facto* guarantee also the action of non-governmental organizations, which we briefly mentioned in the previous paragraphs. Apart from producing shadow reports for the treaty bodies (fact-finding), NGOs are also engaged in activities of campaigning, i.e. actions of sensibilization of the public opinion, and of lobbying or advocacy, i.e. actions of pressure on public authorities[40].

Finally, going back to properly international mechanisms, it is useful to underline the role in the protection and promotion of human rights of two important types of institutions, namely peacekeeping missions and international criminal tribunals.

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[34] A. MARCHESI, *op. cit.*, p.117-129.
[35] A. MARCHESI, *op. cit.*, p.129-130.
[36] "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter."
[37] "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."
[38] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.39.
[39] A. MARCHESI, *op. cit.*, p.58.
[40] A. MARCHESI, *op. cit.*, p.61.

Regarding the first, peacebuilding missions and international observatories are particularly relevant to our analysis. One of the most striking examples is the UN mission in Namibia (UNTAG 1989-90), whose mandate included not only elections supervision, but also the establishment of a Constituent Assembly, the possibility for all adult Namibians to vote freely and secretly, the repeal of discriminatory laws, the return of refugees and the freeing of political prisoners[41].

International criminal tribunals are a much more complex issue, given their diversity and their often *ad hoc* nature. In general, they have been established to punish *delicta juris gentium*, i.e. war crimes, genocides and crimes against humanity. The most famous *ad hoc* tribunals of such kind are the International Tribunals for Rwanda and for the former Yugoslavia.

1.3 The International Court of Justice

1.3.1 The Court and Judicial Law-Making

Whereas in the previous sections we have gone through the major mechanisms of human rights protection in the UN system, we will now turn to the pivotal role of the International Court of Justice (ICJ). In the words of N. Singh, "No account of the international aspect of human rights would be complete without a mention of the views of the International Court of Justice which have been progressive, developmental and helpful to the cause of human rights"[42]. For this reason, the remainder of this chapter will be dedicated to the study of the contribution of the ICJ to the matter.

First of all, it is necessary to make some preliminary considerations on the nature of the Court and one of its most debated activities, namely its judicial law-making.

According to Articles 3 and 9 of the ICJ Statute, the Court is composed of 15 judges representing all the main forms of civilization and legal systems. The parties submitting their dispute, which in contentious cases are only States[43], may request a judge *ad hoc* from their own country in the case where their nationality is not already represented by one of the 15 regular judges. The Court is entitled to, following Article 38 para.1 of its Statute, settle legal disputes submitted to it by States, and, according to Article 65, issue advisory opinions to international bodies authorized to do it.

As far as judicial law-making is concerned, there is an ever-going debate on whether judges should simply apply law or should they contribute to develop it. The first approach is commonly referred to as "judicial conservatism", and it is typical, among others, of many British legal scholars. The second is called "judicial activism", and it is based on judge Denning's conception that "Law does not stand still. It moves

[41] L.M. HOWARD, *UN Peace Implementation in Namibia: The Causes of Success*, in *International Peacekeeping*, 2002, IX n.1, p.103.
[42] N. SINGH, *Enforcement of Human Rights in Peace and War and the Future of Humanity*, Dordrecht, 1986, p.27. Cited in S.R.S. BEDI, *The Development of Human Rights Law by the Judges of the International Court of Justice*, Portland, Oregon, 2007, p.85.
[43] Art.34 par.1, ICJ Statute.

continually. (...) [The judge] must consciously seek to mould the law so as to serve the needs of the time. He must be an architect"[44].

The ICJ have often adopted this second approach, as confirmed by its former President Judge Jennings in 1992. He recognized that the Court should not simply be concerned with dispute settlement, but also, through it, with the development of international law[45]. Although he was referring mainly to international environmental law, the same can be said about human rights law, as we are going to see in depth in the next section.

1.3.2 ICJ's Judicial Law-Making in Human Rights Law

As underlined by Judge Higgins, the ICJ is not a Human Rights Court as such[46]. Nevertheless, both the ICJ and its predecessor, the Permanent Court of International Justice ("PCIJ") contributed heavily to the development of international human rights law through their case-law. Higgins points out at the fact that nowadays many international instruments related to human rights have been created, both internationally and regionally, thus the load of human rights-related cases submitted to the ICJ is pretty light. However, we should acknowledge its role in the evolution of these rights, and in particular of important concepts such as the one of self-determination. We will address this issue in the next section, but for now it suffices to say that, even if the Court seldom deals with cases directly concerned with human rights, it has been fundamental in moulding international law towards a better protection of them through judicial law-making.

According to Higgins, the role of the PCIJ in this sense started in the 1920s and 30s, when human rights were perceived as being only minority rights[47]. It then helped to expand both the notion and the scope of protection, but the author was concerned, at the time of writing, that the Court might now stop this progression in favour of a more conservative approach, as exemplified by the decisions adopted in *East Timor*[48] and *Bosnia Herzegovina v. Yugoslavia* cases[49][50].

As far as the conservatism of the Court is concerned, it is important to remind that in many instances of the ICJ's case-law the progression of international human rights law was not determined by the official judgement expressed in the reasoning and the *dispositif*. On the contrary, whereas the latter have often proved themselves quite conservative, the actual breakthroughs in the development of the law were made by separate and especially dissenting opinions. The possibility for individual opinions at the end of the decision is envisaged in Article 57 of the ICJ Statute, in Article 95(2) of the Rules of Procedure of the Court (1978),

[44] Quoted in S.N. DHYANI, *Fundamentals of Jurisprudence: The Indian Approach,* Allahabad, 1997, p.335. Cited in S.R.S. BEDI, *op. cit.*, p.35.
[45] R. JENNINGS, *The Role of the International Court of Justice in the Development of International Environmental Law*, in *Review of European Community & International Environmental Law*, 1992, I n.3, p.241. Cited in S.R.S. BEDI, *op. cit.*, p.29.
[46] R. HIGGINS, *The International Court of Justice and Human Rights,* in R. HIGGINS (ed.) *Themes and Theories*, Oxford, 2009, p.639.
[47] *Ibidem*
[48] Judgement of the International Court of Justice of 30 June 1995, *East Timor case (Portugal* v *Australia)*.
[49] Judgement of the International Court of Justice of 11 July 1966, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v *Yugoslavia)*.
[50] Judgement *Genocide*, p.644-645.

and in the so-called handbook[51]. This practice, widely used by the Court, reflects a liberal and broad-minded approach to law, so it is no surprise that it has been so important in the development of human rights law[52].
Separate opinions are statements in which a judge, who agrees with the final decision of the Court, expresses a different reasoning to reach the same conclusions, or broadens the perspective. On the other hand, a dissenting opinion is expressed by a judge who voted against the final decision of the Court and decides to explain the reasons of her disagreement.
Many judges and scholars position themselves against this practice, on the basis that it weakens the authority of the Court, making its judgement appear fragmented. In particular, J.W. Bridge took inspiration from the ban to dissenting opinions in place in the European Court of Justice in order to propose the same thing for the ICJ[53]. However, as remarked by Professor Koskenniemi, "The disadvantages should not be overlooked: Judgements of the European Court of Justice not infrequently lack in elegance and coherence and it is difficult to estimate the likelihood of changes in the case as long as the judgements do not reveal whether, why and to what extent the Court is divided"[54].
This opinion was largely shared, and individual opinions are still a common practice in the ICJ.

1.4 The Development of Human Rights Law in the Case-Law of the ICJ

This section will explore some examples of the contribution given by the ICJ to the development of international human rights law. While not all cases directly concern European States, the principles developed by the Court in the following examples became milestones of International Law, strengthening protection of human rights in every area of the world, including Europe. The first two paragraphs will deal with contentious cases, the last with an advisory opinion requested to the Court.

1.4.1 South West Africa cases (Ethiopia and Liberia v. South Africa) 1962-1966

The main issue at stake in this case is, in the words of Judge Higgins, the difference between law seen as a set of rules and law seen as a process, with Higgins favouring the second option[55].
In 1960, both Ethiopia and Liberia questioned the application of the mandate of South Africa on South West Africa (Namibia) asking the end of the practice of *apartheid* in the region, basing their jurisdiction on Article 7 of the Mandate and Article 37 of the ICJ Statute.
In its first judgement in 1962, the Court accepted its jurisdiction despite the procedural objections by South Africa, mainly based on the questionable succession of the UN to the League of Nations, under which the

[51] INTERNATIONAL COURT OF JUSTICE, *Handbook*, The Hague, 2014, p.75.
[52] S.R.S. BEDI, *op. cit.*, p.93.
[53] J.W. BRIDGE, *The Court of Justice of the European Communities and the Prospects for International Adjudication*, in M.W. JANIS, *International Courts for the Twenty-First Century*, Dordrecht, 1992, p.97-98. Cited in S.R.S. BEDI , *op. cit.*, p.94.
[54] M. KOSKENNIEMI, *Commentary by Professor Martti Koskenniemi*, in C. PECK AND R.S. LEE, (eds.), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR. Colloquium to Celebrate the 50th Anniversary of the Court*, The Hague, 1997, p.347-348. Cited in S.R.S. BEDI, *op. cit.*, p.102.
[55] R. HIGGINS, *Problems and Process: International Law and How we Use it*, Oxford, 1994, p.19. Cited in S.R.S. BEDI, *op. cit.*, p.110.

Mandate had been established. The Court was firm in asserting that "no State party to a human rights litigation, in this pertaining norm of non-discrimination, before it can escape using strict formalism of law, or strict proceduralism, as a strategy of defence, can escape from its adjudication"[56].

This liberal and progressive judgement was further enriched by the separate opinions of Judge Jessup and Judge Bustamante. The first, concerning the question of the legal interest of Ethiopia and Liberia, argued for "the right of a State to concern itself, on general humanitarian grounds, with atrocities affecting human rights in another country"[57]. This notion might be considered the cornerstone of subsequent controversial practices such as the R2P doctrine and the issue of universal jurisdiction. Furthermore, Judge Bustamante reaffirmed the concept of "sacred trust of civilization", allegedly violated by South Africa with its discriminatory policies.

Unfortunately, this case is not remembered for this judgement, but for a subsequent and completely opposite one, delivered in 1966, or, as Falk called it, a "covert reversal"[58]. The procedural argument behind this revised reasoning was that the 1920 Mandate provided for judicial remedy only in the case of "special interests", not on matters of conduct, therefore Ethiopia and Liberia had no standing[59]. As underlined by both Bedi and Falk, however, there was also an ideological conservative argument, namely a neat distinction between law and morals and between law and politics. In rejecting jurisdiction, the Court blamingly avoided to pronouncing on the merits of the conduct held by South Africa, preserving the latter's sovereignty *vis-à-vis* the pressures of the international community (represented by the UN General Assembly). In doing this, the Court took an antithetic position to the one of 1962, where it was stated that "international law develops under pressure from the will of the international community. The General Assembly is a forum within which evolving normative standards can be accurately identified"[60].

Given this betrayal to human rights development by the Court, why is this case relevant to our purposes? The answer lies in the numerous, long and insightful dissenting opinions. The most famous of them is the one delivered by Judge Tanaka, an exponent of the natural law school and of a sociological and teleological interpretation of law. First of all, he established that the principle of equality (and thus non-discrimination) exists before the law and it is thus a source of International Law in the sense of Article 38 ICJ Statute. This is due to several reasons. Firstly, the ICJ, being a UN organ, is directly bound by the Charter, and in particular by Articles 1(3), 13, 55(c) and 56 regarding the duty to promote human rights. Given that South Africa is a UN Member State, its Mandate over South West Africa is directly bound by the Charter[61]. Moreover, he recognized that norms of non-discrimination fulfil the requirements of *diuturnitas* and *opinio iuris* so as to be considered International Customary Law, but also as a general principle of law, thus binding on all States regardless of the Mandate or of objections *ratione personae*, *ratione materiae* or *ratione*

[56] S.R.S. BEDI, *op. cit.*, p.114.
[57] Separate Opinion of Judge Jessup of 21 December 1962, *Joint cases of South West Africa*, *(Ethiopia* v *South Africa) and (Liberia* v. *South Africa)*, p.425.
[58] R.A. FALK,*The South West Africa Cases: An Appraisal*, in *International Organization*, 1967, XXI n.1, p.11.
[59] R.A. FALK, *op. cit.*, p.9.
[60] R.A. FALK, *op. cit.*, p.14.
[61] S.R.S. BEDI, *op. cit.*, p.129-132.

temporis. Finally, in a Kelsenian perspective, equality must be considered as the *Grundnorm* of the legal system[62].

Not only did Judge Tanaka contributed to the development of norms of non-discrimination, but also to considerations about human rights in general, above all the recognition of human rights as *jus cogens* grounded in natural law[63]. All these reflections result in the assertion that "the legislative imperfections in the definition of human rights and freedoms and the lack of mechanism for implementation do not constitute a reason for denying their existence and the need for their protection"[64].

To conclude, this case is an example of how, notwithstanding the occasional judicial conservatism of judgements, the development of human rights law can still be put in motion by dissenting opinions, especially when the latter represent the wills of the international community as expressed by the UN General Assembly. The seven dissenting judges appealed to a "future intelligence" of humanity, an intelligence that came already with the Advisory Opinion of the ICJ in 1971 on the Namibia case, to be addressed *infra*, and with the official abolition of the *apartheid* regime in 1991.

1.4.2 Barcelona Traction, Light and Power co, Ltd (New Application 1962) case (Belgium v. Spain) 1962-1970

The Barcelona Traction case was not directly concerned with human rights, but it is considered a hallmark in this regard anyway, because "While from a dispute settlement perspective the Court's handling of the case was disappointing, the Barcelona Traction judgement illustrates the Court's influence on the development of international law"[65], and in particular of human rights law. Since the history of the case is not that relevant to our purposes, it suffices to say that the contention concerned a Canadian company, whose shareholders were for a large part Belgian citizens, which was registered also in Spain and was submitted to legal procedures in Spanish Courts after its bankruptcy. In 1958, Belgium brought Spain before the ICJ, claiming that the legal actions undertaken by Spain were against international rules of diplomatic protection and asking that Spain paid compensation for the liquidated assets. In its 1970 judgement, the ICJ declared that Belgium had no *jus standi* in the case, since claims of diplomatic protection must be linked to the nationality of the plaintiff, and the relevant one in this case would have been Canada. What is important for us is, however, the remark by the Court that "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the protection of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*"[66]. Interestingly, for the first time the notion of *erga omnes* was not used to talk about the effects of a

[62] S.R.S. BEDI, *op. cit.*, p.132-136.
[63] S.R.S. BEDI, *op. cit.*, p.142.
[64] Dissenting Opinion of Judge Tanaka of 18 July 1966, *Joint cases of South West Africa*, *(Ethiopia* v *South Africa) and (Liberia* v *South Africa)*, p.290.
[65] C.J. TAMS and A. TZANAKOPOULOS, *Barcelona Traction at 40: The ICJ as an Agent of Legal Development*, in *Leiden Journal of International Law*, December 2010, XXIII n.4, p.782.
[66] Judgement of the International Court of Justice of 5 February 1970, *case on Barcelona Traction, Light and Power Company, Limited, (Belgium* v *Spain)*, p.32.

judicial decision on third parties, but about legal enforcement[67]. In such a situation, the claim by a third State before the ICJ is not to be considered a violation of sovereignty, but rather a vindication of those international obligations[68]. This conclusion can be ideally linked with the controversial South West Africa second judgement, because it finally recognizes the possibility for every State to have a legal interest in matters of human rights protection, and it finally reconciles the ICJ with the public opinion and the international community of the General Assembly.

Nevertheless, Tams and Tzanakapoulos cite other scholars who, even acknowledging the importance of this progress of the Court, argue that the notion of "*erga omnes* obligations" is still too theoretical, given that no case since then has been decided upon it[69]. On the contrary, the authors recognize that, being the *erga omnes* rule a residual one, which can be used to fill in legal vacuums, "there is a tendency (...) to use the *erga omnes* concept as a legal *vade mecum* that can conveniently be used to explain all sorts of legal effects. In the long run, this inflationary reliance may be the real challenge for the *erga omnes* concept"[70].

To sum up, given the way in which the South West Africa decision was indirectly rectified, and the influence that the notion of *erga omnes* obligations has had on adjacent fields of international law, the Barcelona Traction case can be viewed as a benchmark of the development of human rights protection.

1.4.3 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) case (1970-71)

After the Barcelona Traction case, another possibility for the Court to redeem itself from the infamous 1966 judgement came from the Advisory Opinion requested to it by the Security Council in 1970, regarding the very same occupation of Namibia by South Africa.

Despite the adoption by the General Assembly of Resolution 2145(XXI)[71], which had terminated the South African mandate over Namibia, in 1969 South Africa refused to withdraw from its occupation. For this reason, the UN Security Council adopted Resolution 276, which declared the occupation illegal, and thus every act from the South African government on behalf of Namibia should have been deemed invalid. Moreover, other States were encouraged not to conclude agreements with South Africa contrary to that declaration.

Due to another rejection by South Africa, the Security Council adopted two additional resolutions, and in the second one (Resolution 284) of 1970[72] it requested an advisory opinion to the Court regarding the following question: "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276(1970)?"[73].

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[67] C.J. TAMS and A. TZANAKAZOPOULOS, *op. cit.*, p.792.
[68] S.M. SCHWEBEL, *Human Rights in the World Court*, in *Vanderbilt Journal of Transnational Law*, 1991, XXIV n.5, p.965.
[69] C.J. TAMS and A. TZANAKAZOPOULOS, *op. cit.*, p.793.
[70] C.J. TAMS and A. TZANAKAZOPOULOS, *op. cit.*, p.794.
[71] Resolution 2145 (XXI) of the United Nations General Assembly, of 27 October 1966, regarding the question of South West Africa.
[72] Resolution 284 of the United Nations Security Council, of 29 July 1970, regarding Namibia.
[73] Advisory Opinion of the International Court of Justice of 21 June 1971, *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, p.17. Hereinafter "Advisory Opinion of the International Court of Justice on Namibia".

The complexity lied in the fact that the Resolution concerned assumed the validity of GA Resolution 2145(XXI), thus considering the Mandate terminated. However, France and South Africa had argued that the General Assembly had acted *ultra vires* in issuing that Resolution. The Court did not have the competence to make a judicial review of another UN organ which had not asked for an Opinion, thus it refused to review the validity of the General Assembly's Resolution. Anyway, it asserted the binding character of Security Council Resolution 276, and in doing so "the Court not only required Member States not to recognize South Africa's administration, but also imposed an affirmative obligation to apply pressure in order to force South Africa out of Namibia"[74].

Notwithstanding the non-binding nature of advisory opinions, what is important in this case is again the development of international human rights law. First of all, the concept of self-determination was clarified as being not only a prerogative of independent States, but also the ultimate goal of Mandates for non-independent nations. Judge Ammoun even argued that self-determination might be considered a principle of Customary Law, since it has long been present in the struggles for independence and the resulting charters and covenants (there is both *diuturnitas* and *opinio iuris*)[75].

Secondly, the ICJ made a clear statement against *apartheid*, defined by Judge Ammoun as simply "the negation of equality"[76]. Even if it was not legally necessary, the Court stated that "The former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter"[77].

Possibly more important than that to our purposes, the final acknowledgement of the ICJ was that, referring to Article 80 Para 1 UN Charter, individuals can be subjects of international law as well. These individual rights exist independently of international and supranational institutions. The "view that in international law people as such can become holders of rights and obligations"[78] is a milestone of the development of human rights law, but also of international law more in general.

1.5 Conclusion: a World Court of Human Rights?

In this first chapter, we have gone through the evolution of human rights in the UN system, to then analyse the main mechanisms of implementation. We have focused in particular on the International Court of Justice,

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[74] P. BROWN, *The ICJ 1971 Advisory Opinion on South West Africa (Namibia)*, in *Vanderbilt Journal of Transnational Law*, 1971, V n.1, p.239.

[75] S.R.S. BEDI, *op. cit.*, p.293-294.

[76] Separate Opinion of Vice-President Ammoun of 21 June 1971, Advisory Opinion of the International Court of Justice on Namibia, p.81.

[77] Advisory Opinion on Namibia, p.45.

[78] A. CASSESE, *The International Court of Justice and the Right of Peoples to Self-Determination*, in V. LOWE and M. FITZMAURICE (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, Cambridge, 1996, p.353. Cited in S.R.S. BEDI, *op. cit.*, p.295.

which through a tendency to judicial law-making has proven helpful in developing international human rights law, as exemplified by the three case-studies reported. However, along with the positive aspects of these mechanisms, also several faults have emerged, and a study that aims to be comprehensive should acknowledge them.

First of all, the treaty-bodies system often does not have the authority necessary to provide an effective enforcement. This, along with its fragmentation, is one of its main weaknesses, especially when it comes to individual complaints. Philip Alston individuated four main defects of the treaty bodies: capacity, efficiency, quality and the reporting burden[79].

Similarly, the ICJ has been useful in the development of core notions regarding human rights, but, as we have seen in the Namibia case, implementation of the Court's decisions is not always straightforward. Lastly, we should mention the fact that, although the Court recognized the status of individuals as subjects of international law, they are still not allowed to appear before it, as only States are allowed this legal standing.

Some scholars, in particular Manfred Nowak and Martin Scheinin, proposed the creation of a World Court of Human Rights ("WCHR") to tackle a large majority of these shortcomings. This would provide a greater coordination and consistency among the different implementation mechanisms of the treaty-bodies, in part solving the above-mentioned fragmentation. Furthermore, since it would be open to individual claims, it would guarantee a much better access to judicial remedies than the ICJ or any other UN mechanism[80].

Of course, this proposal did not come without sharp criticisms, the most relevant of which are expressed in Alston's article *A Truly Bad Idea: a World Court for Human Rights*. In a nutshell, what he argues is the following: "There are enormous practical challenges implicit in the assumption that any court could function effectively to pass judgment in response to complaints from over seven billion people. The cost would be vast, at least by the standards of any funds currently devoted to human rights protection at the international level. And the political prospects of almost any state being prepared to subject itself to a World Court with such a limitless jurisdiction (virtually any human right recognized in any international treaty) and with enforcement powers, would seem far from bright"[81].

Moreover, there would surely be problems of coordination with regional human rights protection mechanisms, such as those envisaged by the EU or the Council of Europe.

A viable compromise might be, on one hand, the strengthening of implementation mechanisms within the treaty-bodies system, and on the other, the opening of the ICJ to individual complaints in highly circumscribed situations. This last option, however difficult to put in practice, would also be consistent with previous statements of the Court which have recognized individuals as subjects of international law, and would guarantee them due protection in human rights matters.

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[79] P. ALSTON, 1989 Report (n.8). Cited in F.D. GAER, *The Institutional Future of the Covenants: a World Court for Human Rights?,* in D. MOECKLI and H. KELLER (eds), *The Human Rights Covenants: Their Past, Present, and Future,* Oxford, 2018, p.6.

[80] F.D. GAER, *op. cit.*

[81] P. ALSTON, *A Truly Bad Idea: a World Court for Human Rights*, in *openDemocracy.net*, 13 June 2014.

For the purposes of our analysis, we will now move on to analyse the human rights protection system previewed by the European Union, to come back at an international perspective and the relationship between the two in the last chapter.

CHAPTER 2: HUMAN RIGHTS IN THE EU SYSTEM AND THE JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE

2.1 The evolution of Human Rights in the EU System

2.1.1 The EU as a Human Rights Body

The European Union was not born as an international organization concerned with the protection of human rights. In the view of the drafters of the Rome Treaty of 1957, establishing the European Economic Community, the latter was meant to integrate different national economies, and "human rights were gradually introduced as limits to the discretion of supranational institutions"[82]. For this reason, the rights mentioned in the Treaty were just those necessary to attain the economic goals set during the Messina Conference. Only in the subsequent decades, and thanks to a prominent role of the European Court of Justice (ECJ or CJEU), the Community, then the Union, came to be "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights"[83].

This narrative, according to which human rights were not envisaged in the original project, and assumed a central role only later in the history of the Union, is challenged by an interesting piece of research conducted by de Burca. She argues that the original federalist project thought by Altiero Spinelli, Aristide Briand and Jean Monnet, and culminated with the draft of the European Political Community ("EPC") Treaty in 1954, was much more ambitious in terms of human rights protection than the current Union[84], but "those attempts were consigned not just to history, but to obscurity"[85]. The reasons for this abrupt change of direction was mainly political, since after the defection by France it was perceived as more prudent to go for a merely economic integration, and to leave the issue of human rights to the Council of Europe, perceived as less threatening because it was not endowed with strong enforcement powers over Member States.

After this step back, the issue of human rights appeared again in a European treaty only in 1986, in the preamble of the Single European Act ("SEA"), which underlined the will of State Parties to make progress in the promotion and protection of fundamental rights[86]. Subsequently, in the Maastricht Treaty we find that "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law"[87].

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[82] A. VON BOGDANDY, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, in *Common Market Law Review*, 2000, XXXVII n.6, p.1308.
[83] Art.2, Treaty on European Union.
[84] G. DE BURCA, *The Road Not Taken: The European Union as a Global Human Rights Actor*, in *American Journal of International Law*, 2011, CV n.4, p.649-693.
[85] G. DE BURCA, *op. cit.*, p.653.
[86] Preamble, Single European Act.
[87] Art. F par. 2, Maastricht Treaty.

However important this obligation is from a symbolic point of view, it was not inserted among those issues subject to the jurisdiction of the CJEU, thus its power was limited[88].

The Treaty of Amsterdam of 1997 is the real breakthrough in European human rights protection. First of all, in its Article 46d (now abrogated) it extended the competences of the Court to human rights issues, and it institutionalized the accession criteria (the so-called "Copenhagen criteria"), among which it figures the respect for human rights. Furthermore, from the wording of the preamble it is evident a clear shift from a Community concerned with the development of the market to a Union based on the rule of law and fundamental rights. Eventually, a mechanism to deal with breaches committed by a Member State was introduced in Article 7[89].

The most recent treaty at the time of writing is the Lisbon Treaty, entered into force in 2009. Its drafting came as a result of the failure of the constitutional treaty in 2004, and it has similar aspirations, though being less prone to define itself as a "Constitution". The most important innovation to our purposes is the Charter of Fundamental Rights, which we are going to delve into in the next paragraph, but also Article 6 TEU, in which all the sources of human rights in the European Union are listed, along with the obligation for the EU to accede the European Convention on Human Rights ("ECHR"):

"1. The Union Recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law"[90].

In the next paragraphs, we are going to explore more in detail the role of the Charter and of constitutional traditions common to Member States, as well as the main mechanisms of protection. We will leave the analysis of the third source, the ECHR, for the next section of this chapter.

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[88] N. NAPOLETANO, *L'evoluzione della tutela dei diritti fondamentali nell'Unione Europea*, in A. CALIGIURI, G. CATALDI and N. NAPOLETANO (eds.), *La tutela dei diritti umani in Europa. Tra sovranità statale e ordinamenti sovranazionali*, Padua, 2010, p.17-18.

[89] N. NAPOLETANO, *op. cit.*, p.18-20.

[90] Art.6, TEU.

2.1.2 The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union was signed in December 2000 in Nice as a non-binding instrument. In addition, its creation was overshadowed by the concomitant ratification of the Nice Treaty, thus in the first period after its drafting it was not granted much attention and value[91].

It was only with the Lisbon Treaty that the Charter was given the same legal value as the treaties, thus assuming the status of European primary law, directly enforceable in national Courts of EU Member States. Despite this huge gap between its creation and its acquisition of a binding character, during this period the Charter was often referred to within the jurisprudence of the CJEU, underlining its authoritative standing.

The Charter lists 50 rights, divided in six categories: Human Dignity, Freedoms, Equality, Solidarity, Citizen Rights, Justice. Along with civil and political rights, it contains also social and economic ones, as well as some "third generation" rights, such as those regarding cloning or data protection[92], thus providing a more extensive and updated list than the ECHR.

Since it has become primary law, the Charter has now three main functions. Firstly, it is a support to interpretation, given that "both EU secondary law and national law falling within the scope of EU law must be interpreted in the light of the Charter"[93]. Secondly, since the rights contained in it have been recognized as general principles of EU law, they can function as grounds for judicial review. Eventually, they continue to be "a source of authority for the 'discovery' of general principles of EU law"[94].

However, the scope of the Charter is qualified in two ways. First of all, it applies only to those fields falling under EU law. Although it is true that the competences of the Union are increasingly expanding, it is still a relevant limitation. Secondly, differently from the ECHR, it does not contain any absolute right with universal application. Every right or principle indicated in the Charter can be qualified if such restrictions are "necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others"[95].

Another important qualification is provided by the distinction between rights and principles, as outlined in Article 52 para.5 of the Charter: "The provisions of this Charter which contains principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality". The main problem of this discrimination is that only three articles in the whole Charter explicitly use the word "principle" (Articles 23, 37 and 47), while for the others is often difficult to understand if the text is talking about a right or not, especially since many articles contain both rights and

[91] S. DOUGLAS-SCOTT, *The European Union and Human Rights After Lisbon,* in *Human Rights Law Review*, 2011, XI n.4, p.650-651.
[92] S. DOUGLAS.SCOTT, *op. cit.,* p.651.
[93] K. LENAERTS, *Exploring the Limits of the EU Charter of Fundamental Rights,* in *European Constitutional Law Review*, 2012, VIII n.3, p. 376.
[94] *Ibidem*
[95] Art.52, Charter of Fundamental Rights of the European Union.

principles[96]. The Explanations to Article 52 offer little help since they only remark what has already been said and further add that principles "do not (...) give rise to direct claims for positive action by the Union's institutions or Member States authorities"[97]. Once this lack of clarity has been acknowledged, the responsibility to clarify the issue is left to the Court of Justice[98].

2.1.3 Constitutional Traditions Common to Member States

As stated in Article 6(3) TEU, the "constitutional traditions common to Member States" shall be regarded as general principles of EU law. We will see later in this chapter how this came to be affirmed in the jurisprudence of the European Court of Justice, in a dialectic relationship with many national Constitutional Courts, especially the German and Italian ones.

In the struggle of the Union to find a common standard for human rights protection, it is evident that national constitutional traditions cannot be of great help, since they provide "a necessarily incoherent source"[99]. As exemplified by Douglas-Scott, cases such as *Omega Spielhallen* show this fragmentary nature of constitutional traditions. In *Omega*, a case revolving around a game that simulated homicide, there was a dispute between Germany and the UK, which allegedly held two different standards for the protection of human dignity. The Court, in upholding the German ban to the game, specified that the decision was not taken on the basis of traditions common to Member States, but instead considered the matter as a Member States' competence. What can be extrapolated from this situation is that "rather than unifying and harmonizing fundamental rights in the EU, Member States constitutional traditions may in fact separate them, operating not as a condition of legality of EU action, but rather as Member States defences to EU action"[100].

2.1.4 Protection of Human Rights in the EU Institutions

Although it is widely recognized, and the Court of Justice has repeatedly stated, that the European Union does not have competence to implement positive obligations regarding human rights[101], the EU institutions have developed some mechanisms of protection in the last decades, some of which are very close to be positive obligations.

Firstly, the European Commission has declared in 2009 the intention to submit every legislative proposal to a human rights impact assessment, in order to ensure compliance with the Charter, and it has expressed the willingness to verify Member States' compliance with the Charter when implementing EU law[102].

Secondly, the Council has drafted some guidelines for Member States, regarding their relationship with third parties and how human rights can be promoted in these contexts.

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[96] S. DOUGLAS-SCOTT, *op. cit.*, p.652.
[97] Explanations relating to the Charter of Fundamental Rights, of 14 December 2007, OJ C-303, p.34.
[98] K. LENAERTS, *op. cit.*, p.400.
[99] S. DOUGLAS-SCOTT, *op. cit.*, p.670.
[100] *Ibidem*
[101] See Judgement of the European Court of Justice of 27 June 2006, case C-540/03, *European Parliament* v *Council of the European Union*, para.104.
[102] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.10.

The European Parliament, on its behalf, has created many committees charged with the dealing of issues closely related to human rights, and it often encourages the other EU institutions to ensure both protection and promotion of human rights[103].

Furthermore, it is to be underlined the creation, in 2007, of the European Union Agency for Fundamental Rights (FRA), funded by the Union budget and charged with the task to provide assistance and independent and evidence-based consultancy to the EU institutions and Member States in matters regarding fundamental rights[104]. It is relevant to the purposes of our analysis to delve a little bit into the methodology adopted by the FRA. This is because the latter is one of the few EU human rights organ which relies heavily on international instruments (including UN human rights treaties), and it uses them as a background against which to assess Union's policies and suggest modifications[105].

The FRA is currently conducting many pieces of research in fields such as LGBT discrimination, Roma discrimination, migration and asylum policies, access to justice and gender equality[106].

Finally, there is a branch of human rights in which the European Union has developed its own comprehensive regime, namely non-discrimination. The area of its greater application is obviously the economic one, which is also responsible for the very origin of the EU non-discrimination regime. This regime was in fact introduced to prevent Member States of the newly-born European Economic Community to engage in a race to the bottom, resulting in a loose protection of workers (in terms of cost of labour) or of gender equality. Many directives have been promulgated during the past decades in order to preserve minorities of all kinds from discrimination, but the final provision in this direction is Article 10 TFEU, according to which: "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation"[107]. The wording of the Article suggests that "the EU should ensure not only that its policies themselves do not discriminate, but also that they promote equality"[108]. Therefore, especially after the entry into force of the Lisbon Treaty (and thus of the Charter of Fundamental Rights), the EU has been gradually moving toward a more comprehensive human rights regime, starting from its most familiar themes such as economic concerns, entailing negative as well as positive obligations.

In the next paragraph we are going to analyse the last, and probably most relevant and most problematic, source of human rights protection in the European Union: the European Convention on Human Rights.

[103] *Ibidem*
[104] Information taken from *fra.europa.eu/it*
[105] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.10.
[106] Information taken from *fra.europa.eu/it*
[107] Art.10, TFEU.
[108] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.10.

2.2 The EU and the European Convention on Human Rights

2.2.1 Origins and Features of the Convention

The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was drafted in 1953 within the Council of Europe, at a time when the conception of the European Union was still in its embryonic phase, and it was gradually signed by all its Member States. Today, all the 47 Member States of the Council of Europe are parties to the Convention.

The original text of the ECHR listed the core civil and political rights, such as the right to life, the prohibition of torture, the right to a fair trial, and many others. While it drew its list mainly from the Universal Declaration on Human Rights, the Convention does not comprehend all of the rights present in the Declaration, but only some of them. Nonetheless, the original catalogue has been gradually widened by the jurisprudence of the European Court of Human Rights ("ECtHR"), an organ of the Convention, and by 16 additional protocols. Despite this expansion, the Convention still does not include many of the "second generation" rights listed in the ICESCR, thus providing overall a more qualified protection than the one envisaged by the UN system[109]. An additional limitation is given by the fact that, whereas the ratification of the Convention is mandatory for those wishing to join the Council of Europe, Member States are under no obligation to ratify the additional protocols. This results in different levels of protection across European States, a differentiation made even more pronounced if we consider also the differences between those States who are members of the EU and those who are not[110].

The rights listed in the Convention have no hierarchical order, and they are indivisible and interdependent. However, the ECHR distinguishes between derogable and inderogable rights, the latter being those contained in Articles 2, 3, 4 and 7 (right to life, prohibition of torture, prohibition of slavery and forced labour, principle of legality of crimes and punishments). Another distinction is made between those provisions which only envisage negative obligations and those giving rise to positive ones. This differentiation is not explicitly present in the text of the ECHR, but it has been developed by the jurisprudence of the Court[111].

The European Court of Human Rights, instituted in 1959, has acquired a compulsory jurisdiction only with Protocol 11. It is a court of last resort, subsidiary to national courts, which adopts a principle of autonomy from national legal orders. When it comes to restrictive measures, the Court usually tends to leave a great margin of discretion to Member States, with the only exception of inderogable rights.

The Court was given a greater binding force, with the possibility for the Committee of Ministers to take measures against a party to a dispute who does not comply with the judgement, by Protocol 14 (Article 16). That same Protocol is famous also for another reason, namely the amendment of Article 59 of the Convention in order to envisage the accession of the European Union to the Convention.

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[109] A. VITERBO, *Origini e sviluppo della Convenzione europea dei diritti umani,* in A. CALIGIURI, G. CATALDI and N. NAPOLETANO (eds.), *op. cit.*, p.77.
[110] A. VITERBO, *op. cit.*, p.78.
[111] A. VITERBO, *op. cit.*, p.78-79.

2.2.2 The Accession of the EU to the ECHR

As a consequence to the abovementioned amendment, now Article 59 para.2 ECHR reads as follows: "The European Union may accede to this Convention". In the same way, in order for the EU to accede, it has been necessary to amend the European Treaties. Therefore, in the Lisbon Treaty the following provision was added to make it happen: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties"[112].

The first argument in favour of the accession is surely the issue of external accountability. Behind the very creation of the Union lied the post-World War II narrative that nation-States are not sufficiently equipped to deal with an effective protection of democracy and freedoms. However, "non-State institutions that exercise public power are, like States, capable of abusing it and must be held to similarly demanding standards of legitimacy"[113]. Therefore, there is a necessity for the EU to be submitted to a human rights scrutiny similar to those envisaged for States[114]. In particular, while EU citizens have nowadays enough instruments to go against States that violate their rights, an external scrutiny by the ECHR would provide individuals with the same instruments against potential breaches of their rights committed by EU institutions[115].

Furthermore, the accession would solve the issue of double standards, given the fact that in the current situation there is the possibility of having two divergent interpretations of the same right, one by the EU, the other by the ECHR. Although this optimistic vision about the accession is widely shared, Cannizzaro expressed the opposite view, underlining how instead the fact of having both direct and indirect effects produced by the ECHR on the Union would multiply the juridical contexts in which a problem of interpretation arises[116]. On the other hand, Isiksel holds that "accession would institutionalize dialogue in order to ensure consonance between the two legal orders as well as the predictability and uniform application of basic rights standards"[117].

From a procedural perspective, the accession is extremely complex, given that it has to follow Article 218 TFEU, which regulates the accession of the Union to international treaties stipulated with third parties. According to it, the requirements are unanimity of Member States, the approval of the treaty by two thirds of the European Parliament, and then the ratification of the agreement in all the EU and CoE Member States. In order to regulate the accession, in 2011 the Committee of Ministers of the Council of Europe, in cooperation with the EU, has adopted a Draft Accession Treaty that has been longly discussed. Eventually, the CJEU has rejected it in 2014 in its Opinion 2/13, on grounds of incompatibility with the EU institutional structure. The main concern of the Court of Justice has been, for all these years, the possibility that the accession would

[112] Art.6 par.2, TEU.
[113] T. ISIKSEL, *European Exceptionalism and the EU's Accession to the ECHR*, in *The European Journal of International Law*, 2016, XXVII n.3, p.568.
[114] T. ISIKSEL, *op. cit.*, p. 565.
[115] S. DOUGLAS-SCOTT, *op. cit.*, p.659.
[116] E. CANNIZZARO, *L'incidenza della giurisprudenza della Corte europea sul contenuto della tutela dei diritti umani nell'Unione Europea*, in M. FRAGOLA (ed.) *La cooperazione fra Corti in Europa nella tutela dei diritti dell'uomo*, Cosenza, 2010, p.40.
[117] T. ISIKSEL, *op. cit.*, p.583.

threaten the autonomy of EU law, and for this reason it has adopted an ambiguous attitude, on one hand formally expressing the willingness to accede to the Convention, on the other materially thwarting this accession.

2.2.3 The ECHR and the Charter of Fundamental Rights

"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection"[118].

This provision exhaustively explains the relationship between the Convention and the Charter. Firstly, it outlines the principle of equivalent protection, according to which the meaning and scope of articles that are present in both texts shall be regarded as the same. In the Explanations to the Charter, it is possible to find a list of all the provisions of the Charter that have a correspondence with a provision of the Convention or of a Protocol. This is because, as remarked in the Explanations, the reference to the ECHR made in the Charter implicitly refers to the Protocols as well[119]. The list continues with those articles which have the same meaning but a wider scope with respect to the ECHR[120]. Nonetheless, it has been argued that this wording is not exact, since the catalogue includes also rights which have both a meaning and a scope that are wider than those outlined in the Convention[121].

Equally important is the last sentence of the provision, which, read in combination with Article 53, is intended to preserve the autonomy of EU law. In particular, Article 53 has been seen in the jurisprudence of both Courts as a prohibition of regression, i.e. whereas if the ECtHR expands the scope of a right, the ECJ shall reinterpret the Charter in light of the new interpretation by the ECtHR, in the opposite case the ECJ is prohibited from lowering its own standards. This is to be considered an instrument to maintain the autonomy of EU law[122].

There are cases in which an issue of dual regime might arise, such as in the case of Article 50 of the Charter, corresponding to Article 4 of Protocol n.7 ECHR, regarding the *ne bis in idem* principle. According to the Explanations, when dealing with cross-border situations, the EU standard shall be applied. By contrast, in purely internal situations the ECHR meaning and scope of the principle prevail. This has proven to be particularly complex in cases where it is difficult to define a situation as "purely internal". The relevant jurisprudence to solve the issue is to be found in *Zolotukhin* v *Russia*, where the ECtHR decided to interpret the principle in accordance with the jurisprudence of the CJEU, thus making the jurisprudences of the two

[118] Art.52 par.3, Charter of Fundamental Rights of the European Union.
[119] Notices from the European Parliament, the Council and the Commission of 14 December 2007, *Explanations relating to the Charter of Fundamental Rights*, OJ C-303, p.34-35.
[120] *Ibidem*
[121] K. LENAERTS, *op. cit.*, p.396.
[122] K. LENAERTS, *op. cit.*, p.394-395.

Courts converge[123]. This case shows "how important it is for the ECJ and the ECtHR to engage in a constructive dialogue, notably in relation to the provisions of the Charter that refers to the ECHR"[124].

2.3 The European Court of Justice and the Development of Human Rights Law in its Jurisprudence

2.3.1 Introduction to the European Court of Justice

The main provision regarding the structure, functioning and jurisdiction of the European Court of Justice is Article 19 TEU. The Court is composed of the Court of Justice, the General Court (introduced in the Single European Act in 1986 under the name of "Court of First Instance"), and specialized courts. It is composed of one judge for each Member State (*at least* one for the General Court), chosen among persons who satisfy the requirements outlined in Articles 253 and 254 TFEU, and it may be assisted by Advocates General. It is in charge of ensuring the compliance to European law in the interpretation and application of the Treaties. It can rule on issues brought by Member States, natural or legal persons, and it may further issue preliminary rulings upon request from national Courts of Member States in order to shed light on the interpretation of Union law[125].

Although the CJEU is not a court specifically concerned with human rights, it has had a pivotal role in the development of the EU human rights regime. Its caseload in the field has dramatically increased after the equivalent recognition of the Charter of Fundamental Rights with the Treaties within the Lisbon Treaty, for three main reasons. First of all, the restrictions on preliminary rulings in the field of Freedom, Security and Justice were eliminated through the repeal of Article 68 EC Treaty. Secondly, the jurisdiction of the Court was extended, through Article 263 TFEU, to EU agencies engaged in activities producing legal effects. Finally, the accelerated procedure and the urgent preliminary ruling in cases of persons held in custody were strengthened by the addition of a fourth paragraph to Article 267 TFEU[126].

The Court has promoted itself, in the last decade, as the watchdog not only of the Treaties, as entailed by its traditional functions, but also of the Charter. In particular, it has made itself the instrument to implement Article 47 of the EU Charter, according to which all those citizens of the Union who are subject to Union law must be provided with an effective remedy against the breach of their rights and freedoms by EU institutions. Drawing on standards and procedures borrowed by the ECtHR, as we will see in subsequent sections, the CJEU is a useful tool to enforce the rights envisaged in the Charter, especially in the area of Freedom, Security and Justice, which comprehends also the fields of immigration and asylum. These areas

[123] Judgement of the Grand Chamber of the European Court of Human Rights of 10 February 2009, Case n. 14939/03, *Zolotukhin* v *Russia*.
[124] K. LENAERTS, *op. cit.*, p.397.
[125] Art.19, TEU.
[126] S. CARRERA, M. DE SOMER and B. PETKOVA, *The Court of Justice of the European Union as a Fundamental Rights Tribunal. Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice,* CEPS paper in *Liberty and Security in Europe*, 2012, n.49, p.7.

are particularly sensitive due to the differences among EU States and the vulnerability of the people concerned[127].

Notwithstanding all these recent developments, we will consider in the next paragraph the most relevant case law of the CJEU, prior to the Lisbon Treaty, regarding human rights and the role of the Court in the creation of an EU human rights regime.

2.3.2 Internationale Handelsgesellschaft case (1970)

In order to understand the importance of the case for the development of the EU human rights regime it is not necessary to delve into the details at its origin, which are rather complex and not meaningful to our purposes. What is to be underlined is that "for the first time with *Internationale Handelsgesellschaft*, the CJEU refers to the constitutional traditions common to Member States and shows itself concerned with the issue of the protection of fundamental rights at the Community level"[128]. The achievement of the Court was the recognition that, although it is not possible to review the validity of Community acts on the basis of national constitutional provisions, since this would undermine the autonomy of the Community legal order, "however, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice"[129].

In the subsequent paragraph, the Court underlines the fact that, as remarked in section 2.1.3 of this dissertation, constitutional traditions of Member States do constitute a source of human rights in the European legal order. Nevertheless, in this case the Court affirms the existence of a Community human rights standard independent from the one of Member States, and the willingness to develop it further. In other words, "the validity of EC law would be judged by the EC's own criteria for fundamental human rights"[130].

This assertion of autonomy of EU law, which prevented Member States to infringe EU law by means of national constitutional provisions, was not well received by Member States' courts, especially by the German and Italian Constitutional Courts. The first one in particular, through the *Solange I* doctrine, rejected the supremacy of EU law "as long as there was not a catalog of fundamental rights equivalent to the German one present in EU law"[131].

This conflict, which led to a fruitful dialogue, between national and EU courts, brought the CJEU to develop a more comprehensive human rights regime, which would bring the German Constitutional Court to reverse

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[127] S. CARRERA, M. DE SOMER and B. PETKOVA, *op. cit.*, p.3-5.

[128] L. GRIMALDI, *La tutela dei diritti fondamentali in Europa: il caso Internationale Handelsgesellschaft*, in *iusinitinere.it*, 2018, p.3. My translation from Italian.

[129] Judgement of the European Court of Justice of 17 December 1970, C-11/70, *Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main - Germany.

[130] D. SHELTON, *The Boundaries of Human Rights Jurisdiction in Europe*, in *Duke Journal of Comparative & International Law*, 2003, XIII n.95, p.112.

[131] B. DAVIES, *Integrity or Openness: Reassessing the History of the CJEU's Human Rights Jurisprudence*, in *The American Journal of Comparative Law*, 2016, LXIV n.4, p.804.

the doctrine in *Solange II*[132]. According to this new version of the doctrine, the German Constitutional Court recognises that the EU legal order has achieved a satisfying level of human rights protection, and thus would not challenge EU supremacy as long as the EU continues to provide a protection equivalent to the one envisaged by the German Constitution.

In conclusion, this case allowed the Court to develop its doctrine of supremacy, and since then it has drawn upon both the ECHR and the constitutional traditions common to Member States in order to develop its own human rights regime. However, in finding its own rights as general principles of EU law, the Union remains not bound by them, though this will change with the accession of the Union to the ECHR[133].

2.3.3 Nold case (1974)

Pushed by the German initial reluctance to accept the EU supremacy in the absence of a more comprehensive human rights regime in its legal order, the ECJ furthered the development of Community rights in the subsequent years, and a landmark case is surely *Nold* v *Commission* in 1974, dealing with an issue of discrimination. Apart from restating the important concept that fundamental rights are general principles of EC law that must be protected by the Court, the latter also clarified better the relationship both between EC law and national Constitutions and between EC law and international human rights instruments.

This was possible because the applicant had claimed that he had been victim of a discrimination that violated his fundamental rights as enshrined in the German Constitution, and that those rights were allegedly to be accepted by Community law as its own as well.

The Court found that, notwithstanding the fact that it was not formally bound by national Constitutions in its law-making functions, it was "bound to draw inspiration from the constitutional traditions common to the Member States"[134] and it could not "uphold measures which are incompatible with the fundamental rights established and guaranteed by the Constitutions of these States"[135].

It is even more important to our purposes to underline another passage of the judgement, where the ECJ recognizes that "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines, which should be followed within the framework of Community law"[136]. We will see in the next section how the softness of this statement, which does not constitute an obligation of any sort, might prove detrimental. Anyway, the acknowledgements of this case have been useful to allow the expansion of the EU human rights regime from a purely economic fields to also political rights, thanks to the possibility of taking inspiration from other international sources, in particular the ECHR. Therefore, not only Community acts must be compatible with the Union

[132] Judgement of the European Court of Justice (Second Chamber) of 6 May 1982, C-126/81, *Wünsche Handelsgesellschaft* v *Federal Republic of Germany*, Reference for a preliminary ruling: Bundesverwaltungsgericht - Germany.
[133] T. STEIN, *Internationale Handelsgesellschaft case*, in *Max Planck Encyclopaedia of Public International Law*, 2008. Accessed 25 April 2019.
[134] Judgement of the European Court of Justice of 14 May 1974, C-4/73, *Nold* v *Commission*.
[135] *Ibidem*
[136] *Ibidem*

fundamental rights, but also Member States shall be held responsible for implementing Union law in accordance with their own constitutional rights, thus resulting in a two-tier protection[137].

This protection results even stronger than the one provided by international human rights law when it comes to an individual vindication of rights, since in *Francovich* v *Italy* the CJEU held that the Member States can be liable also for failing to implement an EU directive. This ensures individuals "a remedy against Member States even when the direct source of the violation is a private actor"[138].

2.4 The relationship between the CJEU and comparative law

2.4.1 The Relationship between the CJEU and the ECtHR

Dialogues, conflicts and future engagements between the two European Courts have been largely addressed by legal scholars. Therefore, we will limit ourselves to provide a general overview of their relationship, drawing from such a vast literature.

The first point that needs to be observed is that it seems that there is a dichotomy between the political willingness of the EU to accede the Convention and the judicial reluctance of the CJEU to do so[139]. For this reason, Davies argues that the only viable solution lies in a unilateral acceptance by the CJEU, which would preserve the EU autonomy since "voluntary declarations can be withdrawn at any time"[140].

The reason for this reluctance of the Court is to be found in the delicate task it has to "maintain the coherence and integrity of a self-contained, exclusive system of law"[141].

Nevertheless, though having rejected a formal submission to the jurisprudence of the ECtHR, the two courts are involved in an intense informal dialogue. This has been favoured by, among other things, the practice of having annual meetings between delegations of the two Courts, and by the creation in Strasbourg of a working group charged with the task of keeping track of the evolution of the human rights jurisprudence in Luxembourg[142].

Although some conflicts in the interpretation of rights have arisen, especially in matters of privacy rights and discrimination against the LGBT community, this has never resulted in inconsistent obligations for Member States thanks to a mutual deference of the courts to each other[143].

The appeasing attitude of Strasbourg can be noted first and foremost in the Bosphorus presumption, i.e. the presumption that the EU legal order has a protection of fundamental rights equivalent to the one envisaged by the ECHR, excluding cases of manifest lack of protection. This has made the ECtHR very cautious in accepting appeals regarding EU institutions, where it has preferred to assume a general compliance of the EU system with the Convention. The only case in which it has found a manifestly deficient protection is

[137] D. SHELTON, *op. cit.*, p.112.
[138] *Ibidem*
[139] B. DAVIES, *op. cit.*, p.812.
[140] B. DAVIES, *op. cit.*, p.813.
[141] B. DAVIES, *op. cit.*, p.802.
[142] A. BULTRINI, *I rapporti con la Corte di giustizia nella prospettiva della Corte europea dei diritti dell'uomo*, in M. FRAGOLA (ed.), *op. cit.*, 2010, p.26-27.
[143] D. SHELTON, *op. cit.*, p.144.

Matthews[144]. In fact, the notion of "manifestly deficient protection" is highly criticized for its lack of precision, which brings the Bosphorus presumption to be an abstract standard of review[145].

Despite this immunity conceded to the EU institutions, the ECtHR has found several creative ways to indirectly review the actions of the Union by holding accountable Member States implementing Union law with a margin of discretion. This is made possible by the completely overlapping membership between the EU and the CoE.

In the same way, the CJEU has been prone to accept and adapt to the ECtHR interpretation in many situations, among which the best example is *Roquette Frères*, in which it was asked to reconsider a previous judgement in order to comply with the jurisprudence of the ECtHR, a thing that the CJEU has been willing to do[146].

Given the heavy reliance that the CJEU has made on the ECtHR case-law, a question to be asked is whether the latter should be made binding. Lock gives a negative answer, providing three main reasons. First of all, making the ECHR the prominent human rights standard, abolishing the margin of appreciation given to Member States, would result in a worse protection, since there are rights which are valued by national Constitutions but are largely ignored by the Convention, such as those related to the environment[147]. Secondly, the Convention has an evolutive character, whereas making its case-law binding would produce a risk of stagnation[148]. Lastly, those CJEU judgements that currently produce *inter partes* effects would follow the doctrine of *stare decisis*[149]. Therefore, we can safely state that the current situation is more advantageous than the adoption of this proposal.

Apart from the lessons that the CJEU can learn from the ECtHR regarding substantive legal matters, there are also two procedures that should be taken as an inspiration. The first one is the practice, successfully adopted in many instances by the ECtHR, of having third parties submitting their own reports during proceedings. Third-party interventions, especially from NGOs, would provide more factual information to the CJEU when deciding upon cases concerned with fundamental rights. However, the *locus standi* of non-state actors within the CJEU's proceedings is extremely restricted, in particular for indirect actions (preliminary rulings)[150]. In some situations, non-state third parties have found ways to informally provide information during a proceeding (the UNHCR has done so in more than one instance), but the lack of a formal procedure is one of the biggest criticisms moved toward the CJEU by international human rights organizations[151].

Finally, the Rule-39 procedure of the ECtHR entails the possibility for the Court to adopt *interim* measures in order to freeze a practice perpetrated by a part to a dispute, when that practice is deemed to irreversibly

[144] A. BULTRINI, *op. cit.*, p.30.
[145] S. DOUGLAS-SCOTT, *op. cit.*, p.667.
[146] T. LOCK, *The European Court of Justice and International Courts*, Oxford, 2015, p.174.
[147] T. LOCK, *op. cit.*, p. 178.
[148] *Ibidem*
[149] T. LOCK, *op. cit.*, p.183.
[150] S. CARRERA, M. DE SOMER and B. PETKOVA, *op. cit.*, p.14.
[151] S. CARRERA, M. DE SOMER and B. PETKOVA, *op. cit.*, p.15-16.

hamper the defendant[152]. Whereas provisional measures are envisaged also by the CJEU, their use is not as extensive as in the ECtHR and it is subject to more constraints, such as higher treshold conditions for granting them, and the fact that only the legal representatives of the parties involved can ask for their implementation[153].

In short, even in this informal relations and with the tensions caused by the difficulties of accession, the two Courts might be seen as complementary[154] in their jurisdiction, and the ECtHR might constitute a virtuous model for the CJEU.

2.4.2 The CJEU and its Reluctant Engagement with Comparative Law

In moving toward the next chapter, which will analyse in detail the relationship between the EU and the international human rights law, in this last section we explore the reasons and implications of the reluctance of the CJEU to draw upon comparative law when dealing with fundamental rights. Since, as we mentioned at the beginning, the CJEU is not specifically a human rights court, it does not possess the same level of expertise as other more specialized international bodies, included the ECtHR[155]. In order to provide evidence of the reluctance to draw from other sources, de Burca shows data demonstrating that, up to the time of writing, out of the 122 cases submitted to the Court of Justice and the 37 cases submitted to the General Court which mentioned the Charter of Fundamental Rights, in very few of them the ECHR was recalled, and in none of them there is a reference to other international human rights instruments[156].

The author points out to several possible reasons for this reluctance. The first of them is related to the very spirit behind the creation of the Court, which holds a continental judicial approach, inspired to the French *Conseil d'Etat*, entailing a single collegiate judgement and a dry, impersonal style of reasoning[157]. Another plausible explanation is the attempt by the Court to firmly assert its legitimacy and be less exposed to criticisms. Other defendants of the approach of the Court also argue that judgements are actually informed by other international instruments, which are simply not mentioned[158].

De Burca not only challenges all these reasons, but she also makes some compelling arguments about why the Court should instead change its approach. She affirms that, apart from necessitating to draw inspiration from more experienced *fora*, the Court also needs to provide a standard that is coherent with the global one if it wants to maintain its legitimacy, and that it must also consider the fact that third countries increasingly look at the CJEU as a human rights-setting body[159]. Therefore, it should abandon its isolation if it wants to

[152] S. CARRERA, M. DE SOMER and B. PETKOVA, *op. cit.*, p.12.
[153] S. CARRERA, M. DE SOMER and B. PETKOVA, *op. cit.*, p.17-18.
[154] T. LOCK, *op. cit.*, p.212.
[155] G. DE BURCA, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights adjudicator?*, in *Maastricht Journal of European and Comparative Law*, 2013, XX n.2, p.171.
[156] G. DE BURCA, *After the EU Charter of Fundamental Rights*, cit., p.174-175.
[157] G. DE BURCA, *After the EU Charter of Fundamental Rights*, cit., p.176.
[158] G. DE BURCA, *After the EU Charter of Fundamental Rights*, cit., p.178-179.
[159] G. DE BURCA, *After the EU Charter of Fundamental Rights*, cit., p.181-182.

avoid the risk of "a detached, autonomous and potentially insufficiently informed case law on a growing range of important human rights issues"[160].

2.5 Conclusion

In this second chapter, we have gone through the evolution of the human rights regime within the European Community and then the European Union. To accomplish this task, we have analysed the main legal instruments that have been necessary in order to do so, with a particular focus on the relationship with the other main European human rights body, namely the ECHR. We have then provided some details about the pivotal role of the European Court of Justice in the development of the abovementioned regime, presenting two judicial cases that have been particularly relevant to this purpose.

It is a matter for the next chapter to go into further detail on the relationship between the Union and international law, especially given the self-perception of the Union as a peculiar legal order, which struggles to find a place in the hierarchy of international law. The presence of several overlapping bodies and legal norms, instead of providing a more extensive human rights protection for European citizens, might in fact results in the risk that "fundamental rights are indeed 'lost in complexity' in the EU"[161].

[160] G. DE BURCA, *After the EU Charter of Fundamental Rights,* cit., p.174.
[161] S. DOUGLAS-SCOTT, *op. cit.*, p.647.

CHAPTER 3: THE RELATIONSHIP BETWEEN UN AND EU LAW IN THE PROTECTION OF HUMAN RIGHTS

3.1 The European Union and the United Nations

3.1.1 The Relationship between EU and General International law

In the words of B. Kunoy and A. Dawes, "The EC is vested with international legal personality and it accordingly follows that the Community may incur international legal liability if its international conduct is inconsistent with the international obligations incumbent upon it"[162].

As remarked also by the Court in several instances of case law, such as the *Racke* case, the EU "must respect international law in the exercise of its powers"[163]. However, problems might generate from the tension between internationalism and constitutionalism of the EU legal order, which arises from the peculiar status of the Union as an organ in between an international organization (thus a product of an international treaty, subject to international law) and a State (thus having its own internal legal order)[164]. According to Anne Peters, it might be appropriate to make an analogy between the EU legal order and a national one, *vis-à-vis* international law[165], also given the constitutionalist attitude of the CJEU. However, the hybrid character of the Union keeps generating complexities in how to define this relationship. Anyway, it is now widely acknowledged that the EU derives its international obligations first and foremost from International Customary Law, but also from treaty law and from the succession to Member States, though regarding the latter the ECJ adopts a narrow approach, as it has been clarified in the *Intertanko* case[166].

Another level of complexity is represented by the inevitable involvement of a third legal order: the one of each EU Member States. In fact, international law might use the EU to penetrate national legal orders. This I possible because the EU has generally accepted that international treaties have direct effect on the Union, whose legislation in turn has direct effect on States[167]. In order to limit the implications of direct effect of international law on the EU, the ECJ has excluded some international treaties from having direct effect, namely the WTO agreement, the UNCLOS and, most notably, the UN Charter.

A further complication that might arise between EU and international law, and their respective Courts, is a potential conflict of norms or of jurisdiction and substantive interpretation[168]. When dealing with EU secondary legislation, this issue is often overcome by means of conform interpretation, according to which

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[162] B. KUNOY and A. DAWES, *Plate Tectonics in Luxembourg: The Ménage à Trois between EC Law, International Law and the European Convention on Human Rights Following the UN Sanctions Case*, in *Common Market Law Review*, 2009, XLVI n.1, p.83.

[163] Judgement of the European Court of Justice of 16 June 1998, C-162/96, *A. Racke GmbH & Co*. v *Hauptzollamt Mainz*. Reference for a preliminary ruling: Bundesfinanzhof - Germany. Para.55.

[164] K.S. ZIEGLER, *The Relationship between EU Law and International Law*, in *University of Leicester School of Law Legal Studies Research Papers Series*, 2013, n.13-17, p.2.

[165] A. PETERS, *The Position of International Law within European Community Legal Order*, in *German Yearbook of International Law*, 1997, XL n.9, p.11.

[166] Judgement of the European Court of Justice of 3 June 2008, C-308/06, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others* v *Secretary of State for Transport.* Reference for a preliminary ruling: High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) - United Kingdom.

[167] K.S. ZIEGLER, *The Relationship between EU Law and International Law*, cit., p.9.

[168] K.S. ZIEGLER, *The Relationship between EU Law and International Law*, cit., p.3.

interpretation on the basis of conformity with international law must be preferred to other methods of interpretation. Moreover, Article 31 VCLT, regarding a duty to interpret international treaties in good faith, taking into account the "relevant rules of international law applicable to the parties"[169], represents another tool to avoid fragmentation[170].

To conclude, the hierarchy of norms within the European legal order sees at the top of the pyramid inderogable *jus cogens* principles, followed by the European Treaties, general international law and at the bottom EU secondary law. Instead of considering this a fixed and static hierarchy, we must consider that the two legal orders deeply influence each other in a mutual way, and that often the EU has decided whether to rely or not on international law on the basis of pragmatic considerations[171]. We shall now move forward to explore more specifically the interactions between the two human rights regimes.

3.1.2 International Human Rights Law in the EU Legal Order

The EU is explicitly bound by UN human rights standards by Article 3(5) TEU: "In its relations to the wider world, the Union (...) shall contribute to (...) the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter". Although, as we have already remarked, the most prominent way in which the EU has drawn upon international law in the field of human rights is through the development of general principles, a role has been played also by the conform interpretation of major UN human rights treaties in the ECJ case law[172]. For instance, in the *Dynamic Medien* case, the Court explicitly referred to the Convention on the Rights of the Child in order to deliver its preliminary ruling[173].

Nonetheless, in other situations the CJEU has proven reluctant to rely so heavily on UN human rights treaties, such as in the *Grant* case, where the CJEU stated that, while it is true that it might draw upon international treaties and instruments, these shall not expand the competences of the Union, and that the Human Rights Committee cannot be used as a point of reference, since it has no binding legal power[174]. Therefore, it is evident how the Court has made reference to UN human rights treaties and bodies in an occasional and inconsistent manner[175]. This proves detrimental for the EU, since in many fields the European human rights regime is not as comprehensive and detailed as the UN one. One outstanding example is the protection of minority rights, which are neither specifically mentioned in the ECHR (the primary source of inspiration for the development of the EU human rights regime) nor in the FRC. Conversely, the right, "in community with the other members of the group, to enjoy their own culture, to

[169] Art 31, Vienna Convention on the Law of Treaties.
[170] K.S. ZIEGLER, *The Relationship between EU Law and International Law*, cit., p.23.
[171] A. PETERS, *op.cit.*, p.23.
[172] K.S. ZIEGLER, *The Relationship between EU Law and International Law*, cit., p.17.
[173] Judgement of the European Court of Justice of 14 February 2008, C-244/06, *Dynamic Medien Vertriebs GmbH* v *Avides Media AG*. Reference for a preliminary ruling: Landgericht Koblenz - Germany. Paras. 39-40.
[174] Judgement of the European Court of Justice of the 17 February 1998, C-249/96, *Lisa Jacqueline Grant* v *South-West Trains Ltd.* Reference for a preliminary ruling: Industrial Tribunal, Southampton - United Kingdom. Paras. 45-46.
[175] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.11.

profess and practice their own religions, or to use their own language"[176] is granted to minorities by the ICCPR[177].

Another example reported by the Office of the High Commissioner for Human Rights ("OHCHR") is the non-discrimination regime developed by the EU. Whereas its importance is not to be questioned, doubts might be raised regarding the adequacy of its scope with respect to the UN regime. First of all, in the EU there is a sort of hierarchy when it comes to rules of non-discrimination, given that racial and ethnic discrimination are prohibited in the fields of employment and access to goods, services and welfare schemes. On the other hand, other grounds of discrimination, such as disability or gender, are prohibited only in terms of access to employment. Secondly, while the EU provides a fixed list of prohibited grounds of discrimination, both the ECHR and UN human rights treaties (in particular the ICESCR) are open-ended, in that they refer also to discrimination on the grounds of "other status". Lastly, and more generally, the EU provides minimum standards for the respect and protection of human rights, while UN treaties require States to go beyond these standards[178]. For all these reasons, it would be convenient for the EU to draw more upon UN instruments, but the Union has also to struggle in order to maintain the delicate equilibrium it has reached along the years with the human rights regimes of its Member States. The necessity of keeping this equilibrium intact should not be underestimated when considering the EU approach.

3.1.3 The CJEU and Other International Courts

In this first part, it remains to analyse the relationship of the CJEU with other international courts. This is because, notwithstanding the constitutionalist approach of the Court, which assimilates it to a domestic forum, it remains also an international court. In fact, it is a court that receives disputes over the application of an international treaty (the EU Treaties) between States parties to it (EU Member States), as envisaged by Article 259 TFEU[179]. By virtue of Article 344 TFEU, the CJEU retains an exclusive jurisdiction over EU law, which means that "no Court other than the CJEU may examine the validity of an act of the EU"[180]. Furthermore, Article 344 implies a duty of cooperation, i.e. Member States are required to consult the European Commission before submitting a dispute to another international court. The exclusive jurisdiction of the CJEU might raise conflicts of jurisdiction between it and other international courts.

As far as the ICJ is concerned, jurisdiction has seldom been an issue, since Article 95 UN Charter explicitly allows Member States to resort to other means of dispute settlement[181]. Problems might arise in the case of other international Courts, resulting from international agreements to which the EU and/or its Member States are parties. In the case of purely EU agreements, the solution is straightforward. If two EU Member States bring a dispute over an EU agreement before an international court different from the CJEU, that Court must declare the case inadmissible. The situation is more complicated in the case of mixed agreements, where

[176] Art 27, ICCPR.
[177] T. AHMED and I. DE JESÚS BUTLER, *op. cit.*, p.793.
[178] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.20.
[179] T. LOCK, *op. cit.*, p.74.
[180] T. LOCK, *op. cit.*, p.79.
[181] T. LOCK, *op. cit.*, p.34.

both the EU and Member States are parties. The most exemplar of these cases is *MOX Plant*[182], where Ireland had brought a complaint against the UK before an arbitral tribunal, and applied for provisional measures before the International Tribunal for the Law Of the Sea (ITLOS), established by the UN Convention on the Law Of the Sea (UNCLOS). In this case, the Commission argued that Ireland has infringed EU law in several ways. First of all, it had violated Article 344 TFEU both by bringing UNCLOS provisions before the arbitral tribunal, and by submitting matters related to EU law to it. Secondly, it argued that Ireland had violated the duty of cooperation established in article 4(3) TFEU[183]. The ECJ actually found that the EU had competence over matters in the proceedings, in particular by making reference to an EU directive over environmental assessments[184]. The question was whether this competence was exclusive or not. According to the Court, jurisdiction should belong to itself due to a necessity to preserve the autonomy of the EU legal order, but its argument was made even more convincing by the reference to Article 282 UNCLOS, which allowed the EU to take precedence. The outcome of this case implied that, whenever there is a possibility of an involvement of EU law in an international dispute, the CJEU might claim jurisdiction. The consequence is that "in a case which has European Union law at its heart, an international court is not in a position to deliver a judgment which is binding on the Member States involved, be it under European Union law or under their domestic law"[185]. The main rationale of the EU in adopting this approach is the interest in providing a uniform interpretation, but it has been criticized for lacking a solid doctrinal basis to exercise this discretion[186].

This attitude of the CJEU might present some problems for EU Member States if combined with its tendency not to rely much on international law in its judgements. Taking the case of human rights, not only are Member States restricted in their possibility to rely on other means of dispute settlement, but they are also potentially less protected under the jurisdiction of the CJEU since, as we have seen, EU law does not entail a human rights recognition and protection equivalent to the one granted under international law.

If this is one reason why it would be desirable for the CJEU to rely more on international law, other reasons will be presented in the next section.

3.1.4 Advantages for the CJEU to Rely More on International Law

Integration is necessary to the EU legal system if it wants to reach a comprehensive protection of human rights for several reasons, many of them expressed in previous sections. However, some considerations remain to be made, that should encourage the CJEU to more decisively draw upon other sources of international law, especially the UN treaty bodies.

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[182] Judgement of the European Court of Justice of 30 May 2006, C-459/03, *Ireland* v *United Kingdom*.
[183] T. LOCK, *op. cit.*, p.115-116.
[184] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.
[185] T. LOCK, *op. cit.*, p.165.
[186] T. LOCK, *op. cit.*, p.112.

Firstly, the EU has often remarked the concept of universality of human rights. Its attitude, which in some ways isolates the EU human rights system from the rest of international law, risks to heavily undermine this universality[187].

Furthermore, the EU has enforcement mechanisms that are not available to the UN system, especially when it comes to contentious cases. Thus, the monitoring bodies and the UN mechanisms would only reach their full potential if used by more powerful (from an enforcement perspective) regional authorities[188].

The document by the OHCHR reports other two reasons why international human rights law is to be taken into consideration by the CJEU. In the first place, EU Member States are among the signatories of the core UN human rights treaties, and they have mandated the treaty bodies with the task of monitoring human rights protection. Therefore, they have all the interest in having them properly implemented within the EU system. Lastly, since each international human rights body has some elements of protection that others do not have, they need to rely on one another and to interact in order to fully comply to their mandate[189].

3.2 Conflict between EU and UN Law in the CJEU's Jurisprudence

Throughout this section, we are going to present a landmark case in order to show more clearly what are the legal consequences of a confused and inconsistent integration between the UN and the EU legal orders, and the difficulties of defining a hierarchy of norms and jurisdictions. In the first paragraph we will go through the first proceeding, brought in 2005, while in the second one we will move to the appeal phase, which took place in 2008. In the last paragraph, we will make some final considerations.

3.2.1 *Kadi I* (2005)

The peculiarity of the EU legal order is that, unlikely other products of international law, its subjects are not only Member States, but also their nationals[190]. Following this trend, the United Nations as well have started to consider individuals not only holders of rights, but also subjects liable for their actions before international law. This new UN approach brings with it the risks of conflict with the EU system[191].

One conflict of such kind arose in the first *Kadi* case[192], regarding the regimes of targeted sanctions established by the UN Security Council Resolution 1267 (1999)[193]. This harshly criticized regime entailed the possibility for the Security Council to apply financial sanctions including the freezing of assets against individuals suspected of being affiliated with terrorist groups. From the perspective of the Security Council, these sanctions did not represent a trade-off between security and human rights, since their being targeted to

[187] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.12.
[188] *Ibidem*
[189] *Ibidem*
[190] B. KUNOY and A. DAWES, *op. cit.*, p.73.
[191] P. HILPOLD, *EU Law and UN Law in Conflict: The Kadi Case*, in *Max Planck Yearbook of the United Nations Law*, 2009, XIII n.1, p.142.
[192] Judgement of the Court of First Instance of 21 September 2005, T-315/01, *Yassin Abdullah Kadi* v *Council of the European Union and Commission of the European Communities.*
[193] UN Security Council Resolution 1267 of 15 October 1999, S/RES/1267 (1999).

individuals instead of entire States allegedly reduced the human costs of the sanctions[194]. Nonetheless, the system of "smart sanctions" was not adequately matched with a mechanism of legal protection[195], and it is against this background that the case developed.

The Security Council Resolution was rendered effective in the EU by the Council Common Position 2002/402/CFSP[196] and Regulation 467/2001[197], later repealed by Regulation 881/2002[198]. Mr Kadi, a Saudi Arabian citizen with economic interests in Europe, brought an action for annulment before the Court of First Instance ("CFI") of Regulation 467/2001, on the basis of the violation of his right of access to justice and lack of competence.

The CFI famously dismissed Mr Kadi's claim, on the basis that it could not review an act of the UN Security Council. The Court founded its judgement on a combination of Article 103 UN Charter, which grants supremacy to UN law over any other international agreement, and Article 307 EC Treaty, which binds EU Member States to those international agreements signed before their entry into the Community. This line of reasoning brought the Court to the following statement: "Reference to infringements either of fundamental rights as protected by the Community legal order or of the principles of that legal order cannot affect the validity of a Security Council measure or its effect in the territory of the Community"[199]. A notable exception to this deference to UN law is the violation of peremptory norms of *jus cogens*. The CFI, therefore, did not completely disregard the issue of human rights protection in favour of counter-terrorism measures. Instead, it tried to find a compromise between EC and UN law in a mix of monist and dualist approaches, submitting UN law to the inevitable review under the *jus cogens* standards[200].

In this approach, open to international law, the CFI attempted to avoid a perception of the EU legal order as a self-contained, isolated system, declaring instead that "the applicant's arguments based on the view that the Community legal order is a legal order independent of the United Nations, governed by its own rules of law, must be rejected"[201].

Despite the sophistication of this judgement, it was widely criticized for being too disregarding of the issue of human rights in favour of an excessive deference towards the UN system. Feeling that his rights were still being violated, Mr Kadi decided to appeal to the European Court of Justice.

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[194] P. HILPOLD, *op.cit.*, p.145.

[195] K.S. ZIEGLER, *Strengthening the Rule of Law, But Fragmenting International Law: The Kadi Decision from the Perspective of Human Rights*, in *Human Rights Law Review*, 2009, IX n.2, p.301.

[196] Council Common Position of 27 May 2002 concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP.

[197] Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000.

[198] Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan.

[199] Judgement *Kadi*, para.225.

[200] K.S. ZIEGLER, *Strengthening the Rule of Law, But Fragmenting International Law*, cit., p.292.

[201] Judgement *Kadi* para.208.

3.2.2 *Kadi II* (2008)

Since Mr Yusuf and the Al Barakaat International Foundation had filed similar complaints against Regulation 467/2001, their cases were joined with the one of Mr Kadi. Because Mr Yusuf was soon removed from the Security Council list, in this second part we are concerned with the joined cases of *Kadi* and *Al Barakaat*[202].

The ECJ completely reversed the judgement of the CFI, and its reasoning reflects the idea that "the formal superiority of UN law is contrasted (...) by a claim of substantial and moral superiority of EU fundamental rights"[203].

In delivering its judgement, the Court was highly informed by Advocate General Maduro's legal reasoning, according to which the international obligations that EU Member States derive from Article 307 EC Treaty (now Article 351 TFEU) cannot be subordinated to Article 6(1) TEU, regarding the respect of human rights. Therefore, the Court ruled that: "Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights"[204]. Whereas it might appear that the approach adopted here completely excludes international law from the EU system, the Court actually stressed the openness of the EU to international law, and remarked the notion of conform interpretation of EC law to international law. Nevertheless, it envisaged the possibility of a full review not of international law *per se*, but of its implementation within the EU legal order[205]. The grounds upon which this review is made possible are not, as for the CFI, considerations of *jus cogens*, but legal elements purely internal to the EU legal order, namely EU primary law and its very foundations.

What Maduro argues, and the Court follows, is that "respect for international law is desirable but from it no legal implications arise"[206]. The problem with this assertion is that it downgrades international law to a sort of soft law, linked more to political rather than legal considerations[207]. Therefore, a more appropriate reading of the ECJ judgement would probably be one that envisages a *Solange* approach. In this way, EU institutions would be bound to UN law and would not be allowed to review it, as long as an equivalent protection of human rights is guaranteed[208].

To sum up, in reversing the judgement of the CFI, the ECJ did not disregarded the importance of international law within the EU system, but it reinstated "the Community courts as the ultimate judges of the compatibility of Community legislation with fundamental rights"[209].

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[202] Judgement of the European Court of Justice of 3 September 2008, Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation* v *Council of the European Union, Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland* (Common Foreign and Security Policy (CFSP)).
[203] P. HILPOLD, *op. cit.*, p.158.
[204] Judgement *Kadi and Al Barakaat*, para.303.
[205] K.S. ZIEGLER, *Strengthening the Rule of Law, But Fragmenting International Law,* cit., p.293.
[206] P. HILPOLD, *op. cit.*, p.167.
[207] P. HILPOLD, *op. cit.*, p.168.
[208] P. HILPOLD, *op. cit.*, p.179.
[209] D. KUNOY and A. DAWES, *op. cit.*, p.96.

3.2.3 The Implications of *Kadi II* and the Fragmentation of International Law

The dispute displayed in *Kadi* is considered to be "more political in nature than technical-legal"[210], since we can look at it as a power struggle between the UN and the EU legal orders regarding human rights. Despite the substantial differences between the judgement of the CFI and the one of the ECJ, both courts were willing to stretch the competence of the Community in this case, given that EU fundamental rights were at stake facing the UN Security Council Resolutions[211].

The attitude of both European courts underlines a departure from the traditional narrative according to which the Union is primarily concerned with economic activities lying at its foundation. The evidence of this is the potential willingness of the EU to subordinate economic freedoms to matters of international security, whereas fundamental rights are considered to be not derogable given that they constitute the very basis on which the whole notion of the Union is built[212].

Indeed, this constitutes a potential problem in terms of fragmentation of international law, in particular from the perspective of EU Member States, which might find themselves in the position of having to choose between implementing a Security Council Resolution or follow the guidelines provided by the EU legal order, without knowing exactly what is the best course of action in order not to incur in a breach of one of the two legal orders. However, as we already mention, the concern brought about by this case is not so much legal but rather political. The consequence for the international asset of the ECJ judgement is that "it cannot be ignored that the international system is not only characterised by the existence of a "global community of courts" but also by a strong multi-level interaction of political, judicial and administrative organs and institutions"[213]. Therefore, the solution is not to be found only in judicial fora, where *Kadi* clarified some points but was not enough to provide a sound doctrine to solve the issue once and for all. "In the long term, (...) both the EU and the UN will have no other choice than to compromise. (…) Now it is up to the political institutions to find a workable solution"[214].

Furthermore, the proliferation of international means of dispute settlement is not necessarily a carrier of fragmentation. Whereas the legal consequences of *Kadi* on international law are uncertain, the probability that this uncertainty and fragmentation will lead to a lowering of human rights protection standards is quite low[215]. Conversely, the presence of multiple checks on human rights is potentially a stronger guarantee that individuals will enjoy a high level of protection in the international arena. In particular, where individuals struggle to find their international legal personality within the UN system, the additional layer made up by the EU provide them with the subjectivity necessary to make themselves heard when their human rights are violated. The focus on individuals as subjects of international law is thus the main heritage of the *Kadi* case.

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[210] P. HILPOLD, *op. cit.*, p.144.
[211] P. HILPOLD, *op. cit.*, p.155.
[212] K.S. ZIEGLER, *Strengthening the Rule of Law, But Fragmenting International Law,* cit., p.297.
[213] P. HILPOLD, *op. cit.*, p.179.
[214] P. HILPOLD, *op. cit.*, p.180.
[215] K.S. ZIEGLER, *Strengthening the Rule of Law, But Fragmenting International Law,* cit., p.305.

3.3 The Applicability to the EU of International Human Rights Obligations

3.3.1 Treaty obligations

The OHCHR document on the relationship between the EU and International Human Rights Law lists many different sources of international obligations for the Union. It would be repetitive to mention again the contentious Article 103 UN Charter and International Customary Law, which were examined more deeply in previous sections. In this subsection, we will be mainly concerned with the obligations that the EU derives from UN treaties. The only human rights treaty at the time of writing to which the EU is a party is the Convention on the Rights of Persons with Disabilities ("CRPD"). The ratification by the EU was made possible by the insertion of a clause in the Treaty allowing for the accession of international organizations[216]. Since its entry into force in 2009, the Union is thus bound to its text and it is obliged to report periodically to the UN Committee on the Rights of Persons with Disabilities in order to show how the Convention is being actually implemented within the Union[217]. Not only the Union, but also all its Member States are parties to the Convention, and 22 of them are parties to the additional protocol. This makes the Convention a mixed agreement, whose complexities we have explained above, but it also represents the willingness to provide a level of protection that is both at the national, supranational and international level.

It is to be encouraged the positive attitude of the Union to be bound to the treaty bodies, but some necessary steps are required in order to make this possible, and many alternatives are available.

The first possibility is, obviously, a formal accession by the Union to a given treaty, through a signature and a ratification. Although this might seem the most straightforward way, it would require a treaty amendment in order to insert a clause similar to the one present in the CRPD, or the drafting of an additional protocol[218]. Another option would be a unilateral declaration by the European Union, in which it declares itself bound to a given treaty. Of course, these possibilities have as their basic assumption the idea that the Union is actually willing to be bound by the treaty-bodies. This would be in line with the latest declarations made by the High Representative of the Union for Foreign Affairs and Security Policy Federica Mogherini, during her speech at the United Nations before the UN Security Council in 2017. According to her, "The European way is also the United Nations' way. This explains why all our actions, all our initiatives are always taken in full coordination and partnership with the UN. We believe in the UN, because we believe in the same principles, in the same values, and our communities are built upon the same fundamental ideals"[219]. Conversely, the assumption seems at odds with the reluctant attitude of the European Court of Justice, which is usually

[216] Art 44, Convention on the Rights of Persons with Disabilities.
[217] Information taken from *United Nations Convention on the Rights of Persons with Disabilities* in *ec.europa.eu*. Accessed 15 May 2019.
[218] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.22.
[219] High Representative/Vice President Federica Mogherini at the UN Security Council, 9 May 2017.

extremely concerned with the preservation of the autonomy of the EU legal order, even if this means adopting an isolationist approach.

The third and last alternative is the one that resembles the most the current approach of the EU institutions and that seems consistent with previous declarations of intent. It is the possibility of engaging in an informal relationship with the treaty bodies, acting *as if* the Union was bound, but without formally acceding[220]. This usually happens through the adoption of internal measures that are informed by the UN treaties, such as the Qualification Directive creating a Common Asylum System[221], practically an implementation at the EU level of the 1951 Geneva Convention on the Status of Refugees[222].

3.3.2 Succession to Obligations of EU Member States

Another source of obligations imposed directly on the Union comes from Article 351 TFEU (former Article 307 EC Treaty), which allows for a derogation from the EU law primacy doctrine[223] in cases involving international agreements contracted by States with third parties before their accession to the Union[224]. This does not hold for subsequent amendments to those agreements, but still the Union, in succeeding to Member States, is *de facto* bound by their previous international obligations. Importantly, the derogation might also be a derogation from primary law, i.e. the Treaties. However, "Member States cannot invoke Article 351(1) TFEU in order to honour their obligations under the UN Charter, including binding decisions of the Security Council, if these obligations contravene basic fundamental rights and rule of law principles contained in the Union constitutional order"[225].

In the second and third paragraphs of Article 351, it is expressed the duty for Member States to interpret previous obligations in conformity with the EU Treaties[226] and, if this proves impossible, to withdraw from the previous agreement[227]. Some treaties allow withdrawal only after a certain interval of time, thus in such situations the EU Member State is allowed to remain bound until another opportunity for withdrawal presents itself[228].

The CJEU in its case law has found two consequences to Article 351. First of all, Member States are allowed to give priority to previous obligations, and secondly, the EU is under a duty to avoid interference with the implementation of such obligations[229].

Up to this point, it would seem that the EU is only bound indirectly to these agreements through the ratification by EU Member States. Nevertheless, it has been found out that when Member States transfer to

[220] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.22-23.
[221] Directive 2004/83/EC of the Council, of 29 April 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
[222] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.22.
[223] A. ROSAS, *The Status in EU Law of International Agreements Concluded by EU Member States*, in *Fordham International Law Journal*, 2010, XXXIV n.5, p.1321.
[224] Art 351(1), TFEU.
[225] A. ROSAS, *op. cit.*, p.1324.
[226] Art 31(3), TFEU.
[227] Art 351(2), TFEU.
[228] A. ROSAS, *op. cit.*, p.1323.
[229] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.24.

an international organization competences that are necessary to comply with their previous obligations, the organization (in this case the EU) becomes *de facto* directly bound by those obligations[230].
Furthermore, the Court has recognized that those UN Treaties to which all the EU Member States are parties must be considered general principles of EU law, thus directly binding on the Union[231].

3.3.3 International Obligations of Member States

Although the EU is in many cases directly bound by the international obligations of its Member States, the latter cannot avoid international responsibility for wrongful acts by simply attributing all the liability to the Union. They maintain their responsibility in the terms expressed in Article 60 of the Draft Articles on the Responsibility of International Organizations, prepared by the International Law Commission: "A State Member of an international organization incurs international responsibility if it seeks to avoid complying with one of its own international obligations by taking advantage of the fact that the organization has competence in relation to the subject matter of that obligation, thereby prompting the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation".
Although the most used approach in terms of liability is the conditional one, applied for example by the ECtHR, we will demonstrate why a strict liability approach would be more suitable.
Taking the ECtHR, when a State commits a violation of international law that allegedly derives from its membership to an international organization, the Court starts a customary analysis[232] in order to determine whether the violation was suitable and proportionate. When determining the proportionality of acts committed by the EU Member States, the ECtHR adopts the Bosphorus presumption, apart from cases of manifest lack of protection. Therefore, in the majority of cases, the Court rejects jurisdiction on merits, and the same usually happens for acts directly attributable to international organizations more in general[233].
However, as we noted in previous sections, the protection of human rights guaranteed under the EU system is not always equivalent to the one under the UN human rights treaties and the relative treaty bodies. On the other hand, a strict liability approach would not present this problem, since Member States would be directly responsible under their obligations toward the UN in any case, and they would not be excused through the Bosphorus presumption granted to the EU. The treaty-bodies would have jurisdiction on States, even for acts attributable to the Union, by virtue of their delegating act[234].
To overcome this issue of a gap in accountability, both the ECtHR and the HRC are usually very prone to hold States accountable, even when it is evident that they had little margin of discretion when committing the violation. However, "until the EU becomes party to the full range of human rights instruments to which its Member States are party, it is necessary to guarantee accountability for failure to observe the relevant

[230] *Ibidem*
[231] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.25.
[232] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.26.
[233] See Decision on Admissibility of the European Court of Human Rights (Grand Chamber) of 2 July 2007, application n. 71412/01, *Behrami and Behrami* v *France* and application n. 78166/01, *Saramati* v *France, Germany and Norway*.
[234] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.26.

obligations by continuing to hold the Member State accountable. This is best done where a system of strict liability is in operation"[235].

3.4 The Integrity of International Law

In this last section, we will explore several possibilities for the EU to become more engaged with the international legal order, in order to provide a more coherent legal, judicial and political coordination. In light of the proliferation of new international courts and legal orders, the question that we will try to answer is the following: "How then is the integrity of the subject matter of international law be guaranteed?"[236]. Whereas this would seem to be a purely legal issue, political considerations must be made as well.

3.4.1 The EU in International Organizations and Treaty Bodies

As it emerged also from previous sections, there is a dichotomy between what the EU's statements of intent and its actual behaviour in its relationship with the UN system. On the one hand, "for the past few years, the EU has consistently declared that it seeks to strengthen the UN (...) and that it seeks to promote human rights within the United Nations"[237]. On the other, not only has its role been limit by its hybrid status, in between member and observer[238], but it has also been unable to maintain a coherent position. Regarding its legal status, after being a simple observer for many decades, the EU has obtained an enhanced status in 2011, when the UN General Assembly granted it through the adoption of Resolution 65/276[239]. The Resolution allows the Union to be in the list of speakers to intervene in the sessions of the General Assembly, make oral proposals and amendments. It still does not have the right to vote.

Apart from its restricted status, if we take the example of the Human Rights Council ("HRC"), the EU has been hampered in its effectiveness because of the struggle to present itself as a coherent block, at the same time leaving to Member States the freedom that the UN multilateralism entails[240]. Actually, the EU cohesion has been quite solid lately, especially after 2005, when the strategy of "one message with many voices" was adopted[241]. Nevertheless, the EU lost its opportunity to take on a leadership position within the HRC, given that the US were not part of it, due to its consensus-seeking approach. In fact, the EU has adopted a "soft balancing" attitude, in order not to incur in the strong opposition of the Islamic countries, which are sceptical about European anti-terrorism measures, and Latin American countries, which criticize heavily European

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[235] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.29.
[236] R. HIGGINS, *The ICJ, the ECJ and the Integrity of International Law*, cit., p.18.
[237] K.E. SMITH, *The European Union at the Human Rights Council: Speaking with One Voice but Having Little Influence*, in *Journal of European Public Policy*, 2010, XVII n.2, p.228.
[238] F. HOFFMEISTER, *Outsider or Frontrunner? Recent Developments Under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies*, in *Common Market Law Review*, 2007, XLIV n.1, p.54.
[239] Resolution A/RES/65/276 of the UN General Assembly, of 3 May 2011, on the Participation of the European Union in the work of the United Nations.
[240] K.E. SMITH, *op. cit.*, p.224.
[241] K.E. SMITH, *op. cit.*, p.229.

immigration policies[242]. Therefore, the EU within the HRC is perceived as hypocrite, since it releases very bold statements, but in practice it is always striving for compromise, which brings to a lowering of its standards of protection[243].

Aside from the HRC, the EU is surely extremely present within the UN system. Along with its Member States, the EU is the largest contributor to the UN budget, both the regular one (30%) and the peacekeeping budget (31%)[244]. The two organizations have also launched programs for the enhancement of human rights, such as the Spotlight Initiative to eliminate violence against women and girls. Therefore, the commitment of the EU to cooperate with the United Nations in order to promote their common values is evident, but not easy to put in practice.

The reason of this are the complications brought about by the accession to the treaty-bodies. We have already explained the procedural difficulties to achieve this objective, and the reasons why it would be advisable to do so. The main issues that need to be overcome are basically two. Firstly, the EU system is very cautious due to the political implications of accession. Being a party to all the treaty-bodies would mean that they would become instruments legally binding on the Union, thus possibly undermining the EU autonomy[245]. Secondly, the same problems of competence that we mentioned for mixed agreements would arise. In order to avoid complications in this sense, the Council should issue a declaration of competence[246].

Assuming the willingness of the EU to actually incorporate the treaty bodies, some measures would need to be adopted. First of all, it should coordinate with Member States to decide which is the most effective institution to give effect to the obligations of the treaty[247]. The incorporation of the UN treaties in EU law would also mean a reform of the CFR, which at the present time does not contain the range of rights envisaged by the UN treaties. Moreover, the access to the treaties would entail an obligation by the EU to provide an effective remedy to violations, according to Article 8 UDHR. This would mean, on one hand, increasing the control mechanism of the FRA, on the other, a widening of the access to the CJEU[248].

"In a nutshell, the European Union is neither an outsider anymore nor it has become a frontrunner in the multilateral arena. Rather it turns into a respected actor in international organizations and treaty bodies with the same speed as the law develops. Under international law that needs years of skilful multilateral diplomacy, under European law the European Court of Justice may accelerate the process"[249].

3.4.2 The Federalist Option

What has emerged from our analysis is that the main sources of conflict and confusion when dealing with the integration of the EU legal order into the UN one come from the peculiar nature of the European Union as

[242] K.E. SMITH, *op. cit.*, p.235.
[243] K.E. SMITH, *op. cit.*, p.236.
[244] UNITED NATIONS REGIONAL INFORMATION CENTRE FOR WESTERN EUROPE, *How the European Union and the United Nations Cooperate*, in www.unric.org, Bonn, 2007. Accessed 19 May 2019.
[245] F. HOFFMEISTER, *op. cit.*, p.63.
[246] F. HOFFMEISTER, *op. cit.*, p.57.
[247] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.39.
[248] OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, EUROPE REGIONAL OFFICE, *op. cit.*, p.39-40.
[249] F. HOFFMEISTER, *op. cit.*, p.68.

something in between a State and an international organization. First of all, it is not possible to define a clear hierarchy between international and EU law, and consequently between international and European courts, when facing a conflict of jurisdiction. Secondly, the unclear nature of the Union has resulted in the granting of a hybrid status in the UN institutions, somewhere in between the observer status and membership.

In order to definitively clarify both points, a process of deeper integration through federalization would be desirable. This might seem quite a bold statement, but in fact it is widely acknowledged that the EU is already behaving like an emerging federation, except for two major features: a common system of spending and taxation, and the fact that Member States are still the formal masters of the Treaties[250]. Nonetheless, it shares many elements with federations not only on formal grounds, such as a certain degree of legislative coercion at the European level with respect to national orders, but also from the perspective of core values, the so-called "federalist spirit", which entails: autonomy, partnership, self-determination, comity, loyalty, unity in diversity, contractual entrenchment and reciprocity[251].

What is to be remarked, however, is that these federalist features are not part of a planned strategy, employed by Member States, to transform the Union in a federation. We might refer to these characteristics as incidental, but lacking a formal agreement that defines them, first and foremost a European Constitution[252].

The absence of a political willingness to define the Union as a federation has been clear since the beginning, especially on behalf of countries like France and the United Kingdom. In particular, "Member States have refused to attribute final constitutional authority to the overarching structure (of which they are part). They insist on the need to see themselves as co-responsive issuers of authoritative constitutional commands. The system is, accordingly, marked by a lack of agreement on the holding of a final competence power, the power of defining who is competent for doing what"[253]. If this willingness has been lacking in the relationship between the Union and Member States, we can speculate an even stronger reluctance to define these competences (and the competence to attribute competences) *vis-à-vis* the international legal order. Indeed, treating the ECJ as a domestic Court and EU law as domestic law would simplify to a great extent questions of hierarchy. Despite it, it is very unlikely that the Union would be able to submit itself to international law, giving up on its privileged status in the international system. This is especially true in a time where nationalisms are spreading all around the continent, and the EU faces an unprecedented crisis of legitimacy.

[250] T.A. BÖRZEL and T. RISSE, *Who is Afraid of a European Federation? How to Constitutionalise a Multi-Level Governance System,* in C. JOERGES, Y. MÉNY and J.H.H. WEILER (eds.), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer,* Florence, 2000, p.46.
[251] J.E. FOSSUM, *European Federalism: Pitfalls and Possibilities,* in *European Law Journal,* 2017, XXIII n.5, p.368.
[252] J.E. FOSSUM, *op. cit.,* p.369.
[253] J.E. FOSSUM, *op. cit.,* p.370.

3.4.3 The Judicial Review of UN Acts by the ICJ

It is logical to assume that, given the *Solange* approach adopted by the ECJ in *Kadi*, the EU would be keener on accepting some forms of submissions to the UN legal order, if this was able to guarantee a comprehensive system of human rights protection that the EU deems equal to the one envisaged by itself.

One possible way to ensure at least some degree of accountability, in terms of human rights, of the UN organs, would be the possibility for the International Court of Justice to review the acts of the other UN bodies. In particular, in order to avoid another *Kadi* situation, the Resolutions issued by the UN Security Council.

At the present time, there is no explicit legal framework that grants the ICJ the possibility to do such thing[254].

The debate on whether to give the ICJ this competence is as old as the UN Charter, and it mainly concerns who should be the ultimate guarantor of legitimacy of the UN, whether a legal or a political body[255].

The issue first surfaced in the *Certain expenses* case in 1962[256], where the ICJ refused to review a Security Council Resolution on the basis that it would have undermined the autonomy of another UN organ, while each organ must be able to define its jurisdiction. The view of the ICJ changed in the *Namibia* case[257], where not only did the Court accepted to consider the possibility of review as a preliminary question[258], but it also declared that an incidental review could have been possible in cases where, when disputing over a contention, the Court found out that the Security Council had violate Article 24 UN Charter or the principles and purposes of the UN stated in Articles 1 and 2 UN Charter[259].

In these cases, and in their evolution in *Lockerbie*[260], the Court was able to find subtle techniques to operate a *de facto* review, though lacking a doctrinal basis to do so. For example, it recognized that, while Article 12 UN Charter prevents the General Assembly from intervening in matters that are being dealt with in the Security Council, the ICJ is not bound by such provision[261]. Moreover, it is widely acknowledged that is should be within the implied powers of a judicial organ to define its own jurisdiction[262]. Therefore, "Neither the Charter nor the jurisprudence of the Court would therefore support the claim that the Court is generally prevented from examining the validity of decision of the UN political organs, including the Security Council, where such decisions have a bearing on a case before the Court. To this extent, it can be said that the Court may subject the resolutions of the Security Council to 'judicial review'. However, this review is

[254] J. UŠIAK and L. SAKTOROVÁ, *The International Court of Justice and the Legality of UN Security Council Resolutions*, in *Law and Economics Review*, 2014, V n.3, p.204.

[255] D. RICHTER, *Judicial Review of Security Council Decisions - A Modern Vision of the Administration of Justice?*, in W. CZAPLIŃSKI, J. BARCZ, A. WYROZUMSKA, K. WIERCZYŃSKA and Ł. GRUSZCZYŃSKI (eds.), *Polish Yearbook of International Law*, Warsaw, 2013, p.271.

[256] Advisory Opinion of the International Court of Justice of 20 July 1962, *case on Certain expenses of the United Nations (Article 17 Paragraph 2 of the Charter)*.

[257] Advisory Opinion of the International Court of Justice on Namibia.

[258] D. RICHTER, *op. cit.*, p.276.

[259] *Ibidem*

[260] Judgement of the International Court of Justice of 27 February 1998, *case on Questions of interpretation and application of the 1971 Montreal Convention arising from the Aerial incident at Lockerbie (Libyan Arab Jamahiriya* v *United States of America).*

[261] D. RICHTER, *op. cit.*, p.273.

[262] D. RICHTER, *op. cit.*, p.274.

implicit in the exercise of the judicial function of the Court; it does not constitute an independent 'power of judicial review'"[263]. The necessity of submitting the Security Council to a more rigorous judicial control arose in the 1990s, with the introduction of the system of smart sanctions. However, it has to be acknowledged that, since the Security Council must take decisions in sudden contexts of crisis, the burden of having all its Resolutions subjected to judicial review might result in a loss of credibility and effectiveness[264].

Anyway, even if a formal judicial review is still not in place, UN Member States should not feel afraid to violate a Security Council Resolution that allegedly does not respect human rights, because usually when it comes to them, the UN system retreats for fear of international pressure and loss of legitimacy[265]. Nevertheless, a formal procedure would probably make the UN implementation mechanisms of human rights more effective, thus allowing the EU to be to some extent more deferential to the international legal order.

3.4.4 The Work of Non-Governmental Organizations

Given the prominent role played by political pressure on the UN system, the work of NGOs might produce great results in terms of guaranteeing the cooperation and an organic development of the UN and EU human rights law. NGOs are also bodies that are traditionally much more in contact with the civil society than UN and EU organs, thus they are able to explain to the wider public what happens inside the institutions and to promote their activities. Furthermore, in many cases they are able to intervene in international legal proceedings to provide reliable evidence, and this possibility should be enhanced.

Apart from these functions, that only collaterally contribute to avoid the fragmentation of international law and strengthen cooperation, there are some organizations that have this kind of cooperation as their core mission. An example is the NGO International Commission of Jurists - European Institutions, whose aim is "in particular to bring the concerns of the ICJ to the attention of institutions and bodies of the European Union and Council of Europe, and advocates to strengthen standards and mechanisms for the protection of human rights at European level"[266]. Here the ICJ is not the International Court of Justice, but rather the International Commission of Jurists, but still the objective of this organization is not only to globally promote the rule of law and the protection of human rights, but also to do it in a consistent manner within Europe, integrating the needs and the approaches of the UN system, the EU system, and the Council of Europe.

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[263] B. MARTENCZUK, *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?,* in *European Journal of International Law,* 1999, X n.3, p.527.
[264] J. UŠIAK and L. SAKTOROVÁ, *op. cit.*, p.209.
[265] D. RICHTER, *op. cit.*, p.292.
[266] Information taken from *www.icj.org.*

CONCLUSION

Throughout this dissertation, we have delved into the evolution of human rights, and the main mechanisms of protection, both in the UN and the EU legal systems, with a particular focus on the jurisprudence of, respectively, the International Court of Justice and the European Court of Justice in developing this peculiar branch of law. The distinct analyses of the first two chapters have been functional to explore, in the third one, the interactions between the two legal orders, potential conflicts and recommendable opportunities that are still to be seized by both the UN and the EU institutions.

What has emerged is that a furthering of formal and informal relations between the two systems and their Courts is likely to be fruitful. This is because on the one hand the UN system presents a wide range of human rights formally protected, but it sometimes lacks accountability and effective enforcement mechanisms. Therefore, it can learn many lessons from the European Union, even serving itself of the EU enforcement mechanisms from time to time, and letting the Union hold the UN institutions partially accountable for violations of EU human rights standards. On the other hand, the European Union does not envisage a range of human rights as wide as the one provided by the UN institutions, and it only limits itself to "negative" protection (at least in theory, though we have demonstrated how several positive mechanisms have been developed). For this reason, "subjecting the EU to international law principles challenges the Community concepts and methods of protection of human rights"[267].

In the absence of such integration between the two systems, the fear of many legal scholars is that EU citizens will find themselves subjected to two different types of human rights protection, but not necessarily more protected than those people who are only protected by national and international law, without the European level. On the contrary, they would be victims of a two-tier system that threatens to generate conflicts that necessarily lowers standards, or at least they leave a legal vacuum that is not easy to fill in.

Actually, there is no empirical evidence that a fragmentation of international law in matters regarding human rights lowers the standards of protection. Differently, it seems that the dialogue, even when conflictual, engaged by the two legal orders always have as a result the development of international law and many legal advantages for the parties involved in a dispute. In particular, individuals are those benefiting the most from the presence of so many layers of protection, since they have increased the fora in which they are not only protected but also recognized as subjects of international law[268].

In conclusion, more integration is necessary to guarantee coherence and the universality of human rights, that from their very nature must be uniform all across the world. Nevertheless, at this stage fragmentation is still conducive to an advantageous dialogue, that might enhance the role of individuals in the international arena, providing them the protection and dignity that until some decades ago was granted only to States.

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[267] T. AHMED and I. DE JESÚS BUTLER, *op. cit.*, p.772.

[268] K.S. ZIEGLER, *Strengthening the Rule of Law, but Fragmenting International Law,* cit., p.305.

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RIASSUNTO DELL'ELABORATO

L'Organizzazione delle Nazioni Unite ("ONU") e l'Unione Europea ("UE") hanno entrambe tra i loro principi costituenti quello della protezione dei diritti umani. Questo elaborato si propone di esplorare i meccanismi messi in atto dai due ordinamenti giuridici a questo scopo, e analizzare le interazioni tra essi. Particolare attenzione sarà dedicata alla giurisprudenza della Corte Internazionale di Giustizia ("CIG") e della Corte di Giustizia dell'Unione Europea ("CGUE"), poiché hanno contribuito notevolmente allo sviluppo delle rispettive legislazioni sul tema. In primo luogo, ci focalizzeremo sull'ordinamento delle Nazioni Unite, poi su quello dell'UE, e infine sul rapporto tra i due e su come integrarli.

La competenza in materia di diritti umani è data all'ONU dalla Carta delle Nazioni Unite del 1945, in particolare dagli articoli 1 e 55, e gli organi competenti sono l'Assemblea Generale e il Consiglio Economico e Sociale (ECOSOC).

Nel 1948, la Commissione per i Diritti Umani redasse la Dichiarazione Universale dei Diritti dell'Uomo ("DUDU"). Nonostante il fatto che non sia legalmente vincolante, ha una notevole autorevolezza morale, e la maggior parte dei diritti in essa contenuti sono stati riconosciuti come principi generali del Diritto Internazionale e norme di *jus cogens*.

La necessità di produrre strumenti con un maggiore potere vincolante portò alla redazione della Convenzione Internazionale sui Diritti Civili e Politici ("CIDCP") e della Convenzione Internazionale sui Diritti Economici, Sociali e Culturali ("CIDESC") nel 1966. Entrambe furono adottate nel 1976, a sottolineare i delicati equilibri delle relazioni internazionali in piena Guerra Fredda. Le due convenzioni non presentano un ordine gerarchico e contengono obblighi sia positivi che negativi.

Infine, esistono nove trattati tematici, tra i quali menzioniamo a titolo esemplificativo la Convenzione sui Diritti dell'Infanzia e dell'Adolescenza. Gli Stati Membri dell'Unione Europea sono firmatari della maggior parte di tali trattati.

Dopo aver visto l'evoluzione dei diritti nel sistema ONU, è opportuno analizzare come vengono protetti. Innanzitutto, un ruolo importante è svolto dal Consiglio per i Diritti Umani, che nel 2006 ha sostituito la Commissione tramite la Risoluzione 60/251 dell'Assemblea Generale. Da segnalare sono le cosiddette "procedure speciali", ovvero delle procedure specifiche di un tema o di un Paese, che prevedono comunicazioni con gli Stati coinvolti, visite sul campo, consultazione di esperti e programmi di advocacy. Inoltre, ogni 4 anni e mezzo viene prodotto un Esame Periodico Universale, volto a monitorare la situazione dei diritti umani in tutti i 193 Paesi membri dell'ONU.

In aggiunta, per ogni trattato tematico esiste una commissione di 18 esperti che ricevono periodicamente dei report dagli Stati parti, redatti attraverso l'uso di linee guida e il supporto delle Organizzazioni Non Governative ("ONG"), sullo stato di implementazione del dato trattato nel proprio territorio. Questi organi non solo ricevono comunicazioni da Stati e individui, ma rilasciano anche osservazioni generali e

raccomandazioni, o avviano inchieste *proprio motu*. Il potere vincolante di tali meccanismi deriva dall'Articolo 2(2) della Carta ONU e dall'Articolo 8 della DUDU.

Altre garanzie di protezione dei diritti previste dal sistema internazionale sono: il lavoro delle ONG, le missioni di peacekeeping, i tribunali penali internazionali.

Ci accingiamo ora a fare delle considerazioni preliminari sulla Corte Internazionale di Giustizia, fondamentale per la codificazione di alcuni diritti. La Corte si compone normalmente di 15 giudici di diversa nazionalità, e può essere interpellata per risolvere contenziosi tra Stati (Articolo 38 dello Statuto della CIG), o per rilasciare un parere consultivo (Articolo 65 Statuto CIG) quando richiesto dalle Organizzazioni Internazionali autorizzate.

Fondamentali per lo sviluppo dei diritti umani sono state spesso le opinioni separate e dissenzienti, previste dall'Articolo 57 dello Statuto. Ci concentreremo adesso su due contenziosi e un parere consultivo nei quali l'operato della CIG è stato fondamentale per lo sviluppo di una giurisprudenza dei diritti umani. Il primo caso trattato è quello dell'Africa Sud-Occidentale, che vede Etiopia e Liberia contrapporsi al Sudafrica, accusata di occupare illegalmente il territorio dell'attuale Namibia, sulla base di un mandato affidatole dalla Lega delle Nazioni, e di applicare le pratiche discriminatorie dell'*apartheid*. Inizialmente, nel 1962, la CIG accettò il caso. In questo frangente, è rilevante l'Opinione Separata del giudice Jessup, il quale riconobbe a tutti i membri della comunità internazionale la responsabilità di denunciare una violazione dei diritti commessa in un'altra nazione, anche in mancanza di un interesse diretto. Tuttavia, nel 1966 la Corte negò l'interesse legale a Etiopia e Liberia sulla base di una distinzione tra legge e moralità. Nell'Opinione Dissenziente del giudice Tanaka, l'equità intesa come non discriminazione viene riconosciuta non solo come diritto consuetudinario e principio generale del diritto internazionale, ma anche come *grundnorm* del diritto internazionale nella piramide kelseniana.

L'occasione per la Corte di redimersi arrivò con il caso *Barcelona Traction*, in cui si opposero Belgio e Spagna. Se le specifiche del caso sono poco rilevanti, fondamentale è invece la distinzione che viene fatta tra gli obblighi di uno Stato verso un altro e quelli verso la comunità internazionale. Nel secondo caso, quegli obblighi sono *erga omnes*, perciò reclamabili da qualsiasi Stato seppur non coinvolto direttamente.

L'ultimo caso che trattiamo è il parere consultivo sull'occupazione della Namibia. Infatti, il Consiglio di Sicurezza aveva chiesto alla CIG quali sarebbero state le conseguenze per la comunità internazionale dell'occupazione illegale della Namibia da parte del Sudafrica, considerando che il Consiglio aveva adottato la Risoluzione 276(1970) intimando il Sudafrica a ritirarsi. In questo caso, la Corte chiarificò il principio di autodeterminazione dei popoli come obiettivo ultimo dei Mandati, ma anche come diritto consuetudinario (nell'Opinione Separata del giudice Ammoun). Altri punti salienti sono la ferma condanna dell'*apartheid* e un'interpretazione dell'Articolo 80(1) della Carta ONU che dà agli individui lo status di soggetti del diritto internazionale.

In conclusione, le Nazioni Unite sono state molto efficaci nel creare e riconoscere una vasta gamma di diritti; tuttavia, mancano spesso di poteri coercitivi per assicurare un controllo effettivo sull'implementazione dei trattati e le garanzie per gli individui non sono sufficienti.

Passiamo ora a trattare dell'Unione Europea, che secondo la narrativa tradizionale nasce per scopi economici, ma che secondo de Burca era in origine un progetto politico, fallito per mancanza di volontà degli Stati.

I diritti umani compaiono in tutti i trattati europei dal 1986 in poi, ma è con Lisbona che la Carta dei Diritti Fondamentali ("CDF") diventa diritto primario e viene sottoposta alla giurisdizione della CGUE. Inoltre, l'Articolo 6 del Trattato dell'Unione Europea ("TUE") riconosce i diritti fondamentali come pilastri dell'Unione.

La CDF, redatta a Nizza nel 2000, contiene 50 diritti, tra cui alcuni diritti sociali ed economici. Tuttavia, secondo l'Articolo 52 CDF essi sono derogabili in casi eccezionali, e un'ulteriore limitazione è posta dalla distinzione tra principi e diritti: solo gli ultimi possono essere invocati in un tribunale. Un'altra fonte di diritti nell'UE sono le Costituzioni nazionali degli Stati membri, ma essendo molto diverse tra loro c'è un rischio di frammentarietà.

La protezione è garantita da tutti i principali organi UE: la Commissione dal 2009 si impegna a produrre una valutazione d'impatto in tutti gli Stati membri; il Consiglio ha rilasciato delle linee guida per la promozione dei diritti umani nei rapporti con Stati terzi; il Parlamento ha istituito diverse commissioni competenti. Inoltre, dal 2007 esiste l'Agenzia UE per i Diritti Fondamentali, che utilizza consistentemente gli strumenti internazionali come standard.

L'ultima fonte di diritti umani per l'UE è la Convenzione Europea per la protezione dei Diritti Umani ("CEDU"), nata nel 1953 in seno al Consiglio d'Europa. L'elenco di diritti civili e politici che contiene è stato gradualmente ampliato dalla giurisprudenza della sua Corte e da Protocolli aggiuntivi.

Essa distingue tra diritti derogabili e inderogabili, e il Protocollo 11 dà alla Corte EDU giurisdizione vincolante. L'Articolo 59 del Protocollo 14 prevede l'accesso dell'UE alla CEDU, di cui già fanno parte tutti i suoi Stati membri.

Esso sarebbe auspicabile per garantire agli individui un ricorso effettivo contro eventuali violazioni dei propri diritti da parte delle istituzioni UE. Inoltre, si eviterebbe il rischio di standard doppi. Nonostante secondo alcuni le situazioni di interpretazione divergente potrebbero in realtà moltiplicarsi, è evidente che un dialogo più formalizzato tra i due sistemi garantirebbe un'applicazione più uniforme. Nel 2014, la CGUE ha rigettato una Bozza d'Accordo di adesione con l'Opinione 2/13, giudicandola incompatibile con suoi principi costituzionali. Pertanto, c'è una dicotomia tra le dichiarazioni dell'UE e il suo approccio riluttante verso la CEDU.

Riguardo al rapporto tra CEDU e CFR, per i diritti contenuti in entrambe è in vigore il principio di protezione equivalente, nonostante numerosi diritti abbiano un significato più ampio nella CFR.

L'autonomia dell'UE è preservata dall'Articolo 53 CFR, che costituisce un obbligo di non regressione per l'UE. In casi di problemi di interpretazione, come in *Zolotukhin* v. *Russia*, solitamente la Corte EDU ha mostrato deferenza verso la CGUE, sottolineando l'importanza di un dialogo tra le due Corti.
La CGUE negli anni è stata molto attiva nel creare uno standard europeo di diritti umani. Secondo l'Articolo 19 TUE, essa si occupa di vigilare sull'interpretazione e applicazione dei Trattati europei e della CFR.
Nel caso *Internationale Handelsgesellschaft* (1970) la CGUE riconobbe l'esistenza di uno standard europeo per i diritti umani, impedendo agli Stati di violare una norma europea sulla base delle loro Costituzioni nazionali. Temendo che l'UE non possedesse ancora i meccanismi di protezione necessari, la Corte Costituzionale tedesca sviluppò la dottrina *Solange*: la supremazia dell'UE non sarebbe stata riconosciuta finché essa non avesse garantito una protezione equivalente a quella tedesca. Questa dottrina esortò l'Unione ad ampliare la propria protezione, portando la Corte tedesca a capovolgere la dottrina.
Un altro caso importante è *Nold* (1974), dove la CGUE si dichiarò obbligata a non violare i principi delle Costituzioni degli Stati membri, e riconobbe i trattati internazionali come fonte di diritti nell'UE. Tuttavia, abbiamo visto come solitamente la Corte si mostri riluttante a lasciarsi vincolare dal diritto internazionale, e anche il dialogo con la Corte EDU avviene perlopiù in maniera informale. Nonostante ciò, raramente si sono presentati problemi di inconsistenza tra le due Corti, soprattutto perché la CEDU adotta nei confronti della CGUE la "presunzione Bosphorus": si assume che l'UE abbia un sistema di diritti equivalente a quello della CEDU, tranne in casi di "manifesta carenza". Questo principio è spesso considerato troppo astratto, e per raggirarlo sovente la Corte EDU ritiene gli Stati UE direttamente responsabili.

In ultima analisi, il dialogo tra le due Corti è fruttuoso anche in via informale, ma ci sono altre due pratiche per cui la CGUE dovrebbe ispirarsi alla Corte EDU: il coinvolgimento delle ONG nei processi; e la possibilità di adottare misure provvisorie per bloccare un'attività che potrebbe danneggiare irreversibilmente la parte lesa.
Più in generale, nonostante ci siano diverse ragioni che spingono la CGUE a non richiamarsi spesso al diritto internazionale, questo atteggiamento potrebbe generare un isolazionismo rischioso, con una conseguente perdita di legittimità della Corte.

L'UE ha effettivamente un obbligo di rispettare il diritto internazionale, che deriva dal Diritto Consuetudinario, dai Trattati internazionali e dalla successione agli obblighi degli Stati membri. Il rispetto di tali obblighi è però ostacolato dal carattere ibrido dell'Unione, tra un'organizzazione internazionale e uno Stato federale. Ulteriori complessità si aggiungono se si tiene conto anche del livello degli ordinamenti nazionali degli Stati membri, e di possibili conflitti normativi e di giurisdizione tra le Corti europee e quelle internazionali. Il risultato è che, nonostante l'UE sia vincolata al regime ONU dei diritti umani dall'Articolo 3(5) TUE, essa fa riferimento agli strumenti internazionali in maniera saltuaria e talvolta incoerente. Questo può rappresentare un problema, dato che come abbiamo notato precedentemente il regime dell'Unione non presenta una gamma di diritti ampia come quella prevista dalle Nazioni Unite.

Riguardo a possibili conflitti con le Corti internazionali, l'Articolo 344 TFUE dà alla CGUE giurisdizione esclusiva sulla legislazione dell'Unione. Pertanto, se una disputa basata su un accordo UE venisse portata davanti a un'altra Corte internazionale, questa dovrebbe declinare la giurisdizione. Il problema sorge per gli accordi misti. Un esempio è il caso *MOX Plant,* dove la CGUE dichiarò che quando il fulcro del caso si basa sulla legislazione UE, essa può reclamare la giurisdizione. Questo limita fortemente l'accesso degli individui ad altre forme di ricorso effettivo nel diritto internazionale.

In aggiunta, una maggiore integrazione tra diritto UE e diritto internazionale in merito alla protezione dei diritti umani sarebbe desiderabile per garantire l'universalità dei diritti e per rendere più efficaci i meccanismi di controllo dell'ONU tramite i meccanismi di applicazione dell'UE. Per di più, gli Stati membri dell'UE hanno ratificato la maggior parte dei trattati ONU sui diritti umani, perciò è presumibile che essi abbiano interesse affinché l'Unione metta in atto la loro volontà di aderirvi.

Un caso giudiziario che illustra perfettamente le conseguenze di una mancata integrazione e di una gerarchia indefinita tra i due ordinamenti è *Kadi*. I fatti del caso sono noti, perciò non ci dilungheremo. Nel 2005, il Tribunale di Primo Grado della CGUE si rifiutò di esercitare una revisione giudiziaria di una risoluzione del Consiglio di Sicurezza ONU, la Risoluzione 1267 (1999), basandosi sull'Articolo 103 della Carta ONU e sull'ex Articolo 307 del Trattato della Comunità Europea (oggi Articolo 351 TFUE). L'unica possibilità di revisione sarebbe stata una violazione da parte del Consiglio di Sicurezza di una norma di *jus cogens*.

Al contrario, nella sentenza di appello del 2008, la Corte di Giustizia revisionò non la Risoluzione del Consiglio di Sicurezza, ma la normativa europea che la implementava (Normativa 467/2001, abrogata dalla 881/2002). Il ragionamento, ispirato dall'Avvocato Generale Maduro, vedeva una superiorità morale dei diritti fondamentali dell'Unione sulle norme di sicurezza internazionale. Questo approccio rischia di trasformare il diritto internazionale in una sorta di diritto non vincolante. Tuttavia, la prospettiva più adeguata per interpretarlo è simile a quella di *Solange*: le istituzioni europee non possono revisionare una norma delle Nazioni Unite, finché una protezione equivalente dei diritti umani viene garantita.

Questo conflitto viene quasi unanimemente identificato come politico più che legale, ed è proprio alle istituzioni politiche che si rimette la responsabilità di stabilire una gerarchia tra le due organizzazioni. Quello che emerge è innanzitutto una chiara presa di posizione dell'UE come autorità politica prima che economica, e un maggiore coinvolgimento degli individui come soggetti del diritto internazionale.

Per quanto politica sia la questione, esistono degli obblighi internazionali legali che vincolano l'Unione all'ordinamento internazionale. Sorvolando sull'Articolo 103 della Carta ONU e sul Diritto Consuetudinario, analizzeremo gli obblighi derivanti dai trattati. Al momento, l'UE è parte solamente alla Convenzione sui Diritti delle Persone con Disabilità, che contiene una clausola che ne permette l'accesso. Perché si verifichi un accesso formale anche agli altri trattati, altrettanti emendamenti sarebbero necessari. Un'altra possibilità sarebbe una dichiarazione unilaterale dell'UE, ma in ogni caso entrambe le alternative assumono un desiderio effettivo dell'UE di accedere, desiderio in linea con le dichiarazioni degli esponenti istituzionali

ma non con l'approccio della Corte. Quello che accade realmente è una relazione informale, dove l'Unione si comporta come se fosse vincolata senza esserlo formalmente.

Un'altra fonte di obblighi internazionali per l'UE deriva, come già detto, dalla successione alle obbligazioni degli Stati membri tramite l'Articolo 351 TFUE, che nonostante lasci la libertà agli Stati di continuare a rispettare i loro accordi, li obbliga a interpretarli in linea con il diritto europeo e, se impossibile, a ritirarsi.

Oltre all'Unione, anche gli Stati mantengono le loro responsabilità internazionali, ma di solito in maniera condizionata, quando invece sarebbe più opportuno istituire una responsabilità oggettiva per gli Stati.

Volgendo verso la conclusione, rimangono da esplorare alcune possibilità per favorire l'integrazione tra i due ordinamenti in modo da garantire una protezione dei diritti umani più efficace e coerente.

Innanzitutto, sarebbe opportuna una maggiore partecipazione dell'UE nelle istituzioni ONU. Infatti, nonostante abbia ricevuto uno status rafforzato nel 2011 e sia la maggiore contribuente al budget delle Nazioni Unite, l'Unione fatica a imporsi in organismi chiave come il Consiglio per i Diritti Umani, dove adotta un approccio prudente che non le permette di imporsi come leader a livello mondiale e di guadagnarsi il rispetto degli altri membri.

Un'opzione per definire le gerarchie tra i due ordinamenti sarebbe il pieno raggiungimento dell'Unione di una condizione di Stato federale. In questo caso, la sua Corte sarebbe trattata come una corte domestica, e verrebbe ripristinato un rapporto ordinamento nazionale - ordinamento internazionale. Tuttavia, non solo è molto difficile che l'Unione accetti di rinunciare al suo status ibrido, ma è anche politicamente utopico pensare a una federazione nel breve termine, considerando l'ondata euroscettica dell'ultimo decennio e il numero di riforme e sconvolgimenti politici che essa implicherebbe.

Un dibattito aperto sin dalla redazione della Carta ONU è quello sulla competenza della CIG di revisionare atti delle altre istituzioni ONU. Se ciò fosse possibile, essa potrebbe supervisionare il rispetto dei diritti umani in tutto il sistema ONU, generando probabilmente un atteggiamento di maggiore deferenza da parte dell'UE. Al momento non è formalmente possibile, anche se spesso la CIG ha adottato delle tecniche per raggirare il divieto.

L'ultima possibilità di integrazione è rappresentata dall'attività delle ONG, che possono porsi come intermediari e favorire un dialogo proficuo tra i due ordinamenti.

In conclusione, la frammentarietà del diritto internazionale generata dalla mancata integrazione tra i due ordinamenti non è particolarmente dannosa per la protezione dei diritti, considerando che spesso il conflitto tra i due porta a proficui dialoghi e quindi a una maggiore protezione. L'integrazione è tuttavia necessaria perché, da un lato, l'UE necessita della più ampia gamma di diritti fornita dall'ONU; dall'altro, l'ONU è carente di meccanismi di applicazione, che invece sono particolarmente efficaci nell'ordinamento dell'Unione. I due sistemi sono quindi complementari e per questo è auspicabile la loro integrazione.