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Accession of the European Union to the United Nations Human Rights Treaties: Explaining the Reasons for Inaction

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Abstract

This paper explores the puzzling question why the European Union (EU) – as a strong promoter of human rights in external affairs – does not seek accession to most of the United Nations (UN) human rights treaties. Several possible explanatory factors derived from preliminary research are examined: the EU's internal and external context, the added value of accession, and the degree of internalization of the human rights norms in the EU. The example of the European Convention on Human Rights (ECHR), to which the EU seeks to accede, is used for comparison. Based on an analysis of documents and secondary literature as well as interviews with various experts, the paper argues that the low level of internalization accounts best for the lack of EU interest in the ratification of the UN human rights treaties. The other variables are not really different from the case of the ECHR and make accession to the UN framework, in some aspects, even comparatively more attractive for the EU.

Introduction: Why Is the European Union not Joining UN Human Rights Treaties?

Given the growing competences of the European Union (EU) and its image as a human rights actor, it seems surprising that there is almost no external human rights scrutiny of the Union's actions by international bodies. Until 2011, when the EU ratified the United Nations Convention on Rights of Persons with Disabilities (CRPD), it was not a party to any human rights treaty.¹ The Union makes significant efforts to accede to the European Convention on Human Rights (ECHR), but the prolonged accession negotiations did not yet come to fruition.² In 2017, the EU has also decided to sign the Istanbul Convention on Preventing and Combating Violence Against Women.³ The European Parliament's request for an opinion of the Court of Justice of the European Union (CJEU) on the scope of this accession has been pending since April 2019.⁴

Moreover, the EU has, so far, not initiated any ratification of human rights treaties adopted under the auspices of the United Nations (UN) other than the CRPD. UN human rights treaties (UNHRTs) are the core of international human rights law and most of them have achieved universal levels of ratification, including by all EU member states. They are therefore acknowledged as human rights standards. The European Union also embraces this universal understanding of human rights. What is more, it actively promotes the standards represented by the UNHRTs abroad.

There are seemingly evident explanations for the EU's lack of ratification of UN human rights treaties. It can be argued that between the late 1960s and the late 1980s, when most of them were negotiated and adopted, the European Community did not necessarily have the legal and diplomatic capacities to engage in the processes of negotiation and adoption of these treaties. The CRPD was drafted much later, between 2002 and 2006, with the European Commission's involvement from the very

¹ United Nations, "Convention on the Rights of Persons with Disabilities", *United Nations Treaty Series*, vol. 2515, New York, 2006, p. 3.

² Council of Europe, "Convention for the Protection of Human Rights and Fundamental Freedoms", *United Nations Treaty Series*, vol. 213, Rome, 1950, p. 221.

³ Council of Europe, "Convention on preventing and combating violence against women and domestic violence", *Council of Europe Treaty Series*, no. 210, Istanbul, 2011.

⁴ See European Parliament, *Resolution of 4 April 2019 Seeking an Opinion from the Court Of Justice on the Compatibility with the Treaties of the Proposals for the Accession by the European Union to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence and on the Procedure for that Accession*, Brussels, 4 April 2019, (2019/2678(RSP)).

beginning.⁵ Another reason may be the lack of regional and international organization (REIO) clauses in those treaties, which allow the EU, from a procedural point of view, to accede to UNHRTs. Although these factors cannot be dismissed, they should not be considered as insurmountable barriers as law is, after all, a construct. The EU has already proven that it is capable of questioning and transforming the traditional Westphalian order of international relations, from the creation of its own diplomatic corps – the European External Action Service (EEAS) – to its presence in fora such as the G20 and the United Nations General Assembly. Finally, the very same barriers were also present in the case of the European Convention of Human Rights, which did not have a REIO clause when it was adopted in 1950. It did not stop the EU from actively seeking ratification of the ECHR, a fact that makes this Convention an interesting case of comparison with UN human rights treaties. Hence, this paper aims to answer the following question: why does the European Union not seek accession to the UN human rights treaties (with the exception of the CRPD)?

The next section explains the framework of analysis used to answer this research question. Further parts of the paper cover the examination of several possible explanatory factors: the EU's internal and external context, the added value of accession, and the degree of internalization of the human rights norms in the EU. It ends with conclusions regarding the reasons for the EU's inaction in the context of the UNHRTs and makes several recommendations addressed to the EU.

Framework of Analysis

UN human rights treaties is an umbrella term used by the UN itself and in the human rights literature, which denotes the nine core human rights treaties adopted under the auspices of the United Nations:

- 1) International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- 2) International Covenant on Civil and Political Rights (ICCPR)
- 3) International Covenant on Economic, Social and Cultural Rights (ICESCR)

⁵ See United Nations, "Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities", retrieved 2 April 2020, <https://www.un.org/development/desa/disabilities/resources/ad-hoc-committee-on-a-comprehensive-and-integral-international-convention-on-the-protection-and-promotion-of-the-rights-and-dignity-of-persons-with-disabilities.html>.

- 4) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- 5) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- 6) Convention on the Rights of the Child (CRC)
- 7) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW)
- 8) International Convention for the Protection of All Persons from Enforced Disappearance (CED)
- 9) Convention on the Rights of Persons with Disabilities (CRPD).⁶

The phenomenon which I identify and seek to explain is that the fact that EU seems generally disinterested in the ratification of the UN human rights framework as a whole body of law (with the important exception of the CRPD).

No single theoretical concept or approach is able to provide a complete explanation of this phenomenon. An initial review of the literature, especially on states' participation in human rights treaties, and interviews conducted with human rights experts from the European Commission, the EEAS, the Fundamental Rights Agency, a national diplomatic service, the Council of Europe, civil society and academia, helped to identify the relevant factors. The first variable, the context, looks for possible explanations in the environment in which an accession would take place. This environment influences the EU's ability to ratify the UNHRTs and defines potential costs of adaptation. The second variable, the added value, assumes an implicit benefit analysis in the EU's behaviour towards the UNHRTs. The EU will only seek accession to a treaty if it anticipates significant benefits from this action. The context and the added value variables correspond to the 'logic of consequence' which presupposes that the

⁶ United Nations, "International Convention on the Elimination of All Forms of Racial Discrimination", *United Nations Treaty Series*, vol. 660, New York, 1966, p. 1; United Nations, "Convention on the Elimination of all Forms of Discrimination Against Women", *United Nations Treaty Series*, vol. 1249, New York, 1979, p. 1; United Nations, "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", *United Nations Treaty Series*, vol. 1465, New York, 1987, p. 85; United Nations, "Convention on the Rights of the Child", *United Nations Treaty Series*, vol. 1577, New York, 1989, p. 3; United Nations, "International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families United Nations", *United Nations Treaty Series*, vol. 2220, New York, 1990, p. 3; United Nations, "International Convention for the Protection of All Persons from Enforced Disappearance", *United Nations Treaty Series*, vol. 2716, New York, 2006, p. 3.

behaviour of international actors is rational.⁷ The third variable, the internalization of human rights norms, takes into account the EU's attachment to and identification with the UN human rights framework. In this perspective, the EU's identity influences its decision-making processes with regard to the ratification of human rights instruments. The internalization variable corresponds to the 'logic of appropriateness' in constructivist International Relations theory which highlights the importance of values and identity in decision-making.⁸

The analysis will be guided by a comparative method. Different explanations of the EU's inaction regarding the UNHRTs will be compared to the example of the European Convention on Human Rights. This case study has been selected because of its high explanatory potential. The ECHR represents an example of the EU's active effort to join a human rights treaty and therefore contrasts with the EU's attitude towards the UNHRTs. Furthermore, the ECHR shares important characteristics with the UN human rights framework: they both include broad catalogues of human rights – especially if we consider the development of the ECHR through the case law of the European Court of Human Rights (ECtHR) –, they both constitute well-established human rights law frameworks, and they did not envisage the accession of the EU in the first place. At the same time, the ECHR is in many ways different from the UNHRTs. It is European, not global in its scope. It is a single instrument and therefore requires a single ratification, as opposed to the many UNHRTs. Finally, it has an enforcement mechanism, the ECtHR, which contrasts with the non-binding complaint systems of the UN human rights treaty bodies.

The material used in the analysis consists of primary sources such as treaties, EU legislation, official communications and other documents of EU institutions. This desk research was complemented by eight semi-structured interviews with experts. Regarding the secondary literature, there are rather few analyses of the EU's relationship with the UNHRTs. Nevertheless, this paper relies on an extensive list of publications on issues such as internal-external policy coherence, the EU as human rights actor, the law of the EU's external relations and the EU's relationship with the ECHR.

⁷ See e.g. A. van Aaken, *Rational Choice Theory*, Oxford, Oxford Bibliographies, 2015.

⁸ See e.g. J.G. March & J.P. Olsen, "The Logic of Appropriateness", in R.E. Goodin, M. Moran & M. Rein (eds.), *The Oxford Handbook of Public Policy*, Oxford, Oxford University Press, 2008.

The research question has an underlying assumption that the EU, in fact, does not seek to accede to the UNHRTs, which cannot be taken at its face value. Yet, publicly available communications coming from the European Union do not provide any reasons to discard this assumption. Initial research, including interviews, confirmed that the Union is not considering binding itself by the existing UN human rights framework.

The Context of a Possible Accession of the EU to UNHRTs

Turning now to the factors potentially accounting for the EU's inaction towards accession to the UN human rights treaties, I will first explore whether the internal context, that is the EU's own legal order and political constellations, makes an accession difficult, before examining the external context.

Internal Context in the EU

The EU does not have a general competence in the field of human rights, which makes it more cumbersome to prove accordance of the EU's actions with the principle of conferral, according to which the EU only has competences which were conferred on it by the member states (Art. 5(1) TEU). The European Convention on Human Rights has a clear advantage over the UN human rights treaties as not only the competence but also the obligation to accede to this instrument has been conferred on the European Union through a treaty provision (Article 6(2) TEU). Although none of the interviewees considered the lack of an explicit authorization in the Treaties as detrimental to the EU's possible accession to the UNHRTs, some of them, notably EU officials, considered the incorporation of Article 6(2) in the TEU as an explanatory factor for the EU's pursuit of accession to the ECHR over the UNHRTs, emphasizing the EU's duty to join the European convention, while in the case of the UNHRTs no such duty exists and even the EU's competence to ratify the treaties can be put into question.⁹ However, the discussion on the legal feasibility of accession to human rights treaties by the EU does not stop here, since the EU has successfully joined the UN Convention on Rights of Persons with Disabilities and the same cannot be said, at least until now, about the European Convention on Human Rights.

⁹ Interview with Charles-Michel Geurts, Deputy Head of the EU Delegation to Indonesia and Brunei, former Deputy Head of Division Human Rights, EEAS, via videoconference, 8 February 2020; Interview with an Official, European Commission, via telephone, 27 February 2020.

Despite the lack of an explicit human rights competence given to the EU by the Treaties, it is widely acknowledged that human rights are a cross-cutting issue, meaning that anything, from trade to migration policy, can affect individual rights. According to Alston and Weiler, “it seems self-evident that in [the areas of EU competence] it is only the Community which could reasonably be considered to be the custodian of human rights” and therefore can, and moreover should, ensure the protection of human rights in those areas.¹⁰ This cross-cutting character of human rights seems to be recognized by the EU itself through the adoption of the Charter of Fundamental Rights (CFEU) applicable to all EU actions.¹¹

The fear of the EU going beyond its conferred competences by acceding to human rights treaties is unfounded as the Union will only abide by a treaty to the extent covered by its competences.¹² In comparison, the European Convention on Human Rights, and specifically its case law, relate to virtually any field of policy. For instance, a significant part of the standards developed under the ECHR relates to ensuring proper living conditions in prisons. This does, however, not mean that after the EU’s accession to the ECHR, the EU will have to implement standards related to prisons, among others, in which it clearly lacks competences.

Any accession of the EU to an international agreement would have to fall within the scope of Article 216 TFEU as well as be consistent with the well-established case law on EU treaty-making powers. As discussed above, the Treaties do not confer on the EU an explicit competence to accede to UNHRTs. The accession is also not provided for in any legally binding Union act, which leaves two possibilities for the EU to join the UNHRTs under Article 216 TFEU – either an accession has to be necessary in order to achieve one of the objectives referred to in the Treaties or be likely to affect common rules or alter their scope. In my view, it is reasonable to consider the EU’s accession to UNHRTs as fulfilling each of these criteria. First, according to Article 3(1) TEU, the aim of the Union is to promote its values (under Article 2 TEU respect for human rights is one of them) and the well-being of its peoples, the very purpose which fundamental rights

¹⁰ P. Alston & J. Weiler, “An ‘Ever Closer Union’ in Need of a Human Rights Policy: the EU Union and Human Rights”, *European Journal of International Law*, vol. 9, no. 4, 1998, p. 679.

¹¹ European Union, “Charter of Fundamental Rights of the European Union, *Official Journal of the European Union*, C326/391, 2012.

¹² Interview with Dr. Israel Butler, Head of Advocacy, Civil Liberties Union for Europe, via videoconference, 6 April 2020.

stand for. Second, after the adoption of the Charter of Fundamental Rights, the EU has established common rules in the field of human rights which correspond to the provisions of the UNHRTs. The EU's ratification of the UN human rights framework would therefore affect the common rules under the Charter.

The case for the EU's treaty-making competence is particularly strong for the UNHRTs relating to discrimination. In the case of the CRPD, it was Article 13 of the Treaty establishing the European Community (now Article 10 TFEU), a general anti-discrimination provision, which was invoked as a legal basis. According to the Council, it assigned to the European Community an objective, whose achievement made it necessary for the Community to join the international agreement.¹³ The same legal basis and understanding can then follow in relation to the CERD and the CEDAW. In addition to Article 10 TFEU, the case for the EU's competence in relation to the CEDAW is strengthened by the explicit formulation of gender equality objectives in the Treaties (Article 8 TFEU) as well as the adoption of corresponding legislation by the Union. An additional treaty basis (Article 67(3) TFEU) and common rules are also established in the area covered by the CERD. As the EU possesses what can be called a fully-fledged EU migration law and certainly 'occupies' a large part of the field under this shared competence, it can ratify the ICMW. As regards the CRC, the protection of children's rights also represents an EU objective under Article 3(3) TEU and the EU has a broad *acquis* in this field.

Would the EU's accession, legally speaking, be more difficult for the more general compared to the more specific UNHRTs? As pointed out by one interviewee, the ratification of the CRPD was easier for the EU as the convention covered a specific policy field as opposed to the ICCPR, which could potentially cover all EU policies.¹⁴ A broad field of application certainly does not help to identify one single basis for ratification, but, on the other hand, a multiplicity of legal bases can result in stronger legal argumentation for accession. Issues such as the construction of a European citizenship, encompassing electoral and petition rights, as well as the data protection *acquis* will fall within the ambit of the ICCPR, as could many other pieces of EU legislation. The case for a ratification of the ICESCR by the European Union is made by

¹³ Council of the European Union, "Decision of 26 November 2009 Concerning the Conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities", *Official Journal of the European Union*, L 23/35, 2009.

¹⁴ Interview with an Official, European Commission (...).

De Schutter and Butler who showed how the convention relates to EU policies such as agriculture or employment.¹⁵ Finally, a broad scope of application has not been considered as a legal barrier when it comes to the broad ECHR.

The two remaining UNHRTs, the CAT and the CED, seemingly have not very much grounding in EU legislation, which is vaguely concerned with torture or enforced disappearance. It was, however, noticed by interviewees that the CAT can become increasingly more relevant with the EU's growing *acquis* on detention conditions, migrant reception centres and criminal procedures as well as expanding competences of the European Border and Coast Guard Agency (FRONTEX).¹⁶ The prohibition of torture is also enshrined in the CFEU and the ECHR. On the contrary, it is difficult to find the EU's common rules or objectives related to the CED, although any policy field can have unintended impact on individual rights.

From a procedural point of view, the ratification of UNHRTs should not pose more legal problems than the conclusion of any other international treaty by the European Union. However, some questions on how the procedure would look like remain open. Whereas in the case of the ECHR, the Treaties require the consent of the European Parliament for the conclusion, it is less clear with regard to the UN human rights framework.¹⁷ In the case of the CRPD only a consultation and not the consent of the European Parliament was sought. However, this treaty was adopted under the pre-Lisbon treaty-making procedure, which gave less power to the Parliament.¹⁸ Under the current legal framework, it is more likely that the adoption of the UNHRTs would require the European Parliament's consent as the treaties cover fields of ordinary legislative procedure (e.g. discrimination, migration, justice).¹⁹

The ratification of the UNHRTs should not require a unanimous decision by the Council, a procedural advantage when compared to the ECHR for which the Treaties explicitly

¹⁵ O. De Schutter & I. Butler, "Binding the EU (...)", pp. 315-318.

¹⁶ Interview with Dr. Jonas Grimheden, Fundamental Rights Agency, via telephone, 31 January 2020; Interview with Prof. Roman Wieruszewski, Poznań Human Rights Centre, Polish Academy of Sciences, former member of the United Nations Human Rights Committee, via telephone, 18 February 2020.

¹⁷ Art. 218(6)(a)(ii) TFEU.

¹⁸ European Parliament, *Legislative Resolution on the Proposal for a Council Decision Concerning the Conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities*, 24 April 2009, P6_TA(2009)0312.

¹⁹ Art. 218(6)(aa)(v) TFEU.

require such decision.²⁰ Finally, it is important to assess whether the UNHRTs would need ratification by all EU member states, as in the case of the ECHR, in order to enter into force for the EU.²¹ As none of the UNHRTs is limited in its substance to areas of EU exclusive competence, they would be concluded as mixed agreements. This should not pose a problem when it comes to most of the UNHRTs, already ratified by all EU members states. However, there are two conventions which may constitute a challenge: the IMCW (not ratified by any EU member state) and the CED (not ratified by Latvia, Hungary and Estonia).²²

One must also consider whether the ratification of UNHRTs by the EU would find the support of the CJEU, the ultimate arbiter when it comes to what is and what is not within the EU's competences. Specifically, it is important to test this case against *Opinion 2/94* in which the CJEU stated that the Union cannot accede to the ECHR without an explicit legal basis in its constitutional framework. In this ruling, the Court acknowledges that no Treaty provision confers on the institutions any general power to enact rules or conclude treaties in the field of human rights and states the absence of express or implied powers for the purpose of human rights protection.²³ The Court concludes that the ratification of the ECHR entails "fundamental institutional implications (...) of constitutional significance" and entry of the Community "into a distinct international institutional system" as such would go beyond the scope of Article 235.²⁴

Although the Court does not recognize the EU's general human rights competence, in stating that the Union cannot accede to the ECHR it focuses on the fact that such an accession would entail joining an elaborate institutional framework, consisting of a court and giving a significant role to political bodies in the appointment of judges and the enforcement of rulings. However, this is not the case with the UN human rights treaties and their 'soft' treaty bodies. Accession to the UNHRTs should therefore not be perceived by the CJEU as having implications of constitutional significance. The ratification of the UN Convention on Rights of Persons with Disabilities did not give rise

²⁰ Art. 218(8) TFEU.

²¹ *Ibid.*

²² UN Office of the High Commissioner for Human Rights, *Status of Ratification. Interactive Dashboard*, 9 April 2020, retrieved 9 April 2020, <https://indicators.ohchr.org>.

²³ Court of Justice of the European Union, *Opinion Pursuant to Article 228 of the EC Treaty - Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 2/94, Luxembourg, 28 March 1996, ECLI:EU:C:1996:140, Opinion of the Court, par. 27-28.

²⁴ *Ibid.*, par. 34-35.

to questions about its legality in light of *Opinion 2/94* or to considerations of amending the Treaties (although the Court has never been given a chance to express its opinion on this convention). It can follow from this that the same should be the case for other UNHRTs.²⁵

Accession to the UNHRTs would also have to be tested against a possible encroachment on the CJEU's competences as laid down in *Opinion 2/13*.²⁶ Certainly, UN human rights treaty bodies constitute less of a threat to the autonomy of the EU's legal order than the European Court of Human Rights. As quasi-judicial organs, UN human rights treaty bodies are empowered to receive individual complaints. However, the procedures only apply to the parties which ratified the relevant optional protocols and they are in any case non-binding. This makes the UN conventions easier to ratify for the EU than the ECHR in light of the case law on the autonomy of the EU's legal order, even if the EU chooses to also ratify the optional protocols. The EU institutions seem to follow this understanding as confirmed by the EU's ratification of the CRPD, imposing reporting duties, and an initial interest in the ratification of the Optional Protocol to the CRPD.²⁷

Turning now to the EU's internal political context, it is important to discuss whether there is or could be a political will to join the UNHRTs. The initiative to conclude a UNHRT should normally come from the Commission, but the EU's human rights policies are cross-cutting and fall under the competences of various units, which does not make it easy to identify which ones are directly responsible.²⁸ According to a Commission official, the discussion could be initiated in the Fundamental Rights Unit of the Directorate-General for Justice and Consumers (DG JUST), but they admit that according to their knowledge, no evaluations of the accession were made on any level at the Commission, except for the discussion on the Convention of the Rights of

²⁵ I. Butler, *The European Union and International Human Rights Law*, United Nations High Commissioner for Human Rights, Regional Office for Europe, Brussels, 2008, p. 23.

²⁶ Court of Justice of the European Union, *Opinion Pursuant to Article 218(11) TFEU - Draft International Agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the Draft Agreement with the EU and FEU Treaties*, Opinion 2/13, Luxembourg, 18 December 2014, ECLI:EU:C:2014:2454.

²⁷ European Parliament, *Legislative Resolution on the Proposal for a Council Decision Concerning the Conclusion, by the European Community, of the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities*, 24 April 2009, P6_TA(2009)0313.

²⁸ On fragmentation of EU human rights policies see e.g. P. Alston & J. Weiler, pp. 691-692.

the Child. They also point to the EEAS and the Legal Service of the Commission as relevant stakeholders.²⁹

The comparison with the ECHR does not shed enough light on the reasons for the Commission to seek accession to this treaty as opposed to the UNHRTs. Initially, in 1976 the Commission concluded that the ratification of the ECHR would not be necessary for the Community but changed its mind in 1979.³⁰ Since then, accession to the ECHR became a Commission-led project. The ability to initiate this endeavour and the Commission's perseverance in handling the file for the last 40 years might be explained by several institutional factors. First, better knowledge of the ECHR system by Commission officials compared to the UN human rights framework. Second, the localization of the file within one unit – the Legal Service. As the experience of the EU's accession to the CRPD shows, which was mainly handled by DG Employment, thematic UNHRTs would be dealt with in different units of the Commission. These institutional arrangements do not support the ratification of UNHRTs, a feat unlikely to be achieved without a coordinated strategy from the highest political management. The political priorities of the Commission do not include human rights. President von der Leyen's strategy does not mention the accession to the ECHR, a significant omission for an issue of "constitutional significance".³¹

Although, legally speaking, the ratification of the UNHRTs might only need a qualified majority support in the Council, the institution is driven by consensus-seeking practice on the most important matters. This practice requires all member states to be on board for the EU's accession to the UNHRTs, a process which they do not lobby for, but also do not necessarily oppose. Member states might find themselves balancing the advantages and disadvantages. On the one hand, the accession would stand for the EU's more pronounced role in human rights protection.³² On the other hand, some member states may fear that the more the EU does in this field, the more it is likely to

²⁹ Interview with an Official, European Commission (...).

³⁰ Commission of the European Communities, "The Protection of Fundamental Rights as Community Law is Created and Developed", 4 February 1976, *Bulletin of the European Communities*, Supplement 5/76, par. 28; Commission of the European Communities, "Accession of the Communities to the European Convention on Human Rights", 2 May 1979, *Bulletin of the European Communities*, Supplement 2/79.

³¹ European Commission, *A Union that Strives for More. My Agenda for Europe. Political Guidelines for the Next European Commission 2019-2024*, Brussels, 10 September 2019.

³² Interview with Mr. Jerzy Bauriski, Head of the Department of the United Nations and Human Rights, Ministry of Foreign Affairs of the Republic of Poland, via e-mail, 19 February 2020.

take over some of their competences.³³ Member states' instincts seem to favour the latter conviction as evidenced from their initial opposition to the EU's accession to the ECHR or the adoption of a legally-binding Charter of Fundamental Rights.³⁴ In the end, the CFEU was adopted and the EU's accession to the ECHR was enshrined as a treaty obligation, which shows that member states' opposition can be refuted. There is no inherent reason for the member states not to support the EU's accession to the UNHRTs as compared with the ECHR. It might in fact be less problematic as it entails few possibilities of encroachment on member states' competences. Nevertheless, one of member states' motivations for supporting the EU's accession to the ECHR could be the interest in avoiding the payment of compensation for implementing flawed EU law as a result of ECtHR judgments, a problem which does not arise under the UNHRTs. It would also be illogical for member states to support the EU's accession to instruments they did not ratify. This, however, would pose a problem only for the ICMW and the CED. Moreover, the same can also be said about several protocols to the ECHR which have not been ratified by all EU member states.

The European Parliament has always been a strong human rights supporter. Since the late 1970s, the Parliament supported the accession to the European Convention on Human Rights³⁵ as well as to the UN human rights treaties, namely the ICCPR and the ICESCR. The Spinelli Draft, a constitutional treaty draft of 1984 based on the initiative of the European Parliament, stated that the European Community shall accede to all of these three instruments.³⁶ Since then, the European Parliament did not take a strong position on the EU's accession to the UNHRTs and its general position on human rights oversight of the Union suggests a supportive attitude towards the ratification of UNHRTs. In 2011 a study on the implementation of the CEDAW commissioned by the European Parliament recommended the EU's accession to the Convention.³⁷ In

³³ *Ibid.*; Interview with Prof. Jan Wouters, Leuven Centre for Global Governance Studies, KU Leuven, Bruges, 4 February 2020.

³⁴ *Opinion 2/94*, pp. 1772-1782; G. De Búrca, "The Drafting of the European Union Charter of Fundamental Rights", *European Law Review*, vol. 26, no. 2, 2001, pp. 126-138.

³⁵ Commission of the European Communities, "Accession (...)", par. 6-7; European Parliament, *EU Accession to the European Convention on Human Rights (ECHR)*, European Parliamentary Research Service, Briefing, Brussels, July 2017, pp. 5-6.

³⁶ European Parliament, "Draft Treaty Establishing the European Union of 14 February 1984", *Bulletin of the European Communities*, February 1984, no 2. Luxembourg, art. 4(3).

³⁷ European Parliament, *How Could the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) Be Implemented in the EU Legal Framework?*, Brussels, 2011, p. 19.

addition, the Parliament's resolution on children rights from 2019 explicitly calls on the Commission to explore how the EU can accede to the CRC.³⁸

Another possible obstacle for the EU to join UN human rights treaties are legal and political challenges external to the Union.

External Context outside the EU

The international legal framework was not designed with a supranational organization, such as the European Union, in mind, and the UN human rights system is a reflection of that. None of the UNHRTs to which the EU is not a party can currently be ratified by non-state actors. All the interviewees referred to this fact. However, none of them treated the lack of REIO clauses in the UNHRTs as the sole explanatory factor for the EU's inaction without considering the possibility of adapting the current international framework to the EU's needs.

The European Convention on Human Rights was a states-only club up until 2010, when Article 17 of Protocol no. 14 amending the Convention entered into force.³⁹ The amendment stated that the European Union may accede to the ECHR. Nevertheless, the EU was preparing to join the ECHR way before it was feasible from the point of the Convention itself. First declarations of interest in joining the ECHR came from the Commission's communications in 1979. Legally speaking, nothing precludes amending the UNHRTs with a clause allowing for the EU's accession as it has been done in the case of the ECHR. However, the difference lays in numbers. First, amending the UNHRTs with EU-specific or general REIO clauses would require initiating not just one, but eight amendment procedures. Second, as membership of UNHRTs is in each case larger compared to the ECHR, the number of states which need to ratify an amendment for it to enter into force makes it more difficult to amend UN conventions when compared to those of the Council of Europe.

The difference, however, may not be as big as it seems. Although the ECHR does not lay down its amendment procedure, the drafters of Protocol no. 14 required all parties,

³⁸ European Parliament, *Resolution on Children's Rights on the Occasion of the 30th Anniversary of the UN Convention on the Rights of the Child*, 26 November 2019, P9_TA(2019)0066, par. 5.

³⁹ Council of Europe, "Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention", Strasbourg, 2004, *Council of Europe Treaty Series*, no. 194.

meaning 47 states, to ratify the Protocol in order for it to enter into force.⁴⁰ This amendment of the ECHR was, however, not sufficient for the EU to become a party to this treaty. The last version of the draft agreement allowing for the EU's accession to the ECHR, which is now being redrafted due to its inconsistency with EU law in light of *Opinion 2/13*, further amends the Convention and requires ratification of all parties to the ECHR and the European Union for the agreement to enter into force.⁴¹ The adoption of an amendment to the ICCPR, the ICESCR, the CRC and the ICMW requires approval of the UN General Assembly (simple majority vote) and the acceptance of two thirds of the parties.⁴² The CAT and the CED require only ratification by two thirds of the parties.⁴³ The CEDAW and the CERD do not have specific amendment procedures. In these cases, Article 40 of the Vienna Convention on the Law of the Treaties applies, under which any proposed amendment to a treaty can be effectively adopted.⁴⁴ After the introduction of amendments to the UNHRTs, the EU only needs to ratify the treaties – no subsequent agreements requiring the ratification of all state parties seem to be necessary.

There are some alternative options to the still cumbersome amending procedures under the UNHRTs. It could be done by way of optional protocols to each treaty which, as the practice of the UN human rights framework suggests, would not have to be ratified by the whole membership to enter into force. The interviewees also contemplated the idea of an EU 'observer status' at the UN human rights bodies as an option not requiring ratification of the UNHRTs which would allow the EU to have some level of involvement in the UN system, e.g. voluntary reporting.⁴⁵ Given the complexity of ECHR's enforcement system, such alternative options are not available in the case of the European Convention.

⁴⁰ Art. 19 Protocol no. 14.

⁴¹ Art. 10(3) Appendix I, Council of Europe, European Union, *Fifth Negotiation Meeting between the CCDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final Report to the CDDH*, Strasbourg, 10 June 2013, 47+1(2013)008rev2.

⁴² Art. 18(3) UN Charter, Art. 51(2) ICCPR, Art. 29(2) ICESCR, Art. 50(2) CRC, Art. 90(2) ICMW.

⁴³ Art. 29(2) CAT, Art. 44(3) CED.

⁴⁴ United Nations, "Vienna Convention on the Law of the Treaties", *United Nations Treaty Series*, vol. 1155, Vienna, 1969.

⁴⁵ Interview with Dr. Jonas Grimheden (...); Interview with Dr. Israel Butler (...); Interview with Mr. Jerzy Bauriski (...).

Following this consideration of legal challenges, the paper now explores the external political context. Both the United Nations and the Council of Europe (CoE) have established relations with the EU. Nevertheless, the relationship with the Council of Europe seems to be more intense, partnership-oriented and centralized, with the adoption of a Memorandum of Understanding illustrating this fact.⁴⁶ As stated by the Deputy Head of the CoE office in Brussels, there is a willingness on the part of the Council of Europe to attract the EU to the Pan-European working methods and standards and the need for CoE-EU cooperation is regularly reaffirmed.⁴⁷ The Council of Europe devotes a lot of its resources to accommodate the EU's ratification of the ECHR and has engaged in negotiations on the accession.⁴⁸ The UN human rights-related bodies have recently also become more involved with the EU. According to the interviewees, UN special rapporteurs interact more and more with the EU rather than its member states, and the chairs of the UN human rights treaty bodies actively seek opportunities to make the system more known to EU decision-makers, for instance by organizing joint visits to Brussels.⁴⁹ The quality of the recently started cooperation between the EU and the CRPD Committee may determine the later attitudes of some UN bodies towards the EU.

When analyzing the attitudes of the UN and the CoE member states towards the EU and its accession to human rights instruments, one must start with the obvious – the membership of the United Nations is roughly four times bigger than the one of the Council of Europe and certainly more diverse. This makes the EU's inclusion more difficult, as can be exemplified with the EU's experience of obtaining an enhanced observer status at the UN General Assembly in 2010-11, which was first met with opposition from several UN groupings. The case is exemplary for the attitude of the UN membership towards accommodating the EU's inclusion. Yet, contrary to the case of the UN General Assembly, the EU's accession to the UNHRTs would not give any additional rights to the EU or EU member states, which could put other parties in a disadvantageous position. These concerns are more pronounced in the case of the ECHR as the Council of Europe is already dominated by EU member states (27 out of

⁴⁶ Council of Europe, European Union, *Memorandum of Understanding Between the Council of Europe and the European Union*, 23 May 2007, Strasbourg.

⁴⁷ Interview with Mr. Humbert de Biolley (...).

⁴⁸ See Council of Europe, European Union, *Fifth Negotiation Meeting (...)*, Final report to the CDDH and Appendix IV, par. 7.

⁴⁹ Interview with Dr. Israel Butler (...); Interview with Prof. Jan Wouters (...).

47 members) and these power dynamics have an impact on the decisions of the Committee of Ministers, which is responsible for the enforcement of Court's rulings. In the case of the UNHRTs, UN member states should not be as worried compared to members of the Council of Europe given that the EU's accession is unlikely to have any major political consequences. The lack of opposition from other parties to the EU's accession to the CRPD illustrates that UN member states have no reasons not to be open to the ratification of other UNHRTs by the EU.⁵⁰

Added Value for the EU

This section examines the added value of the EU's accession to the UNHRTs for internal EU policies and for its external action.

Added Value for Internal EU Policies

The added value of accession to human rights treaties, understood mostly as enhanced protection of human rights for EU citizens, has been one of the most prevalent topics in the interviews conducted for this research. A deficit of protection of individuals' rights resulting from shifting the competences from EU member states to the Union has been acknowledged as the rationale for the EU's decision to join the ECHR.⁵¹ The potential of covering this protection gap has been identified also as a reason why the EU may prioritize an accession to the ECHR over the UNHRTs.⁵²

The lack of external scrutiny of the EU's actions is indeed a problem which needs to be addressed for the sake of the rights of individuals. Most EU legislation is implemented through member states' actions which allows human rights bodies to scrutinize EU *acquis* through examining the human rights records of individual EU countries. According to the case law of the European Court of Human Rights, the EU member states remain accountable for the implementation of EU law which may infringe on the human rights of individuals.⁵³ Consequently, applicants can (and do) address

⁵⁰ See United Nations, "Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities", retrieved 2 April 2020, <https://www.un.org/development/desa/disabilities/resources/ad-hoc-committee-on-a-comprehensive-and-integral-international-convention-on-the-protection-and-promotion-of-the-rights-and-dignity-of-persons-with-disabilities.html>.

⁵¹ Interview with Prof. Jan Wouters (...); Interview with Mr. Humbert de Biolley (...).

⁵² Interview with Mr. Charles-Michel Geurts (...); Interview with Prof. Jan Wouters (...).

⁵³ European Court of Human Rights, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, Grand Chamber, app. no. 45036/98, Strasbourg, 30 June 2005, par. 154.

member states in the Court for violations resulting from the implementation of EU law. The same holds for UN human rights treaty bodies, which receive individual complaints and state reports related to EU law as well. There are certainly important gaps which would be filled by the EU's accession to human rights treaties, especially in the area where the EU acts without the intermediary role of its member states. The direct participation of the EU in human rights procedures should also add more legal certainty (as currently the interpretations under EU law and international human rights law risk divergence). Besides, it would add a general feeling of accountability of EU institutions for their actions which would be beneficial for the protection of the rights of individuals. It should be noticed that a direct beneficiary of the EU's accession to human rights instruments is also the EU itself. The Union has an interest in ensuring the effectiveness of EU law by relieving its member states from the dilemma of having to apply EU legislation challenged by international human rights institutions and gaining the ability to defend its own legislation in front of international bodies. The EU's accession would also benefit member states which would not have to participate in reporting and court procedures when they are related to EU law, and in the case of the ECHR, pay compensation for breaches resulting from the implementation of flawed EU law. This self-interested logic for the EU's accession to the ECHR has been admitted by the Commission in its early analyses.⁵⁴

In this context of internal benefits of EU accession to human rights instruments, it is worthwhile to compare the added value provided by the ECHR and the UNHRTs. When it comes to *ad hoc* human rights verification, the ECHR undoubtedly is encompassed with a stronger instrument – the European Court of Human Rights – with a power to issue legally binding judgments and award compensation for breaches of the Convention. Although under the UNHRTs, an individual may also use a complaint procedure, its result will not have a binding effect (which does, however, not mean that decisions of UN human rights bodies have no legal significance). The treaty bodies are also not competent to award remedies like financial compensation. Moreover, the individual complaint procedures will only concern the EU if it chooses to ratify optional protocols to the UNHRTs. However, the strength of the UN human rights framework may lay in a different type of human rights verification – reporting. Under the UNHRTs, parties are obliged to systematically and cyclically conduct a review of

⁵⁴ Commission of the European Communities, "Accession (...)", par. 10-13.

their actions and legislation to self-assess their compliance and implementation of the treaties' provisions. The reports are then thoroughly examined by the treaty bodies, composed of impartial human rights experts, and discussed with the parties. At the end of the process, the bodies issue recommendations and expect a follow-up. As these recommendations are not legally binding, their effectiveness may vary. In the case of the EU, the importance of reporting to treaty bodies may already be observed in the case of the reports submitted to the CRPD Committee. The procedure has already resulted in large scale mobilization of civil society actors drawing up their own 'shadow reports' on the EU's performance. The European Parliament called on the Commission to implement all the recommendations issued by the CRPD Committee.⁵⁵ Since an *a priori* assessment of fundamental rights carried out by the EU institutions is often very superficial, as stated by Butler, the scrutiny of treaty bodies should motivate the EU to treat this checking activity more seriously.⁵⁶ Needless to say, the ECHR is not equipped with this kind of reporting mechanism and its human rights check depends largely on individuals' willingness to engage in a procedure in front of the ECtHR, a rather lengthy and complicated process. A regular and systematic check, as performed under the UNHRTs, has the advantage of potentially conducting assessments of a larger part of actions and laws, and it shifts the burden of engagement from individuals to the contracting parties.

The UN human rights system also has another advantage – it covers a broader catalogue of human rights than its European counterpart. The ECHR is largely concerned with political and civil rights, although its scope has been progressively broadened thanks to the development of the ECtHR's case law. It is somehow strange that the EU devotes most of its energy related to the ratification of human rights instruments to this particular convention since, as admitted by the Commission itself, EU legislation mostly touches upon social and economic rights of individuals.⁵⁷ Although the Commission initially did not decide to work on the second generation of human rights, because of the lack of agreement among member states on their character and scope, nowadays all EU member states are parties to the International

⁵⁵ European Parliament, "Resolution on the Implementation of the UN Convention on the Rights of Persons with Disabilities, with Special Regard to the Concluding Observations of the UN CRPD Committee", 7 July 2016, *Official Journal of the European Union*, C 101/138.

⁵⁶ I. Butler, "Is the European Union Taking Human Rights Seriously?", *Policy Brief*, Open Society European Policy Institute, Brussels, 2012.

⁵⁷ Commission of the European Communities, "Accession (...)", par. 18.

Covenant on Economic, Social and Cultural Rights, which provides a common understanding.⁵⁸ De Schutter and Butler postulated that the EU should take the positive aspects of human rights obligations more seriously. They argue that the EU human rights approach is mostly built on the EU's presumption that it is enough to ensure that its actions do not negatively affect the rights of individuals.⁵⁹ The ICESCR is better equipped to remedy this issue compared to the ECHR, given the second generation rights' character of a positive obligation.

Added Value for External EU Policies

The fulfilment of the EU's foreign policy goals has been identified by some of the interviewees as a main reason why the Union should join the UNHRTs.⁶⁰ This could promote and authenticate EU as a human rights actor and give it more recognition in the international arena.

One of the objectives of the EU's external action is, according to Article 21(2)(b) TEU, the consolidation and support for human rights. EU human rights promotion is now a fully-fledged policy and was mainstreamed in different external engagements of the Union. The new Action Plan on Human Rights and Democracy 2020-2024 recognizes the need to enhance EU leadership in promoting and protecting human rights worldwide.⁶¹ The document defines the promotion of the global system for human rights as one of the main objectives of this policy area.⁶² It envisages cooperation and coordination with UN human rights treaty bodies and seeks to strengthen their effectiveness.⁶³ Advocacy for the ratification and implementation of relevant UN conventions and optional protocols is seen as one of the main tools for the EU's policy of human rights promotion.⁶⁴ The EU also promotes the UNHRTs through other external actions. The human rights dimension of trade policy is a notable example. Trade agreements with third countries consider the compliance with international human

⁵⁸ *Ibid.*, par. 17.

⁵⁹ O. De Schutter & I. Butler, "Binding the EU (...)"

⁶⁰ Interview with Prof. Jan Wouters (...); Interview with Prof. Roman Wieruszewski (...).

⁶¹ European Commission & High Representative of the European Union for Foreign Affairs and Security Policy, *EU Action Plan on Human Rights and Democracy 2020-2024*, JOIN(2020) 5 final, Brussels, 25 March 2020, p. 1.

⁶² *Ibid.*, p. 4.

⁶³ European Commission & High Representative of the European Union for Foreign Affairs and Security Policy, *Annex to the EU Action Plan on Human Rights and Democracy 2020-2024*, JOIN(2020) 5 final, Brussels, 25 March 2020, pp. 2, 12.

⁶⁴ *Ibid.*, pp. 2, 7, 10.

rights law as an essential element of the agreements, which allows for their suspensions in the case of grave human rights violations perpetrated by a party. Unilateral trade schemes developed by the EU require their beneficiaries to comply with important UN human rights treaties in order to enjoy preferential treatment.⁶⁵ Human rights compliance is also promoted through enlargement and the European Neighbourhood Policy.

Accession to the UNHRTs will be beneficial for fostering the EU's image as an international human rights promoter. By joining the core UN human rights conventions the EU would represent the example of what it recommends third countries to do. Besides, the accession of the Union would endorse and promote the UN human rights system itself, which is another goal of the EU's human rights policy.⁶⁶ The reporting systems of the UN human rights treaty bodies would also give the EU additional means of exercising its normative power. By sharing its practices on the implementation of provisions of human rights treaties in reports which are publicly available and subject to the scrutiny of human rights experts, the EU may better succeed in transferring its standards and ideas to third countries and 'uploading' them to the international level.

Most importantly, EU accession to the UNHRTs will be beneficial for the coordination of largely separate external and internal human rights policies and foster the EU's credibility in human rights promotion. The separate formulation of its internal and external human rights policies risks resulting in incoherence.⁶⁷ Consequently, the EU uses different benchmarks for itself and for its external partners when evaluating human rights performance. It is especially visible in the case of the UNHRTs, which are brought up in externally oriented human rights communication to an incomparably larger extent than when EU institutions assess their own human rights performance. Article 21(3) TEU obliges the EU to ensure consistency between its internal and external policies and the need to implement this provision in the area of human rights policy

⁶⁵ European External Action Service, *Inventory of Agreements Containing the Human Rights Clause European Union*, retrieved 21 April 2020, <https://ec.europa.eu/world/agreements/ClauseTreatiesPDFGeneratorAction.do?clauseID=26>; European Union "Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 Applying a Scheme of Generalized Tariff Preferences and Repealing Council Regulation (EC) No 732/2008", *Official Journal of the European Union*, L303/1, 2012, Annex VIII.

⁶⁶ Interview with Prof. Roman Wieruszewski (...).

⁶⁷ A. Williams, *EU Human Rights Policies: A Study in Irony*, Oxford, Oxford University Press, 2004.

has been recognized in the 2020 Action Plan.⁶⁸ Joining the UNHRTs will help the EU achieve internal-external consistency as it will be forced to start using references and benchmarks of the UN human rights system also to evaluate its own actions.

The ratification of the UNHRTs will also lead to enhanced credibility in the EU's human rights dialogues with third countries, by showing the EU's tangible commitment to the same standards it promotes as well as the confirmation from the treaty bodies that EU policies are in fact compatible (or not) with the UNHRTs. "That the EU is exemplary in respecting fundamental rights is vital (...) a strong track record will strengthen the EU's action to promote human rights around the world" reads the communication of the High Representative and the Commission.⁶⁹ The document recognizes that in order to be credible the EU should "visibly and effectively" implement UN and Council of Europe standards, to which it holds third countries accountable.⁷⁰ It also considers the EU's commitment to accede to the European Convention on Human Rights as raising the Union's credibility in its external human rights policy.⁷¹

Accession to the UNHRTs should also benefit the realization of more general objectives of EU external action. Since the adoption of the Treaty of Lisbon, the EU's foreign policy capabilities were strengthened in order to allow the EU to function better in a still largely Westphalian international order. Although important practices have been developed in order to accommodate the EU's presence in international relations, including the role of the EU Delegations or the High Representative, the EU is still striving for a full recognition as a diplomatic actor.⁷² Many international organizations still do not allow the EU to become a member, and the EU seeks to change this, as evidenced by the strategy on the improvement of the EU's status in international organizations.⁷³ The international fora progressively acknowledge the EU's participation and all recent UN and Council of Europe conventions allow for its accession. Joining the UNHRTs

⁶⁸ European Commission & High Representative of the European Union for Foreign Affairs and Security Policy, *EU Action Plan (...)*, p. 4.

⁶⁹ European Commission, High Representative of the European Union for Foreign Affairs and Security Policy, *Human Rights (...)*, p. 14.

⁷⁰ *Ibid.*, p. 15.

⁷¹ *Ibid.*

⁷² See R. Adler-Nissen, "Symbolic Power in European Diplomacy: The Struggle Between National Foreign Services and the EU's External Action Service", *Review of International Studies*, vol. 40, no. 4, 2014, pp. 657-681.

⁷³ European Commission, *Strategy for the Progressive Improvement of the EU Status in International Organizations and Other Fora in Line with the Objectives of the Treaty of Lisbon*, C(2012) 9420 final, 20 December 2012 (& Annex).

would yet again legitimate and confirm that the EU, even though not a state, is a part of the international order. It would also be an important affirmation of the EU's commitment to multilateralism, as enshrined in Article 21(2)(h) TEU.⁷⁴

After examining the factors related to the cost-benefit analysis of the EU's accession to UN human rights treaties, the paper now turns to a different explanatory factor, the logic of appropriateness, which views actors as doing what seems rightful for them and aligns with their systems of values.

Internalization of human rights norms

A constructivist approach to the ratification of human rights treaties means that signatories join these instruments to affirm their sincere commitment to treaty principles since "the notions of rights and identity inevitably go together".⁷⁵ The level of internalization of human rights norms by the EU, meaning the integration of values and standards in the EU's own identity could perhaps explain the variation in its accession to human rights treaties.

It is not contested that the EU internalizes both universal and European human rights standards, however, it does so to different degrees. All interviewees pointed out this difference. Phrases like "common European standards" (meaning EU and ECHR standards put together) or "the special status of the ECHR in the EU" frequently appeared in these discussions.⁷⁶ One interviewee referred to the European Convention as "being closer to home" for the EU.⁷⁷ Another interlocutor said that the ECHR is a "part of the understanding of the EU itself".⁷⁸ Several interviewees also referred to the historical and geographical reasons for the EU's closer relationship with the ECHR than with the UNHRTs.⁷⁹ Academic literature also points to the notion of European identity as an explaining factor of the EU's effort to join the ECHR. As put by Alton and Weiler, "the European Convention system has become more than a legal safety net. It is now a part of the cultural self-definition of European civilization".⁸⁰

⁷⁴ Interview with Mr. Charles-Michel Geurts (...).

⁷⁵ W. M. Cole, "Hard and Soft Commitments to Human Rights Treaties 1966–2000", *Sociological Forum*, vol. 24, no. 3, 2009, p. 162.

⁷⁶ Interview with Dr. Jonas Grimheden (...), Interview with Mr. Jerzy Bauriski (...), Interview with Dr. Israel Butler (...), Interview with an Official, European Commission (...).

⁷⁷ Interview with Dr. Jonas Grimheden (...).

⁷⁸ Interview with an Official, European Commission (...).

⁷⁹ *Ibid.*, Interview with Mr. Charles-Michel Geurts (...), Interview with Dr. Israel Butler (...).

⁸⁰ P. Alston & J. Weiler, "An 'Ever Closer Union' (...)", p. 686.

Williams notes that by acceding to the ECHR, the EU aspires to become “a part of the greater Europe”.⁸¹ The lack of such a pompous discourse on UN human rights treaties is striking.

Interestingly, when asked about the reason of the special status of the ECHR for the EU, the notion of values often recurred in the interviews.⁸² The representative of the Council of Europe noted that the UN values are not different, but the way of exercising the values, through strong judicial mechanism, brings the EU closer to the ECHR.⁸³ The expert of the Fundamental Rights Agency pointed to the fact that the European Convention focuses on political and civil rights and that historically this generation of rights was also more present in the EU.⁸⁴ The privileging of first generation civil and political rights by the Union over second generation rights is also noted in the academic literature.⁸⁵ It is difficult to find differences in the systems of values represented as such by the European and the UN human rights framework, as they both form part of international human rights law based on the same core principle of inalienable human dignity. The perception of axiological differences should nevertheless be considered as an important observation which translates into the level of EU’s identification with different human rights frameworks.

Starting from the provisions of the EU treaties, there is evidence of deeper socialization of the EU within the ECHR system than the UN human rights framework. Article 6(3) TEU provides that fundamental rights, as guaranteed by the ECHR, constitute general principles of the Union’s law. It is evident from this provision that the ECHR already has a legally binding status within the EU order, which contrasts with “the precarious legal position of other international human rights conventions”.⁸⁶ UN human rights treaties are not given any legally qualified status in EU law, and UNHRTs are not mentioned in the EU Treaties.

⁸¹ A. Williams, *EU Human Rights Policies (...)*, p. 119.

⁸² Interview with Mr. Humbert de Biolley (...); Interview with Prof. Roman Wieruszewski (...); Interview with an Official, European Commission (...).

⁸³ Interview with Mr. Humbert de Biolley (...).

⁸⁴ Interview with Dr. Jonas Grimheden (...).

⁸⁵ C. Churruca Muguruza, “Human Rights and Democracy at the Heart of the EU’s Foreign Policy?”, in F. Gómez, C. Churruca Muguruza & J. Wouters (eds.), *EU Human Rights and Democratization Policies: Achievements and Challenges*, Abingdon, Routledge, 2018, p. 62.

⁸⁶ B. De Witte, “The EU and the International Legal Order: The Case of Human Rights.”, in Malcolm Evans & Panos Koutrakos (eds.), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World*, London, Hart Publishing, 2011, pp. 130, 132.

The CFEU is particularly important in this context as the EU conducts its internal human rights check based on its provisions. In its preamble, the CFEU reaffirms the rights as they result from “international obligations common to the member states”. These obligations evidently include most of the UNHRTs, although the Charter does not make this direct reference. In contrast, explicit mentions of the ECHR as well as the case law of the ECtHR are made in the preamble.

Special interpretative importance is assigned to the ECHR by virtue of Article 52(3) CFEU, according to which a right guaranteed by the Charter shall be given the same meaning and scope as by the ECHR when this right is also protected by the latter. 20 out of 50 provisions of the Charter fall into this category.⁸⁷ The obligation of consistent application does not only concern the wording of the ECHR, but also the case law of the ECtHR.⁸⁸ No such interpretative guideline is laid down for the UNHRTs.

Although, according to Article 53 CFEU, nothing in the Charter can be interpreted as restricting or adversely affecting rights as recognized by international law and international agreements to which the Union or all the member states are parties, again an explicit reference is made only to the ECHR. This negative obligation not only restricts rights already provided, but it has, in addition, a far narrower scope than the positive obligation of uniform interpretation of the Charter and the ECHR. The lower level of internalization of UNHRTs is also evident from the limited number of references made in the official explanations relating to the CFEU. There are only two instances of using the ICCPR as an interpretative tool and one instance of referral to the CRC.⁸⁹ The evidently more pronounced grounding of the CFEU in the ECHR rather than the UNHRTs should not come as a surprise as members of the Council of Europe and the European Court of Human Rights were invited to the drafting process of the Charter, in itself an indication of the strong internalization of the ECHR norms in the EU.⁹⁰ Although other bodies, including the UN Committee on Economic, Social and Cultural Rights, sent their recommendations to the drafting Convention of the Charter to

⁸⁷ European Union, “Explanations Relating to the Charter of Fundamental Rights”, *Official Journal of the European Union*, C303/17, 2007.

⁸⁸ *Ibid.*, Explanation on Article 52.

⁸⁹ *Ibid.*, Explanation on Article 19, Explanation on Article 49, Explanation on Article 24.

⁹⁰ G. de Búrca, “The Drafting of the European Union Charter of Fundamental Rights”, *European Law Review*, vol. 26, no. 2, 2001, p. 129.

incorporate references to the UN human rights instruments, they have not been met with the drafters' approval.⁹¹ The Charter of Fundamental Rights, the synonym of the EU's human rights identity, is therefore profoundly and deliberately an expression of the EU's identification with the ECHR and evidence of the EU's looser connection to the UNHRTs.

The strong affiliation with the ECHR is also reflected in the case law of the CJEU. The "special significance" of this Convention in the EU legal order is regularly reiterated by the CJEU in its judgments.⁹² The Court frequently refers to the ECHR to support its argumentation, but it rarely does so in the case of UN human rights treaties.⁹³ The CJEU will never draw on the UNHRTs where their provisions go beyond the European Convention.⁹⁴ In the *Grant* case, the Court explicitly dismissed the communication of a UN human rights treaty body, the Human Rights Committee.⁹⁵ The tight relationship between CJEU and ECtHR judgments is reinforced by relationships of more personal nature as judges of the courts have regular informal interactions at conferences and special meetings, and some judges of the ECtHR have later been appointed to the CJEU.⁹⁶

In its strategic documents and communication, the EU also highlights its special relationship with the ECHR, a status which is not accorded to the UNHRTs. From the beginning of the consideration of joining the ECHR, the European Commission referred to "the protection of the Western European heritage" as a reason for accession.⁹⁷ Both the Commission's and the Council's implementation strategies for the Charter of Fundamental Rights, on the basis of which the EU institutions conduct the human rights compatibility check of their policies, put the ECHR at the centre of attention. However,

⁹¹ S. Parmar, "International Human Rights and the EU Charter", *Maastricht Journal of European and Comparative Law*, vol. 8, no. 4, 2001, p. 352.

⁹² e.g. Court of Justice of the European Union, *Laserdisken ApS v Kulturministeriet*, Case C-479/04, Luxembourg, 12 September 2006, ECLI:EU:C:2006:549, par. 61; Court of Justice of the European Union, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Luxembourg, 3 September 2008, ECLI:EU:C:2008:461, par. 283.

⁹³ O. De Schutter & I. Butler, "Binding the EU (...)".

⁹⁴ *Ibid.*, p. 283.

⁹⁵ Court of Justice of the European Union, *Lisa Jacqueline Grant v South-West Trains Ltd.*, Case C-249/96, Luxembourg, 17 February 1998, ECLI:EU:C:1998:63, par. 46-47.

⁹⁶ B. De Witte, "The EU and the International Legal Order (...)", p. 132.

⁹⁷ Commission of the European Communities, "Accession of the Communities (...)", par. 7.

they also list UNHRTs as relevant sources of interpretation of the EU's human rights obligations.⁹⁸

The EU's internalization of human rights regimes not only varies with regard to the intensity of the relationship and frequency of its confirmation, but also depending on the policy fields. As discussed above, the EU makes use of the UNHRTs in its external communication and actions. UNHRTs are therefore internalized by the EU as a benchmark to which it holds third countries accountable, while the ECHR is the standard with which the EU self-identifies and which it strives to implement in its internal policies. This dichotomy of identity is evident in the language the EU uses, employing words like "fundamental rights", "protection", "values" and "commitment" in internal policies and "human rights", "promotion", "legal norms", "respect" in external action.⁹⁹

Conclusion: Internalization as key reason for the EU's inaction

This paper explored the puzzling question why the EU – as a strong promoter of human rights in external affairs – does not seek accession to most of the UN human rights treaties. The often-cited arguments for the EU's lack of willingness to accede to the UNHRTs, such as the absence of REIO clauses in those instruments, stop at a superficial level and do not provide enough explanatory power. Several possible explanatory factors were examined: the EU's internal and external context, the added value of accession, and the degree of internalization of the human rights norms in the EU. The low level of internalization accounts best for the lack of EU interest in the ratification of the UN human rights treaties. The other variables are not very different from the case of the ECHR.

From an internal legal standpoint, the EU has a competence to join most, if not all, of the UNHRTs. In some aspects, accession should in fact be less problematic than the ECHR as the UN human rights system would not be encroaching on the autonomy of

⁹⁸ European Commission, *Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union*, COM(2010) 573 final, Brussels, 19 October 2010; Council of the European Union, *Guidelines on Methodological Steps to be Taken to Check Fundamental Rights Compatibility at the Council Preparatory Bodies*, 5377/15, Brussels, 20 January 2015.

⁹⁹ D. Morondo Taramundi, "The Search for Coherence in the EU's Human Rights Policy and Discourse", in F. Gómez, C. Churrua Muguruza & J. Wouters (eds.), *EU Human Rights and Democratization Policies: Achievements and Challenges*, Abingdon, Routledge, 2018, p. 79.

the EU's legal order and the competences of the CJEU. The lack of strong political support for the EU's accession to the UNHRTs stems from a low prioritization of the matter on the part of all actors involved, rather than from an opposition to the idea as such. The ECHR benefited here from the assignment of a clear responsibility to one single unit within the Commission. The external context, although more complex and involving more actors in case of the UNHRTs, is also more flexible, and does not constitute a barrier which cannot be passed, neither from a legal nor from a political perspective. Both the ECHR and the UNHRTs are of great added value for the protection of fundamental rights within the EU. Moreover, a ratification of the UN framework would give the EU tangible benefits in its external policies through a consolidation of its credibility as a human rights promoter and important player in multilateral fora. Nevertheless, given the evidence spread out throughout the EU's founding treaties, internal fundamental rights instruments, jurisprudence and policy discourse, the ECHR embodies a system of human rights which is internalized by the Union to a clearly higher extent than the UNHRTs. Therefore, the latter's lower level of internalization helps to explain the EU's inaction.

The question remains whether these findings still hold in the light of the exception – the EU's accession to the CRPD. There is no evidence which would suggest that this UN treaty is more internalized in the EU than other UNHRTs. As observed by de Búrca, the EU's participation in the drafting of the treaty allowed it to upload some of its norms to the international level, an important external policy objective, with also likely internal benefits (such as reputational added value in the eyes of its own citizens).¹⁰⁰ As explained by one of the interviewees, the decision to join the CRPD was dictated by the fact that the EU was elaborating its own legislation on the protection of persons with disabilities, more or less at the same time as the drafting of the Convention.¹⁰¹ I conclude from these observations that the EU's low level of internalization of the UNHRT framework has in the case of the CRPD been outbalanced by important additional benefits, in particular the possibility of uploading EU norms to an international treaty, and benefitted from more conducive internal and external contexts.

¹⁰⁰ G. de Búrca, "The European Union in the Negotiation of the UN Disability Convention", *European Law Review*, vol. 35, no. 2, 2010, p. 1.

¹⁰¹ Interview with Mr. Charles-Michel Geurts (...).

On the basis of these findings, several recommendations can be formulated. First, the tasks related to the EU's compliance with UN human rights framework should be delimited and explicitly inscribed into the responsibilities of particular units within the European Commission and the European External Action Service. Second, the EU should conduct a proper analysis of the feasibility of its accession to UN human rights treaties. The units which could be engaged in this process are the Fundamental Rights Unit of DG JUST in the European Commission, the Legal Service of the Commission, the Human Rights Division in the EEAS, the Special Representative for Human Rights and the Fundamental Rights Agency. Additionally, other Commission units should be included in the process of analysis for specific thematic conventions. The services responsible for the conclusion and implementation of the CRPD may be able to share valuable experience on the matter. This internal exercise must be supplemented by an engagement with the UN and its membership in order to assess the possibility of accession. Moreover, the EU should stay active in the development of a new UN treaty on Business and Human Rights as well as other UN human rights initiatives which may arise in the future.¹⁰²

¹⁰² See UN Human Rights Council, "Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights", retrieved 28 April 2020, <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx>.

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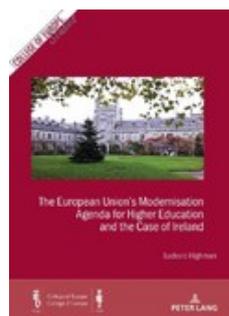
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