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THE CONCLUSION OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES BY THE EC/EU: SOME REFLECTIONS FROM A “CONSTITUTIONAL” PERSPECTIVE

Delia Ferri

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Delia Ferri, Dottore di Ricerca in Diritto Costituzionale Italiano ed Europeo presso l'Università degli Studi di Verona. Nel 2009 ricercatrice di diritto costituzionale europeo/diritto dell'Unione europea presso l' *Européran Foundation Centre* di Bruxelles, all'interno del progetto promosso e finanziato dalla Commissione europea “*Study on challenges and good practices in the implementation of the UN Convention on the rights of persons with disabilities*”.

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The conclusion of the *UN Convention on the Rights of Persons with Disabilities* by the EC/EU: a “constitutional” perspective

L'idea del presente scritto nasce da un intervento svolto in seno al "Il cittadino europeo di fronte alla diversità culturale" (Verona, 30 ottobre 2009) organizzato dal Centro di documentazione europea e dalla Cattedra di Diritto dell'Unione europea della Facoltà di Giurisprudenza dell'Università di Verona, in collaborazione con il Movimento federalista europeo.

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The conclusion of the *UN Convention on the Rights of Persons with Disabilities* by the EC/EU: some reflections from a “constitutional” perspective

Delia Ferri

Abstract (it)

La Comunità europea (oggi Unione europea) ha concluso, nel novembre 2009, alla *Convenzione delle Nazioni Unite sui diritti delle persone con disabilità*. La Convenzione è il primo trattato internazionale afferente i diritti umani che contempla la possibilità di adesione da parte di “organizzazioni regionali d’integrazione”¹. E’, inoltre, il primo trattato sui diritti umani concluso dalla Comunità/Unione e, per questo, offre l’occasione di soffermarsi sul discusso tema delle relazioni tra diritto internazionale pattizio (e, in particolare, tra norme internazionali sui diritti umani) e diritto sovranazionale (dell’Unione europea).

Il presente scritto si propone di analizzare l’impatto che la Convenzione ONU potrà avere sulla protezione dei diritti delle persone con disabilità nell’Unione europea, e più in generale, di valutare il possibile impatto della Convenzione sul diritto costituzionale europeo.

L’esame dei contenuti della Convenzione precede l’analisi dello *status* e degli effetti che la Convenzione assume nella gerarchia delle fonti dell’Unione europea.

In ultimo, lo scritto tenta di mettere in luce come la Convenzione ONU sia, almeno potenzialmente, in grado di influenzare fortemente gli *standard* europei di protezione dei diritti umani.

Abstract (en)

The European Community (now European Union, or EU) acceded to *UN Convention on the Rights of Persons with Disabilities* in November of 2009.

The UN CRPD is the first human rights treaty that contemplates the possibility of regional integration organizations, and not only States, becoming parties. It is also the first human rights treaty to which the EC/EU has become a party.

The conclusion of and accession to the UN CRPD by the EC/EU provides a significant opportunity to observe and reflect on the evolving relationship between international human rights law and EU law.

This paper aims to assess the possible impact of the UN CRPD on the EU legal context and on the EU system of human rights protection. The Convention commits the EU to higher standards of non-discrimination with respect to persons with disability. Its remarkable content, and its underlying rationale could potentially have a positive influence on the overall conception of human rights within the EU. Before embarking on a discussion of the constitutional significance of the UN CRPD, a brief overview on the contents of the Convention is provided. The status and effects of the UN CRPD within the EU legal system are then examined. This paper argues that the UN CRPD, and its implementation, may well have a profound impact not only on EU (secondary) law but also on European constitutional standards of human rights.

Keywords

UN Convention on the Rights of Persons with Disabilities – Human rights – EU constitution - Status of international treaty – Legal basis

¹ La traduzione italiana ufficiale del testo della Convenzione consultabile su http://www.governo.it/GovernoInforma/Dossier/giornata_disabilita/convenzione_disabili_ONU.pdf.

THE CONCLUSION OF THE *UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES* BY THE EC/EU: SOME REFLECTIONS FROM A “CONSTITUTIONAL” PERSPECTIVE

by Delia Ferri*

Contents: 1. Introduction.- 2. The text of the UN Convention on the Rights of Persons with Disabilities: a brief overview.- 3. The conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU.- 4. The UN Convention on the Rights of Persons with Disabilities: status and effects within the EU legal system.- 5. Concluding remarks.

1. Introduction

The European Community (now the European Union, or the “EU”)¹, having already signed the *UN Convention on the Rights of Persons with Disabilities* (hereinafter the “UN CRPD”, or the “Convention”), acceded to the Convention with the Council Decision 2010/48/EC, formally adopted on 26 November 2009 under the former EC Treaty².

The UN CRPD is the first human rights treaty that contemplates the possibility that not just States but «regional integration organizations» may become parties³. It is also the first human rights treaty to which the EC/EU has acceded⁴. The conclusion of and accession to the UN CRPD by the EC/EU thus represents a significant opportunity to seek to gain a deeper understanding of the evolving relationship between international human rights law and EU law.

The UN CRPD itself and the conclusion of the Convention by the EU have attracted much attention among legal scholars⁵. This paper tries to make a contribution to the debate from a “constitutional” perspective. It considers and endeavours to evaluate the possible impact of the

* My special thanks go to Dr. Mel Marquis for his comments and for revising the language of the text. Of course, all errors and opinions remain my own.

A longer version of this paper will be published in the European Yearbook of Disability Law.

¹ The Treaty of Lisbon entered into force on 1 December, 2009, and formally abolished the distinction formerly drawn between the three pillars. With the Treaty of Lisbon, the European Union has replaced and succeeded the European Community (Art. 1(3) TEU). Thus, in the first part of this paper I will refer to the EC/EU, meaning that the EC concluded the agreement, but it is the EU that has now succeeded the EC. The EU now has an explicit legal personality, and it is subject to the obligations set out by the Convention. Unless specified otherwise, I refer only to the EC when discussing the period before the entry into force of the Treaty of Lisbon.

² Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC), OJ L 23, 27.1.2010, p. 35 et seq.

³ Art. 44 of the UN CRPD explicitly refers to the term «regional integration organization» and defines it as an «organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention». Many multilateral treaties use the term «international organization» or «regional integration organization» where it is clear that what is intended by the term is the European Community (European Union) For example, Art. 27 of the UNESCO Convention on the protection and promotion of the diversity of cultural expressions clearly mentions «regional economic integration organizations». Such a provision was included solely to allow the EC's accession to the agreement. See B. DE WITTE, *The emergence of a European System of Public International Law: the EU and its Member States as strange subjects*, in J. WOUTERS, P.A. NOLLKAEMPER, E. DE WET (eds.), *The Europeanisation of International Law*, The Hague, 2008, p. 39 et seq., especially p. 51.

⁴ On this issue, see L. WADDINGTON, *Breaking New Ground: The Implications of Ratification of the UN Convention on the Rights of Persons with Disabilities for the European Community*, in G. QUINN, O.M. ARNARDOTTIR, *The UN Convention on the Rights of persons with Disabilities: European and Scandinavian Perspectives*, Boston-Leiden., p. 101.

⁵ Although it is only one of nine major UN human rights treaties, the UN CRPD has drawn considerable attention for a variety of reasons. Apart from its formal recognition and legal promulgation at the international level of the rights of disabled persons, who have long constituted a highly marginalized and “invisible” minority, the Convention is notable for its distinctive rationale and for its structure (discussed below in Section 2). See *inter alia* J. KUMPUVUORI, M.SCHEININ (eds.), *United Nations Convention on the Rights of Persons with Disabilities – Multidisciplinary Perspectives*, Finland, 2010; G. QUINN, O.M. ARNARDOTTIR, *The UN Convention on the Rights of persons with Disabilities: European and Scandinavian Perspectives*, Boston- Leiden, 2009. See also the World Bank paper: K. GUERNSEY, M. NICOLI, A. NINIO, *Convention on the Rights of Persons with Disabilities: Its Implementation and Relevance for the World Bank*, at <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Disability-DP/0712.pdf>.

Convention on the EU's juridical/constitutional identity and on the EU's system of human rights protection⁶.

The UN CRPD commits the EU to higher standards of non-discrimination with respect to persons with disability. Its remarkable content, and its underlying rationale, could potentially have a positive influence on the overall conception of human rights within the EU⁷. This paper argues that the UN CRPD, and its implementation, may well have a profound impact not only on EU (secondary) law but also on European constitutional standards of human rights (“despite” the *Kadi* saga⁸). In doing so, this paper seeks, through an analysis of the “UN CRPD case study”, to contribute to the debate on the evolving relationship between international law and EU law.

Section two of this paper discusses the distinctive features of the UN CRPD. Before embarking on a discussion of the constitutional significance of the UN CRPD, Section two aims to highlight the fact that the Convention tailors existing human rights to the unique situation of persons with disabilities⁹. Section three discusses the decision on the conclusion of the UN CRPD approved by the Council on 26 November 2009. Section four briefly examines the status and effects of the UN CRPD within the EU legal system. In particular, embracing Besselink's theory, it is considered whether the UN CRPD would be capable of integrating the constitutional dimension of the EU. Section five concludes.

2. The text of the UN Convention on the Rights of Persons with Disabilities: a brief overview

The UN CRPD (together with its Optional Protocol) was adopted by consensus by the UN General Assembly on December 13, 2006¹⁰. It was opened for signature on 30 March 2007 and entered into force on 3 May 2008, as did its Optional Protocol.

⁶ The European human rights system is characterized by a three-layered structure. See F. FABBRINI, *Judicial Review of United Nations Counter-Terrorism Sanctions in the European Multilevel System of Human Rights protection*, in F. FONTANELLI, G. MARTINICO, P. CARROZZA, *Shaping Rule of Law through Dialogue*, Groningen, 2010, p. 149 et seq., especially p. 149.

⁷ The terms “human rights” and “fundamental rights”, of course, are not identical. However, I will use these terms as synonyms (in this sense, see also http://www.europarl.europa.eu/comparl/human_rights/default_en.htm). Arguments against this option can be found in G. PALOMBELLA, *From Human Rights to Fundamental Rights. Consequences of a conceptual distinction*, EUI Working Paper 2006/34, at <http://cadmus.iue.it/dspace/index.jsp>. It should be recalled that fundamental rights have emerged in the jurisprudence of the European Court of Justice (ECJ). According to settled case law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights (ECHR) has special significance in that respect. See, *ex multis*, ECJ, 12 September 2006, *Laserdisker ApS v Kulturministeriet*, Case C-479/04, [2006] ECR I-8089. The discourse on human rights and the attention given in official documents and debates to human rights issues has expanded greatly in the Lisbon Treaty: reference to human rights can be found in the preamble to the new Treaty on the European Union (TEU), in Art. 2 TEU, Art. 6 TEU, and in the now-binding EU Charter of Fundamental Rights.

⁸ ECJ, 3 September 2008, *Yassin Abdullah Kadi and Al Barakat International Foundation v. Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P, [2008] ECR. In this famous case, the ECJ rejected the approach of the Court of First Instance, accepting instead, in essence, the different, pluralistic view of the relationships between interacting legal orders suggested by Advocate General Poiares Maduro. There is extensive literature on *Kadi*. See, e.g., S. GRILLER, *International Law, Human Rights and the European Community's Autonomous Legal Order: Notes on the European Court of Justice Decision in Kadi*, in *European Constitutional Law Review*, 3/2008, pp. 528-533; B. KUNOY, 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 Cases*, in *CMLRev*, 46, 2009, p. 73 et seq.; G. DE BURCA, *The European Court of Justice and the International Legal Order after Kadi*, Jean Monnet Working Paper 01/09, at www.JeanMonnetProgram.org.

⁹ O.M. ARNARDOTTIR, *A Future of Multidimensional Disadvantage Equality?*, G. QUINN, O.M. ARNARDOTTIR, *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, op. cit., p. 45.

¹⁰ The process of drafting the UN CRPD began in December 2001, when the government of Mexico sponsored the establishment of an Ad Hoc Committee to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, based on the holistic approach. Previous attempts to secure an international convention had resulted only in the adoption of non-binding documents. The UN CRPD text, along with its drafting history, resolutions, and updated list of signatories and States Parties, is available at <http://www.un.org/esa/socdev/enable/rights/convtexte.htm>. See also M. ASHLEY STEIN, J.E. LORD, *Future Prospects for the United Nations Convention on the rights of persons with disabilities*, in G. QUINN, O.M. ARNARDOTTIR, *The UN*

The UN CRPD is the first human rights convention adopted in the twenty-first century. It now constitutes one of nine “core” human rights conventions, as designated by the office of the UN High Commissioner for Human Rights¹¹. The Convention does not seek to create new rights for disabled persons, but rather elaborates and clarifies existing human rights obligations within the disability context¹².

The UN CRPD consists of a Preamble and fifty Articles. Additionally, the Optional Protocol comprises eighteen Articles. Whilst the Convention does not contain a definition of disability in Art. 2,¹³ it affirms the social model (as opposed to the “medical” model of disability¹⁴. The Preamble states that disability is an “evolving concept” and that «disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others»¹⁵.

The scope of the Convention is extremely broad: the text does not simply prohibit disability discrimination, nor does it cover only civil or political rights or economic, cultural or social rights. On the contrary, the UN CRPD is built on the core and manifold concepts of the dignity of each individual and autonomy or self-determination¹⁶, and it is underpinned by the principles of non-discrimination and equality, which encompass the right to reasonable accommodation. In this respect, Arnardottir underlines that «the Convention is an extremely important contribution to a paradigm change that is taking place and moves the approach of international human rights law from a concept of formal equality to a concept of multidimensional disadvantage equality»¹⁷.

The UN CRPD is, by nature, programmatic, outlining policy in general terms, without giving a precise description of what can be done. It includes an introductory set of provisions outlining its purpose and key definitions (Arts. 1-2). Art. 2 provides, *inter alia*, a comprehensive definition of

Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives, cit., p. 26 et seq. An Italian translation of the text is available at http://www.governo.it/GovernoInforma/Dossier/giornata_disabilita/convenzione_disabili_UNU.pdf.

¹¹ See R. KAYESS, P. FRENCH, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, in *Human Rights Law Review*, 2008, pp. 1-34. G. QUINN, *The UN Convention on the Human Rights of Persons with Disabilities*, at <http://www.nhri.net/2007/Berlin-Quinn2.pdf>; G. QUINN, O.M. ARNARDOTTIR, *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, op. cit., p. 187 et seq.

¹² See *inter alia* J.E. LORD, *Disability Rights and Human Rights Mainstream: Reluctant Gate-Crashers?*, in C. BOB, *The International Struggle for New Human Rights*, Philadelphia-Pennsylvania, 2009, p. 83 et seq.

¹³ The question of whether or not to include a definition of disability in the Convention was controversial, and the penultimate (Seventh) Ad Hoc Committee meeting on the Convention was devoted almost exclusively to this issue. Ultimately it was decided not to include a definition, since any definition would necessarily exclude some people. It was also considered that the inclusion of a definition of disability could potentially undermine the Convention’s commitment to the social model of disability. As a compromise, however, guidance was included regarding who was to be regarded as a person with a disability under the Convention. At present, a common definition of disability is still lacking. For a definition of disability, see D. BJÖRGVINSSON, *The Protection of the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights*, in G. QUINN, O.M. ARNARDOTTIR, *The UN Convention on the Rights of persons with Disabilities: European and Scandinavian Perspectives*, op. cit., p. 129 et seq. . See also R. CALDIN PUPULIN, *Nuovi approcci alla disabilità: gli orientamenti OMS nell’ICDH-2*, in R. MONTANI BRIGO, R. CALDIN PUPULIN, *Disabilità:quadro teorico e percorsi d’integrazione*, Padova, 2000, p. 13 et seq., especially pp. 26-27.

¹⁴ The “medical” model tends to view persons with disabilities as “objects” who are to be managed or cared for. The “social” or “human rights” model views persons with disabilities as subjects and not objects, and it puts emphasis on respect for their equal human rights. On the social model, see, e.g., R. TRAUSTADOTTIR, *Disability Studies, the Social Model and Legal Developments*, in G. QUINN, O.M. ARNARDOTTIR, *The UN Convention on the Rights of persons with Disabilities: European and Scandinavian Perspectives*, op. cit. See also C. BARNES, *Capire il modello sociale della disabilità*, A. MARRA (traduzione di), in *Persona e danno*, at <http://www.personaedanno.it/cms/data/articoli/005201.aspx>

¹⁵ Disability in the UN CRPD is clearly a multifaceted concept that represents the relationship between an individual and his or her environment. It typically refers to a limitation in functioning that stems from the presence of a physical or mental impairment. The definition becomes complex, however, because an individual who is limited in his or her ability to function in one environment may not be limited when components of that environment are modified or when functioning in alternative environments. In addition, disability status may be dependent on the skills or abilities an individual had prior to the onset of impairment and how the impairment has reduced or destroyed those abilities. For example, a concert pianist who loses her hand would likely be considered to have a work disability, whereas a singer who loses his hand may not be.

¹⁶ This is based on the presumption of a capacity for self-directed action and behaviour, and it requires that the person be placed at the centre of all decisions affecting him/her. See <http://www2.ohchr.org/english/issues/disability/intro.htm>.

¹⁷ O.M. ARNARDOTTIR, *A future of multidimensional Disadvantage Equality?*, G. QUINN, O.M. ARNARDOTTIR, *The UN Convention on the Rights of persons with Disabilities: European and Scandinavian Perspectives*, op. cit., p. 45 et seq.

disability, including «any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms». This definition encompasses both direct and indirect discrimination, even if neither the words *direct* or *indirect* are explicitly used.¹⁸ Discrimination is also considered to include the denial of reasonable accommodation¹⁹. The concept of reasonable accommodation is firmly embedded in the UN CRPD. It is explicitly mentioned in the substantive Articles dealing with education, employment, liberty and security of persons and, though in slightly different terms, in the Article dealing with access to justice. Further, largely as a result of Articles 2 and 5 (Equality and non-discrimination)²⁰, reasonable accommodation is an implicit element of almost every one of the substantive Articles (Arts. 10 et seq.).

Articles 3-9 set out general provisions, to be applied throughout the treaty text. They are significant because they are potentially capable of causing a substantive transformation in the protection of the (human) rights of persons with disabilities.

Article 3 enunciates the Convention's general principles, which include respect for individual dignity, autonomy, and independence; respect for difference and acceptance of disability as human diversity; non-discrimination; equal opportunity; complete and meaningful participation; accessibility; sexual equality; and respect for children's rights and support for their evolving capabilities. Article 3 includes, as a general principle, "equality of opportunity", a term not defined in the UN CRPD itself, but clearly drawn from the UN Standard Rules on the Equalization of Opportunities of Persons with Disabilities²¹.

Art. 4 *UN CRPD* requires Parties: to take measures to abolish disability discrimination by persons, organisations or private enterprises; to engage in the research and development of accessible goods, services and technology for persons with disabilities and to encourage others to undertake such research; to provide accessible information about assistive technology to persons with disabilities; to promote professional and staff training on the Convention rights for those working with persons with disabilities; to consult with and involve persons with disabilities in developing and implementing legislation and policies and in decision-making processes concerning *UN CRPD* rights²². Article 4 further requires Parties to adopt an inclusive approach to protect and promote the rights of persons with disabilities in all policies and programmes, which suggests the need for a screening exercise to assess policy and programming inclusion across sectors.

Among the provisions of general application, Article 9 in particular should be highlighted. This provision seeks to dismantle barriers by promoting different forms of accessibility in the public

¹⁸ Direct discrimination is characterized by the intent to treat persons with disabilities differently (and less favourably) as compared to non-disabled persons. Indirect discrimination occurs when an apparently neutral provision, criterion or practice would put persons with disabilities at a particular disadvantage compared with other (non-disabled) persons. This definition is included in Framework Directive 2000/78. The essence of the concept of indirect discrimination is that a measure or criterion that appears to be neutral has a discriminatory effect to the detriment of a certain group of persons which should be protected against discrimination. The determination of whether or not indirect discrimination exists is characterized by two basic elements. One relates to the nature of the prohibited measure and one relates to the legitimacy of any justification. See C. TOBLER, *Indirect Discrimination. A Case Study into the development of the legal concept of indirect discrimination under EC Law*, Antwerp-Oxford, 2005.

¹⁹ The concept of reasonable accommodation is defined in Art. 2 as a «necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden», which can ensure to disabled persons the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

²⁰ See O.M. ARNARDOTTIR, *A future of multidimensional Disadvantage Equality?*, G. QUINN, O.M. ARNARDOTTIR, *The UN Convention on the Rights of persons with Disabilities: European and Scandinavian Perspectives*, op. cit., p. 45 et seq.

²¹ See <http://www.un.org/esa/socdev/enable/dissre00.htm>. The Standard Rules define "equalization of opportunities" as «the process through which the various systems of society and the environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities». The concept of "equality of opportunity" complements principles of non-discrimination and equality, and it reflects the social model of disability (see above footnote 17) by recognizing that the inclusion of persons with disabilities requires modification of societal systems and the environment.

²² The method of translating international legal obligations into national law is dependent upon the nature of the domestic legal system.

and private spheres, including physical, technological, economic and social accessibility, as well as information and communication accessibility. Accessibility in this regard is to be applied across the Convention both by virtue of Article 9, as well as by its inclusion as a general principle in Article 3. The role that barriers play in reinforcing the social exclusion of persons with disabilities underscores the rationale for giving prominence to accessibility in the *UN CRPD*. It likewise gives rise to specific applications in other substantive articles. Art. 9 is a pragmatic “translation” of the principle of equality. In addition, it must be read in conjunction with Art. 19, which imposes a general obligation on Parties to enable persons with disabilities to live independently and to participate fully in all aspects of life. Art. 19 requires Parties to ensure that persons with disabilities are able to live in the community with accommodation options equal to others, and that these options support the inclusion and participation of persons with disabilities in community life.

Articles 10 through 30 enumerate the specific substantive obligations of the Convention. They «cover the spectrum of life activities of persons with disabilities»²³: the right to life (art. 10), freedom from torture (Art. 15) and other forms of abuse (Art. 16), the right to education (Art. 24), employment (Art. 27), political participation (Art. 29), legal capacity (Art. 12), access to justice (Art. 13), freedom of expression and opinion (Art. 21), privacy (Art. 22), participation in cultural life, sports and recreation (Art. 30), respect for home and family (Art. 23), personal integrity (Art. 17), liberty of movement and nationality (Art. 18), liberty and security of the person (Art. 14), and adequate standard of living (Art. 28). The Convention recognises that, in order to protect and respect some classical human rights, quite substantial action by Parties is required. For example, in order to grant freedom of expression and access to information to persons with disabilities, Parties must provide information in accessible formats and facilitate the use of sign languages, Braille, augmentative and alternative communication²⁴.

For the sake of completeness, it should be added that Articles 31-40 set forth the monitoring and implementation mechanisms for the UN CRPD²⁵. These provisions respond to the need to translate the Convention’s provisions into hard domestic law, policies and good practices. Hence, even if the Convention lacks a judicial enforcement system (and even if the international para-judicial monitoring mechanism set forth by the Optional Protocol seems unable to impose serious constraints on Parties’ behaviour), the UN CRPD establishes a Committee of experts (Committee on the Rights of Persons with Disabilities – see Art. 34) to monitor its implementation at the international level. In addition, it also provides for the operation of independent national level monitoring mechanisms (Art. 33)²⁶. This is a truly innovative aspect: the Convention pays attention not merely to what ought to be

²³ M.A. STEIN, J.E. LORD, *Future prospects for the United Nations Convention on Disability*, in G. QUINN, O.M. ARNARDOTTIR (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, op. cit. p. 33 et seq.

²⁴ The Convention applies the traditional distinction between obligations which are immediately applicable and those which are to be realised progressively. For example, Article 4(2) contains an important distinction between civil and political rights in contrast to economic, social and cultural rights. While the latter rights are subject to progressive realisation, civil and political rights are immediately applicable after ratification. This means that, when ratification takes place, at least these rights must be in total harmony with the Convention. One problem, in this context, is that all the rights are interconnected (see I.E. KOCH, *From Invisibility to Indivisibility: The International Convention on the Rights of Persons with Disabilities*, in G. QUINN, O.M. ARNARDOTTIR, *The UN Convention on the Rights of persons with Disabilities: European and Scandinavian Perspectives*, op. cit.). Civil and political rights may not always be easy to distinguish from economic, social and cultural rights, and the two sets of rights are at times mixed up in the same Articles of the Convention.

²⁵ Article 32 makes it clear that all international cooperation efforts, including international development programmes, should be fully inclusive of persons with disabilities.

²⁶ Article 33(1) UN CRPD states that Parties to the Convention must designate one or more *focal points* within their governments for matters relating to the implementation of the Convention. According to Article 33(2), Parties to the UN CRPD must maintain, strengthen, designate or establish a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor the implementation of the Convention. Art. 33 distinguishes between those institutions which will have responsibility for ‘implementation’ and those with responsibility for ‘monitoring’, with the former being placed in government and the latter with the national framework and civil society organisations. When designating or establishing such a mechanism, Parties must take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights (NHRIs). It must be recalled that, taking its cue from Art. 33(2), the International Coordination Committee (ICC) of National Human Rights Institutions

done but also to the institutional preconditions necessary to ensure that it can be done at the domestic level.²⁷

As mentioned above, the UN CRPD is joined by an Optional Protocol that recognizes the Committee as a para-judicial organ. In particular, it recognizes “the competence of the Committee on the Rights of Persons with Disabilities to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.”

In concluding, it must be emphasised that this overview does not contain a discussion of the contents of the Convention, nor does it cover all the norms and their meaning. It should be pointed out that the UN CRPD is comprehensive not only in terms of its substantive contents, but also in the manner in which monitoring and implementation at all levels is addressed. The rights protected by the Convention are already traditionally protected by national, supranational (EU) and international (European Convention on Human Rights-ECHR)²⁸ norms and institutions. However, the UN CRPD represents a progressive development of existing human rights law by placing the rights of the disabled within the conceptual framework of classical human rights. Traditionally, both national and international norms and decision makers have tended to explain the disadvantageous situation of disabled people as reflecting their specific impairments, physical or mental, rather than being a result of discrimination or other inadequate respect for human rights²⁹. The Convention should be understood «as an instrument that seeks to recast disability as a social construction and articulates protections in specific application to their human rights enjoyment»³⁰.

3. The conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU

Having provided a brief outline of the UN CRPD’s contents, this Section will look at the conclusion of the UN CRPD by the EC/EU. In this context, Council Decision 2010/48/EC, formally adopted on 26 November 2009, will be examined.

The UN CRPD is a “mixed agreement”. “Mixity”, of course, refers to the fact that part of an international agreement falls within the scope of the powers of the EC/EU and part falls within the scope of the powers of the Member States³¹. The UN CRPD fit this description, and it was negotiated and then ratified (concluded) by the various Member States as well as by the EC.

(NHRI) is actively engaged in helping its members raise their capacity to handle the issues that concern them under the Convention. A database on the activities of NHRIs with respect to disability is currently being prepared, and thematic events are being planned. Article 33(3) seeks to ensure that persons with disabilities and their representative organisations are involved, and that they participate in the national monitoring process.

²⁷ G. QUINN, *Resisting the ‘Temptation of Elegance’: Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?*, in G. QUINN, O.M. ARNARDOTTIR (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, cit., p.

²⁸ The scope of this paper is limited to the EU legal order. No reference is made to the ECHR system (which is very active in the field of disability: see at http://www.coe.int/t/e/social_cohesion/soc-sp/integration/02_Council_of_Europe_Disability_Action_Plan/). Although the Council of Europe (and bodies related to it) can play a very important role at the regional level in the implementation of the UN CRPD (and more generally in the protection of rights of persons with disabilities), and although the two organisations currently cooperate in some policy areas, the two organisations remain separate and quite different from each other.

²⁹ See the various contributions in G. QUINN, O.M. ARNARDOTTIR (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, cit.

³⁰ M.A. STEIN, J.E. LORD, *Future prospects for the United Nations Convention on Disability*, op. cit., p. 39.

³¹ On mixed agreements see *ex multis* J. HELISKOSKI, *Mixed Agreements as a Technique for Organizing the International Relations of European Community and its Member States*, The Hague, 2001; M. CREMONA, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, EUI Working Paper, 2006/22, at <http://cadmus.iue.it/dspace/index.jsp>; R. HOLDGAARD, *External Relations Law Of The European Community: Legal Reasoning And Legal Discourses*, Alphen aan den Rijn (The Netherlands), 2008, especially p. 147 et seq.

The EC's competence to negotiate and sign the UN CRPD derived from Articles 13 and 95 EC, which addressed (disability) discrimination and the internal market respectively³². Considering that EC competences existed in a number of areas touched upon by UN CRPD provisions, in the proposal concerning the conclusion of the Convention the legal bases were Articles 13, 26, 47(2), 55, 71(1), 80(2), 89, 93, 95 and 285 EC in conjunction with Article 300(2), and the first subparagraph of Article 300(3) EC³³. However, the final Decision on the Conclusion of the UN CRPD, adopted in November 2009 by the Council (under the EC Treaty), has only two substantive legal bases, namely Article 13 and Article 95 EC, in conjunction with the (procedural) provisions of Article 300(2) EC³⁴ and Article 300(3) EC.

This choice of a double substantive legal basis could be criticized for two main reasons. First, it might appear to “minimise” the scope of the Convention. In other words, at first sight, the use of such a double substantive legal basis seems to neglect the comprehensive scope of the Convention (which affects many and different policy fields), thereby prejudicing *ex ante* its implementation and its impact on the EU legal system. Second, it might appear to neglect the nature of the UN CRPD as a human rights treaty. It is submitted here, however, that the choice of the legal bases was appropriate.

Regarding the first and stronger reason for criticism, one may note that the choice of legal base must rely on objective factors which are amenable to judicial review³⁵, and the measure must be adopted on the legal base corresponding with that main purpose (“single legal base”); if an EU measure has more than one purpose, and if one of those aims cannot be regarded as secondary to the other, the measure can exceptionally be based on more than one legal base (“dual legal base”). The major objective of the UN CRPD emerging from its text seems to be substantial equality (i.e. the protection and ensuring «the full and equal enjoyment of all human rights»³⁶). Whereas the former EC Treaty lacked an adequate legal basis for acceding to human rights treaties³⁷, and as famously underlined by the

³² On the basis of negotiating directives adopted by the Council on 24 May 2004, the Commission conducted the negotiation of the Convention on behalf of the European Community. On 27 February 2007, the Commission presented a proposal for a Council Decision on the signing, on behalf of the European Community, of the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol (COM(2007)77). The Council Decision, dated 27 March 2007 (ST07404/07), authorised the Community to sign the Convention on the Rights of Persons with Disabilities and issued a declaration on the Optional Protocol (Annex II of the Decision) stating that the Council of the European Union would reconsider the question of signing the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities by the European Community as soon as possible. The Commission signed the Convention on 30 March 2007. As Lisa Waddington stresses, the Commission clearly saw Article 13 EC as giving it access to the negotiating table. The goal of the Commission was to seek to ensure consistency between European internal and international action regarding disabled people (see L. WADDINGTON, *A New Era in Human Rights Protection in the European Community: The Implications the United Nations' Convention on the Rights of Persons with Disabilities for the European Community*, Maastricht Faculty of Law Working Paper 2007/4, at <http://www.unimaas.nl/default.asp?template=werkveld.htm&id=F60BL5P00MJO466V63M6&taal=nl>). On the role of the EU in the negotiation process, see, *inter alia*, G. DE BURCA, *The EU in the negotiation of the UN Disability Convention*, in *ELR* 2/2010. An electronic copy of the latter paper is available at: <http://ssrn.com/abstract=1525611>.

³³ Proposal for a Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, COM(2008) 530 final/2. Despite the fact that the UN CRPD expressly calls for action in the fields of health, education and vocational training, the proposal for the decision on the conclusion of the UN CRPD did not mention any other Article according to which the EC only had supplementary powers (*i.e.* Art. 149 EC regarding education, or Art. 152 EC, regarding health). Considering the theory of the “main predominant purpose”, the main reason for this choice may be due to the fact the EC had only a supplementary competence in these fields.

³⁴ Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC), OJ L 23, 27.1.2010, p. 35.

³⁵ See, e.g., ECJ, 16 November 1989, *Commission of the European Communities v Council of the European Communities*, Case C-11/88, [1989] ECR 3799.

³⁶ Art. 1 UN CRPD.

³⁷ Human rights were not mentioned specifically in the Treaty of Rome of 1957, although the Treaty affirmed the Member States' willingness to preserve and strengthen peace and liberty (Preamble), to improve living and working conditions and to abolish discrimination on the grounds of nationality among citizens of the Member States (Article 7). It also created freedom of movement and establishment for EEC citizens (Articles 48-58), equal treatment for men and women in the workplace (ex-Article 119) and equal treatment for immigrant workers (e.g. Article 51). The ECJ “discovered” the protection of human rights: to some extent the ECJ was motivated to create a doctrine of fundamental rights in order to protect the (sometimes fragile) principle of Community supremacy over the national law of the Member States. De Witte adds, however, that the Court's activism was simply a response to the Community's

Court of Justice in Opinion 2/94 (now effectively overruled by the Treaty of Lisbon)³⁸, Article 13 EC, addressing discrimination on a number of grounds including disability, was the provision that best reflected the UN CRPD's main purpose. In addition, as noted by Waddington³⁹, Article 13 was the only Article in EC Treaty which conferred upon the Community explicit powers regarding disabilities.

However, many areas of the Convention extend beyond non-discrimination: this is reflected in the second legal base of the conclusion by the EC/EU of the Convention. Given that the internal market is an extremely broad notion that encompasses the removal of all kinds of barriers to trade, it is not surprising to find that Article 95 EC is the other cited legal base⁴⁰. In addition, and again as noted by Waddington, Article 95 EC has served as the legal base for instruments addressing many different areas. In some cases these instruments have had a specific disability dimension⁴¹.

Articles 13 and 95 EC were also the legal bases for the Decision on the signing of the Convention⁴².

In addition, the declaration of competence annexed to the Decision on the Conclusion, in compliance with Article 44 UN CRPD, fully reflects the broad scope of the Convention⁴³. Such a declaration lists relevant EU legislation: the extent of the EC/EU competence ensues from these legislative acts. Indeed, this declaration (like the declarations of competences included in other decisions)⁴⁴ is only intended to specify to third countries the distribution of competence, indicating the competence that the Member States have transferred to the Community under the Treaties in matters governed by the Convention. In particular, this declaration is mainly devoted to clarifying, *ex ante*, the

growing capacity to affect fundamental rights to an extent unforeseen at the time the European Communities were created. See B. DE WITTE, *The Role of the ECJ in Human Rights*, in P. ALSTON (ed), *The EU and Human Rights*, Oxford, 1999, p. 866. In the *Internationale Handelsgesellschaft* ruling in 1970, the ECJ decided that fundamental rights formed part of the general principles of Community law that it was obliged to uphold, and that it should be guided by the constitutional traditions of the Member States in safeguarding those rights. The *Nold* ruling reinforced this and also referred specifically to international treaties (though not to the European Convention specifically) which Member States had ratified as guidelines to be followed within the framework of Community law. No measure could have the force of law unless it was compatible with the fundamental rights recognized and protected by the Member States' Constitutions. The Treaty of Maastricht confirmed the Court's jurisprudence in the wording of Article 6(2) EU.

³⁸ ECJ, 28 March 1996, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion, 2/94, [1996] ECR I-175. The Council in that case asked the Court to deliver its opinion on the competence of the Community to accede to the ECHR, and on the compatibility of accession with substantive provisions and principles of EC law, in particular the exclusive jurisdiction of the Court of Justice and the autonomy of the Community legal order. The Court admitted only the first part of the request (the second part was considered inadmissible), and its reasoning referred first of all to Article 5 EC (principle of conferral) and to its theory of implied powers. The Court pointed out that no Treaty provisions conferred on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field. According to the ECJ, Art. 308 EC is insufficient as a foundation for the Community's competence because accession would have equally fundamental institutional implications for the Community and for the Member States, and would therefore be of "constitutional significance". With the Treaty of Lisbon, accession of the EU to ECHR is provided for in Article 6(2) TEU. However, the Lisbon Treaty makes it clear that «[s]uch accession shall not affect the Union's competences as defined in the Treaties».

³⁹ L. WADDINGTON, *Breaking New Ground: The Implications of Ratification of the UN Convention on the Rights of Persons with Disabilities for the European Community*, op. cit.

⁴⁰ L. WADDINGTON, *A disabled Market: Free movement of Goods and Services in the EU and Disability Accessibility*, in ELJ 15/2009, p. 575 et seq.

⁴¹ See, e.g., Council Directive (EC) 2001/85 relating to special provisions for vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver's seat, and amending Directives 1970/156/EEC and 1997/27/EC [2002] OJ L43/1 or Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, [2001] O.J. L311/67. See L. WADDINGTON, *A disabled Market: Free movement of Goods and Services in the EU and Disability Accessibility*, in ELJ 15/2009, p. 575 et seq.

⁴² See *supra* footnote 31.

⁴³ As mentioned above, Art. 44 UN CRPD provides the possibility for regional organizations to become parties and (analogously to the *UN Convention on the Law of the Sea* and to other mixed agreements) contains a clause setting out "separate" responsibility. According to Article 44(1), the organizations acceding to the Convention must declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the Convention, and they must inform the depositary of any substantial modification of their competence. The UN CRPD also states that the Convention shall apply to such organizations within the limits of their competence. Hence, by virtue of this declaration, the internal division of powers between the Community and its Member States in fact forms part of the agreement and ceases to be an exclusively "domestic" issue.

⁴⁴ E.g. Council Decision 2006/515/EC of 18 May 2006, OJ L 201 of 25.07.2006, p. 15 et seq.

sharing of international responsibility⁴⁵. Nonetheless, even bearing in mind this “external dimension”, the declaration, with the list of legislative instruments, clearly indicates that the Convention touches upon many different policy fields.

Finally, the choice of the legal basis for the decision concluding the agreement is very important but it is not decisive for implementation. In case C-178/03⁴⁶, the ECJ clearly stated that: «the fact that one or more provisions of the Treaty have been chosen as legal bases for the approval of an international agreement is not sufficient to show that those same provisions must also be used as legal bases for the adoption of measures intended to implement that agreement at Community level»⁴⁷. This means that Treaty provisions other than those mentioned in the Council decision can be chosen as legal bases to implement the Convention obligations in specific fields⁴⁸.

Concerning the second grounds for criticism, it is submitted that Articles 13 and 95 EC do not neglect the nature of human rights treaty of the UN CRPD.

⁴⁵ The declaration is clearly intended to indicate to third countries the distribution of competences. This division of the binding force implies that the EC/EU and the Member States bear responsibility only where they breach the obligations they have respectively assumed. Consequently, the allocation of international responsibility follows the division of binding force, irrespective of the attribution of the wrongful act. If a complaint is brought against the EU because a Member State, by applying national law, violates the international treaty, the EU could deny responsibility because it has not assumed the relevant obligations. At the same time, Member States bear responsibility for violation of provisions falling within their competence. Indeed, even if there is a declaration of competence, the issue of international responsibility for fulfilment of the obligations under a mixed agreement remains inherently complex. There remain problems that are not completely solved. See E. NEFRAMI, *International Responsibility and Mixed Agreements*, in E. CANNIZZARO (ed), *The European Union as an Actor in International Relations*, The Hague, 2002, p. 193 et seq. Member States are not internationally bound by provisions falling within the scope of powers of the Community, but they may be liable under EU law. Art. 216(2) TFEU (ex-Art. 300(7) EC) imposes a duty on Member States under EU law; consequently, international breaches may be sanctioned through the general EU law enforcement machinery. But this is only an intra-Community effect, due to the fact that mixed agreements form part of EU law. The Commission may thus bring an infringement case against a Member State that has not properly fulfilled its international duty. A prominent example is the *Etang de Berre* case (ECJ, 7 October 2004, *Commission of the European Communities v French Republic*, Case C-239/03, [2004] ECR I-9325). In this case, France was condemned by the ECJ for not having implemented a mixed environmental convention. That case concerned, in particular, Article 4(1)(8) of the *Barcelona Convention for the Protection of the Mediterranean Sea against Pollution* and Article 6(1) and 3 of the *Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources to Discharges of Fresh Water and Alluvia into a Saltwater Marsh*. The ECJ stated that these provisions fell within the Community framework because those articles were in a mixed agreement and concerned a field in large measure covered by EC law. In ensuring compliance with commitments arising from an agreement concluded by the EU institutions, «the Member States therefore fulfill, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement». The principle underpinning such procedural mechanisms is the duty of cooperation, which provides the foundation for managing shared competence within mixed agreements. See M. CREMONA, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, cit., especially p. 18 et seq.

⁴⁶ See ECJ, *Commission of the European Communities v European Parliament and Council of the European Union*, Case C-178/03, [2006] ECR I-107.

⁴⁷ The case concerned Regulation (EC) No 304/2003 on the export and import of dangerous chemicals, based exclusively on Art. 175 EC. This regulation implements the *Rotterdam Convention concerning the export and import of dangerous chemicals*. The Commission alleged an infringement of the EC Treaty on the ground that the wrong legal base was chosen. According to the Commission, since the contested regulation is an instrument whose essential purpose is to regulate international trade of chemicals, it ought to have been adopted in the form of a Council regulation based on Article 133 EC, and not in the form of a regulation of the European Parliament and of the Council based on Article 175(1) EC. The Court said that the primary objective of the contested regulation was to implement the Rotterdam Convention. As the Court held in Case C-94/03, *Commission v Council*, that Convention specifically includes two components regulating trade and protecting human health and the environment, which are linked so closely that the decision approving that Convention on behalf of the Community should have been based on Articles 133 EC and Article 175(1) EC. In Case C-178/03, however, the use of the same legal bases both for the decision approving the Convention on behalf of the Community and for the contested regulation, which implements the Convention at Community level, was necessary in any event, in view of the clear convergence of the provisions of those two measures, reflecting both the concern to regulate trade in hazardous chemicals and the concern to ensure sound management of those products and/or to protect human health and the environment against the harmful effects of trade in such products. The ECJ concluded that the contested regulation should have been based on the two corresponding legal bases, namely, Articles 133 EC and 175(1) EC. Accordingly, the Court annulled the contested measure inasmuch as it was based solely on Article 175(1) EC.

⁴⁸ The UN CRPD provisions could also serve as a sufficient legal basis for adopting an act of implementation or application (*i.e.* executive measures). To take an example: Art III GATT requires Member States to amend their tax legislation (pursuant to the international rule and in compliance with existent EC/EU regulation in the field) and there is no need for a separate EC/EU act requiring such amendment.

Once again, we should consider that no other adequate legal base, other than Art. 13, was to be found, considering that recourse to Art. 308 EC could have been contemplated only if no other provision of the Treaty were suitable⁴⁹.

The Commission itself, in its 2003 Communication, “Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities”, stated that «a key tool in achieving equality is the non-discrimination principle. Equal access to human rights can be guaranteed by ensuring that people with disabilities are not discriminated against on the grounds of their disability». In addition, as we will see in Section four, the Convention’s legal status and effects will be largely “determined” by the ECJ, and thus the choice of legal bases does not affect the possibility that the UN CRPD might become part of the constitutional core of EU law.

4. The UN Convention on the Rights of Persons with Disabilities: status and effects within the EU legal system

Having traced the main features of the Convention text and discussed the Council Decision concerning the conclusion of the UN CRPD, this Section examines the status of the UN CRPD and its effects within the EU legal system.

From an EU law perspective, the UN CRPD has become an integral part of EU law. Its legal status and effects may be understood by taking into account «three pillars»: the autonomy of the EU legal order⁵⁰, the hierarchy of norms within this legal order, and the scope of the exclusive jurisdiction of the European Court of Justice (ECJ)⁵¹.

On the basis of the autonomy of the EU legal order (and given that neither the EC Treaty nor the TFEU specify the legal status of international norms), the ECJ has established a hierarchy of norms. The Treaties (primary law), including their Protocols and the Charter of Fundamental rights and the ECHR⁵², form the “constitutional bulk” of EU law⁵³; they are the “supreme law of the land”. All international law sources (international agreements⁵⁴, decisions of international organizations,

⁴⁹ See, *inter alia*, ECJ, 27 September 1988, *Commission of the European Communities v Council of the European Communities*, Case 165/87, [1988] ECR 5545.

⁵⁰ The EU is considered a *sui generis* legal order (ECJ, 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26/62, [1963] ECR 1963, 1. There is, of course, ample doctrine on this. See, e.g., F. PALERMO, *La forma di Stato dell'Unione europea*, Padova, 2005; M. POIARES MADURO, *A Constituição Plural. Constitucionalismo e União Europeia*, S. João do Estoril, 2006. This doctrine is supported by the ECJ’s case law, as may be seen from *Opinion 1/91*: «the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions» (ECJ, 14 December 1991, *Opinion delivered pursuant to Article 228 EC*, Opinion 1/91, [1991] ECR I-6079).

⁵¹ N. LAVRANOS, *Revisiting Art. 307 EC*, in F. FONTANELLI, G. MARTINICO, P. CARROZZA (eds), *Shaping Rule of Law through Dialogue*, Groningen, 2010, p. 121 et seq.

⁵² Even though the EC has not yet acceded to the ECHR, the Convention is unquestionably of vital significance to Community law as a reference text on human rights. In other words, the ECHR enters into the “orbit” of, and co-habitates with, EC law. Originally, the ECHR was important in that it helped to compensate for the absence of a Community catalogue of rights (see ECJ, 28 October 1975, *Roland Rutili v Ministre de l'intérieur*, Case 36-75, [1975] ECR 1219).

⁵³ For a critical view, see, e.g., F. VAN DEN BERGHE, *The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?*, in *ELJ* 16/2010, p. 112 et seq.

⁵⁴ The ECJ, *inter alia*, in case C-239/03 (ECJ, 7 October 2004, *Commission of the European Communities v French Republic*, [2004] ECR I-9325), has argued that mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as pure Community agreements, following the so-called “Demirel doctrine” (ECJ, 30 September 1987, *Meryem Demirel v Stadt Schwäbisch Gmünd. - Reference for a preliminary ruling: Verwaltungsgericht Stuttgart*, Case 12/86, [1987] ECR 3719).

international customary law) are situated “below” the provisions of the Treaties, but “above” secondary EU law (regulations, directives and decisions)⁵⁵.

From the above, we may infer that the UN CRPD is situated formally below the provisions of the Treaties. In hierarchical terms, the Convention is *inferior* to the provisions of the Treaty on the Functioning of the European Union (and the Treaty on European Union), but *superior* to secondary EU law. However, one important note must be made here. The Convention is itself a human rights treaty and «represents a clarification of rights already conferred» by pre-existing international treaties (i.e. among others the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights...), by the ECHR, by the Nice Charter⁵⁶, and recognized in the constitutional traditions of the Member States. The UN CRPD is animated by the concept of equality and non-discrimination, which are firmly embedded in EU law and in the Member States’ constitutions⁵⁷. As seen in Section two, Articles 10 to 30 UN CRPD cover political, social and cultural rights, which are also included both in the ECHR and in the Nice Charter. In addition, the UN CRPD as a whole seems entirely consistent with the rights affirmed in the Nice Charter, especially those expressed in Articles 21 and 26⁵⁸. The content and the rationale of the Convention, discussed earlier, seem likely to become part of the fundamental constitutional core of EU law.

Prior to the entry into force of the Lisbon Treaty, the fundamental rights to which the EU institutions (and bodies and agencies) and Member States (when they act within the framework of EU law) were bound were the rights found in the constitutional traditions common to the Member States and in the international human rights treaties to which they are a party; such rights were generally taken to be part of the general principles of Community law. This was partly reflected in Article 6(2) EU, and partly based on the case law of the ECJ. The same principles are now reflected in Articles 2 and 6 of the TEU. It follows that the UN CRPD, with its disability-sensitive articulation and clarification of human rights, has become part of the EU’s fundamental rights system, and by the same token reflects the EU’s fundamental values.

In this respect, the UN CRPD could be part of the «composite constitution» envisaged by Besselink⁵⁹. The UN CRPD is capable of making an important contribution to European “constitutional” law and to EU human rights standards.

Arguably, whatever the legal bases for the decision are, the conclusion of the UN CRPD fosters the debate about the human rights dimension and standards at the supranational level. Of course, this will depend to a large extent on the ECJ’s acknowledgement.

It is well known that the ECJ usually plays a central role in determining the status and effects of international law within the EU legal system, and it is clear that the Court’s rulings will be crucial in determining how the UN CRPD will impact the EU legal order. This is particularly so because of the

⁵⁵ N. LAVRANOS, *Revisiting Art. 307 EC*, op. cit., p. 122, argues that «from the EC law point of view, international law and Community law are not on an equal footing, but rather asymmetric in the sense that international law is subordinated to primary EC law. Any attempts to change or reverse this hierarchy of norms [...] are forcefully rejected by the ECJ».

⁵⁶ Charter of Fundamental Rights of the European Union.

⁵⁷ M. BELL, *The right of Equality and non discrimination*, in T. HERVEY, J. KENNER, *Economic Rights under the EU Charter of Fundamental Rights*, Portland, 2006, p. 91 et seq. See also M. BELL, *Anti-Discrimination Law and the European Union*, Oxford, 2002. This author states that “the overlapping nature of equality as both a goal of social policy and at the same time the protection of a fundamental right, rests comfortably with the right-based model of social policy that the social citizenship approach proposes”.

⁵⁸ Articles 20 and 21 of the Nice Charter assume a horizontal character and apply to all forms of potential discrimination. The remaining provisions of the equality chapter deal individually with specific forms of discrimination and disadvantage. Art. 26 provides that: «The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community»⁵⁸. These measures (i.e. measures to which Art. 26 refers) may concern education, vocational training, ergonomics, accessibility, mobility, means of transport and housing (point 26 of the Community Charter on the Fundamental Social Rights of Workers of 1989), as well as access to cultural and leisure activities.

⁵⁹ L. BESSELINK, *A Composite European Constitution/Een Samengestelde Europese Constitutie*, Groningen, 2007. The term “composite constitution” means a constitution whose component parts mutually assume one another’s existence, both *de facto* and *de jure*.

wide scope of the Court's exclusive jurisdiction (the "third pillar" mentioned above), which cannot be modified or affected by any other dispute settlement mechanism (see the *MOX plant* case⁶⁰). The need for unity of interpretation of international agreements led the ECJ (explicitly in *Demirel*⁶¹) to declare its own competence as regards the interpretation of agreements under ex-Article 234 EC (now Article 267 TFEU). With regard to the validity of an EC/EU measure under an international treaty, the Court (in a preliminary ruling) has indicated that it can only judge the measure if the treaty's provisions have direct effect⁶².

The ECJ's recognition of the rank of the UN CRPD as a constitutional source would plainly be of paramount importance in moving to a more complex human rights system, one that is appropriate to the wide range of challenges faced by persons with disabilities.

Even if the ECJ declined to embrace the Convention as a core source of the EU's "constitution", the Court could nevertheless (and must) clarify the effects of the UN CRPD provisions. *In abstracto*, the UN CRPD seems capable, in light of its objectives and spirit, of conferring rights upon individuals, but the provisions are literally addressed to the Parties. Thus, it might be argued, none of its provisions seems to be sufficiently clear, precise and unconditional to have direct effect under the standard established long ago by the ECJ. Even if this formal argument is accepted, however, the judgment of the Court in *Kingdom of the Netherlands v European Parliament and Council* provides good grounds to consider that the review of EC/EU measures in light of the UN CRPD may be possible regardless of whether the Convention has direct effect. In that case, the Court did not consider the requirement of direct effect to be necessary with regard to the Rio de Janeiro Convention on Biological Diversity of 5 June 1992⁶³. According to the Court, even if the Rio de Janeiro Convention contained provisions which did not have direct effect, that fact did not preclude review by the Court with respect to the issue of compliance with the obligations incumbent on the EU as a party to the agreement. In addition, the judgment also highlighted that it is for the Court, in its review of the compatibility of acts of the institutions with the general principles of EU law, to ensure that the fundamental right to human dignity and integrity is observed. This case law leaves the door open to the review of EU measures in light of the UN CRPD, in particular where the EU intends to implement an obligation entered into within the framework of international rules, or if the EU act expressly refers to specific provisions of the Convention.

⁶⁰ ECJ, 30 May 2006, *Commission v. Ireland*, Case C-459/03, [2006] ECR p. I-4635.

⁶¹ See *supra* footnote 31. The Court follows a more delicate approach. It considers that "mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements, in so far as the provisions fall within the scope of Community competence". To the extent that the EC/EU has assumed obligations under a mixed agreement, the norms which bind it form part of EU law. In that quality they are binding on the EU and its Member States, and they are subject to the Court's jurisdiction.

⁶² The invalidity of an EC/EU act conflicting with an international agreement may only be invoked if the relevant provision of the agreement has direct effect. As the Court said in *International Fruit* with regard to the GATT, «before the incompatibility of a Community measure with a provision of international law can affect the validity of that measure, the Community must first of all be bound by that provision. Before invalidity can be relied upon before a national court, that provision of international law must also be capable of conferring rights on citizens of the Community which they can invoke before the courts» (ECJ, 12 December 1972, Joined Cases 21 to 24/72, *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*, [1972] ECR 1219). See also Case C-308/06, *International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*, [2008] ECR I-4057; N. LAVRANOS, *Legal Interaction between Decisions of International Organizations and European Law*, Groningen, 2004, p. 44. In some cases the Court does not require direct effect for a provision of an international treaty to be invoked. This is the case in two instances: first, when an EC/EU act is intended to implement a particular obligation arising from an international agreement (the *Nakajima* exception; ECJ, 7 May 1991, *Nakajima All Precision Co. Ltd v Council of the European Communities. - Dumping - Definitive duty - Imports of serial-impact dot-matrix printers originating in Japan*, Case C-69/89, [1991] ECR I-2069); and second, when an EC/EU act expressly refers to a specific provision of an international agreement which is thus to be used as a touchstone when interpreting the act (the *Fediol* exception; ECJ, 22 June 1989, Case 70/87, *Fediol v. Commission*, [1989] ECR 1781). Additionally, the Court has stated that the EC/EU legislation and national measures must be interpreted in accordance with the international agreement in question (ECJ, 16 June 1998, *Hermès International v FHT Marketing Choice BV*, Case C-53/96, [1998] ECR I-3603).

⁶³ ECJ, 9 October 2001, Case C-377/98, *Kingdom of the Netherlands v European Parliament and Council*, [2001] ECR I-7079.

Even if the UN CRPD is found not to have direct effect, and even if the ECJ ultimately refuses to review the validity of EU measures in light of its provisions, these provisions are in any event relevant for the interpretation of national and EU law. Direct effect, of course, is not the only type of effect which an agreement may produce. If the wording of secondary EU law is open to more than one interpretation, preference should be given, as far as possible, to the interpretation which may render the provision consistent with the Convention⁶⁴. International provisions (and thus those of the *UN CRPD*) may be also cited by the ECJ in its preliminary rulings: here it can be recalled that the *UNESCO Convention on the protection and promotion of cultural diversity* was cited in the *UTECA* case⁶⁵. The framework created by the UN CRPD may thus help the Court to develop a more structured and coherent disabled rights approach. Such an approach could be based, explicitly or implicitly, on the social model of disability; in embracing that model the Court could distance itself, or indeed explicitly overrule, the well-known *Chacon-Navas* judgment⁶⁶.

As Lavranos has observed, the ECJ «functions as a gatekeeper that decides on a case-by-case basis what the legal effect of an international law provision is within the Community legal order»⁶⁷. This will apply equally to the UN CRPD.

5. Concluding remarks

As is the case with almost all international conventions (and particularly for human rights provisions), the wording of the UN CRPD is open-ended. Thus, it is clear to all observers - irrespective of their stance - that the Convention's constitutional significance will emerge from its implementation. Clearly, the UN CRPD calls on Parties to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities, and to this end they must, *inter alia*, adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention⁶⁸.

In the last decade, the EC/EU has developed a significant disability policy. The EC/EU's activities regarding disability were relaunched in 1996⁶⁹, with the *European Community Disability Strategy*,

⁶⁴ ECJ, 10 September 1996, Case C-61/94, *Commission v. Germany*, [1996] ECR, I-3989. R. HOLDGAARD, *External Relations Law Of The European Community: Legal Reasoning And Legal Discourses*, op. cit., p. 306 et seq.

⁶⁵ ECJ, 5 March 2009, Case C-222/07, *Unión de Televisiónes Comerciales Asociadas (UTECA) v. Administración General del Estado*, [2009] ECR.

⁶⁶ ECJ, 11 July 2006 *Sonia Chacón Navas v. Eures Colectividades SA*, Case C-13/05, [2006] ECR I-6467. See L. WADDINGTON, *Case C-13/05, Chacón Navas v. Eures Colectividades SA*, in *CMLRev* p. 487 et seq. In *Chacón Navas*, the Court stated that the concept of “disability” within the meaning of the Framework Directive must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life. Then the ECJ underlined that the concepts of “disability” and “sickness” are not identical. The Court stated that, by using the concept of disability in Article 1 of that directive, the legislature deliberately chose a term which differs from ‘sickness’. The two concepts therefore cannot simply be treated as being the same. The definition of disability developed by the Court is based on the “medical” or individual model of disability. According to the definition given by the Court and recalled above, the cause of the disadvantage (or the “limitation”) is the “impairment”, and it is the “impairment” which hinders participation in professional life. Therefore, the problem lies in the individual, and not in the reaction of society to the impairment or the organisation of society, which excludes disabled individuals. As is clear from the discussion earlier in this paper, the ECJ's approach is not in line with the UN CRPD, which is based, rather, upon the social model of disability.

⁶⁷ N. LAVRANOS, *Revisiting Art. 307 EC*, op. cit., p. 123. The author also states that this case-by-case approach enables the ECJ to have a flexible approach: the ECHR is fully integrated within the EU legal order, while the WTO and the UNCLOS are denied direct effect.

⁶⁸ See above Section 4.

⁶⁹ Indeed, there is also a relevant Council action plan for the rehabilitation of disabled workers, adopted in 1974. This was characterized by the “medical” model. It is also recalled that the first broad policy instrument specifically addressing disability that was produced by the Community was a Recommendation and a Guideline framework on Employment (Council Recommendation 86/379/EEC of 24 July 1986 on the Employment of Disabled People in the Community, OJ L 225, 12 August 1986, p. 43). The Recommendation, adopted in July 1986, was a non-binding document which only advised Member States on the action they should take to promote the employment of disabled people. The Recommendation itself is a vague document which refers to the need to promote ‘fair opportunities for disabled people’. Annexed to the Recommendation is a ‘guideline framework for positive action to promote the employment and vocational training of disabled people’. The text of the guideline is relatively precise and defines, in clear terms, what actions Member States should consider taking in the fields of, e.g., job creation, sheltered employment, guidance, assessment and placement, employers and workers’

based explicitly on the equal opportunities model⁷⁰. The current *EU Disability Action Plan 2003-2010* (hereinafter, the “*EU DAP*” or simply the “*Plan*”) carries forward the *1996 Strategy* and proceeds in the direction already traced by the preceding initiatives⁷¹. The Plan seeks to mainstream disability issues and to achieve the full application of Directive 2000/78 establishing a General Framework for Equal Treatment in Employment and Occupation⁷². In addition, many other pieces of EU legislation address disability, directly or indirectly⁷³.

However, the negotiating, signing and conclusion of the *UN CRPD* imply that the EC/EU together with its Member States have assumed an obligation under international law to do something more. Clearly, the EU must now comply with the *UN CRPD* provisions and implement them within the EU legal order⁷⁴.

A new *Action Plan* is in preparation to cover the period of 2010 onwards⁷⁵. The new Action Plan should address the core value of the Convention, such as ensuring the full and effective implementation of both the *UN CRPD*. The EU should also quickly approve a new non-discrimination directive, prohibiting discrimination based, *inter alia*, on disability beyond the workplace. After the conclusion of the *UN CRPD*, a new instrument in this respect will be an urgent priority. The new directive⁷⁶, when adopted, will establish a framework for the prohibition on discrimination on these grounds, and it will establish a uniform minimum level of protection within the EU for people who have experienced such discrimination. It is important to note that the proposal fully addresses discrimination on the ground of disability, and it contains several references to the *UN CRPD*. The EU has been relatively successful in mainstreaming disability into its general legislation in the area of

organisations, and social security. In addition to policy instruments, funding was directed towards disability-related projects. Some of the projects that participated in the early Action Programmes were funded by the European Social Fund. See L. WADDINGTON, *From Rome to Nice in a Wheelchair. The development of a European Disability Policy*, Groningen, 2006, in particular p. 4 et seq. See also S. MUNOZ MACHADO, R. DEL LORENZO, *European Disability Law*, Madrid, 1997, p. 109 et seq.

⁷⁰ Communication of the Commission on Equality of Opportunity for People with Disabilities - A New European Community Disability Strategy COM (96) 406 final on equality of opportunity for people with disabilities: A New European Community Disability Strategy. This was endorsed in a Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council of 20 December 1996 on equality of opportunity for people with disabilities, [1997] O.J. C12/1.

⁷¹ Commission Communication COM(2003) 650 of 30.10.2003 ‘Equal opportunities for people with disabilities: A European Action Plan’.

⁷² Directive 2000/78/EC, establishing a general framework for Equal Treatment in Employment and Occupation [2000] O.J. L303/16. The Framework Directive seeks to combat discrimination on the grounds of religion or belief, disability, age or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment (Art. 1). No definition of disability is provided by the Directive.

⁷³ Directive 95/16/EC on lifts (Council Directive (EC) 1995/16 on the approximation of the laws of the Member States relating to lifts [1995] O.J. L213/1, as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 and by Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006, based on Art. 95 EC, refers to the need to ensure accessibility for disabled persons. See also Council Directive (EC) 2001/85 relating to special provisions for vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver’s seat, and amending Directives 1970/156/EEC and 1997/27/EC [2002] O.J. L43/1.

⁷⁴ The Convention does not need any particular form of transposition, but it produces full effect in the “domestic” legal order once it is concluded and enters into force. The fact that no act of transposition is needed is not to be confused with questions of implementing measures: whether the correct application of all the provisions of the *UN CRPD* requires particular implementation depends on their nature (and of the nature of the Convention itself). Implementation may involve no action at all for provisions which may be interpreted as having direct effect, or for negative obligations, or if EC/EU or national law already complies with the agreement. Implementation may require the adoption of general implementing legislation which is needed so as to adjust either EC/EU or national law to the Community’s international commitments. Implementation may also involve administrative or executive actions (and the incurring of certain expenditures), in which case it is more correctly described as “application”. See P. EECKHOUT, *External Relations of the European Union. Legal and Constitutional Foundations*, Oxford, 2004, p. 27 et seq.

⁷⁵ To improve the situation of persons with disabilities, the European Commission is preparing a new EU Disability Strategy for 2010 to 2020, and it is calling on the public to participate in this process. A questionnaire provided by the Commission asks for the opinion of respondents on the problems of persons with disabilities, and it inquires as to how to solve them. The results of this public consultation will be used to assess the possible impact of various options for action that can be included in the new Disability Strategy. See <http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=disabilitystrategy3>.

⁷⁶ http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/em0008_en.htm.

transport. However, as underlined by Waddington⁷⁷, in light of the UN CRPD, there is a need to incorporate disability accessibility standards in all internal market harmonisation legislation. Many Article 95 EC Directives addressing safety, such as those concerning toys⁷⁸, do not contain any reference to disability. As such, these instruments cannot be considered in compliance with the UN CRPD.

With these few remarks it is clearly impossible to fully explore the challenges and the complexity of the implementation of the UN CRPD. Suffices it to highlight, once again, that the Convention touches upon many different fields. It clearly requires a review of all EC/EU legislation currently in force to determine whether it is possible mainstream the rights of persons with disabilities within such legislation.

The ECJ's recognition of the constitutional value of the UN CRPD, if this comes to pass, will not be sufficient. For that matter, there is no guarantee that the Court's rulings will be always in line with the UN CRPD. Although the ECJ plainly sees its role as that of a guarantor of fundamental rights, the balancing of competing interests may lead to different outcomes in different cases.

The implementation process will therefore be of the highest importance for translating the rights provided for in the UN CRPD (and the concepts contained therein of equality, accessibility and independent living) into effective law, and for assessing, in practice, the UN CRPD's constitutional value. Hence, the conclusion of the UN CRPD imposes an obligation to reinforce and ensure the rights of persons with disabilities in the EU legislative instruments. It is important to revisit legal instruments which do not contain a reference to disability and to see whether they could benefit from the inclusion of specific references to the rights of persons with disabilities. It should be verified whether these instruments might be used to implement UN CRPD, and if so to amend them accordingly. New EU legislation should also contribute to ensuring the rights of persons with disabilities. As the implementation of the Convention proceeds, the "constitutional" value of this international instrument will also be visible.

⁷⁷ L. WADDINGTON, *A disabled Market: Free movement of Goods and Services in the EU and Disability Accessibility*, op. cit., p. 575 et seq.

⁷⁸ Directive 88/378/EEC on the approximation of the laws of the Member States concerning the safety of toys [1988] O.J. L187/1, as amended.