

## **“International human rights, the rule of law and civic space in the EU”**

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Dear President Pelicarić, Dear members of the Council of Bars and Law Societies of Europe,

I am honored to deliver this opening address at the start of your Plenary Session. Your work is crucial for the defense of the rule of law, human rights, and democratic values. Allow me to briefly introduce the [UN Human Rights Regional Office for Europe](#) based in Brussels. We are one of the 80 field presences of the Office of the [UN High Commissioner for Human Rights](#) Michelle Bachelet. We have a very difficult acronym - OHCHR - which is why we are rebranding to “UN Human Rights.”

The primary function of our regional office is to advance human rights in the European Union (EU) through technical assistance, advocacy, and reporting on human rights, based on the recommendations of the UN human rights mechanisms. Specifically, we strive to close human rights gaps in EU legislation, budgeting and policymaking. We also work for the integration of a human rights approach in EU external action, migration policies and development cooperation.

Strengthening regional human rights bodies, like the EU Fundamental Rights Agency and the Council of Europe, is an important part of our mandate, as is the strengthening of national human rights protection systems, like national human rights institutions, equality bodies, bar associations, and human rights defenders.

We also facilitate the engagement of civil society with the [Treaty Body System](#), the [Universal Periodic Review](#) and the [Special Procedures](#) of the [UN Human Rights Council](#), which, as you know, are independent from the office but to which we provide substantive and administrative assistance.

In my presentation today, I will talk about the work of the [UN Special Rapporteur on the Independence of Judges and Lawyers](#) in the context of the [UN Basic Principles on the Role of Lawyers](#). I will then present two publications by our office that may be relevant for you: one on “The place of international human rights in the EU” and the other on “The case for a human rights approach to the rule of law in the EU.”

### **The UN Special Rapporteur on the Independence of Judges and Lawyers**

I know that your organization has already interacted with the special procedures of the UN Human Rights Council. Briefly, I would like to highlight the role of the UN Special Rapporteur on the Independence of Judges and Lawyers, a mandate currently held by Mr. Diego García-Sayán from Peru who serves in his individual capacity.

The Special Rapporteur is mandated to identify and record not only attacks on the independence of judges, lawyers and prosecutors, but also progress achieved by States in protecting and enhancing their independence. The mandate-holder can also make concrete recommendations to States and non-State actors to improve the independence of the judiciary and the legal profession.

The Special Rapporteur, who is appointed by the UN Human Rights Council, reports annually to the UN Human Rights Council and the General Assembly. Some of you may have read his [report on the role of bar associations in protecting and promoting the independence of the legal profession and its members](#) (A/73/365).

The Special Rapporteur also undertakes country visits. Since its establishment, the mandate has conducted visits to more than 40 countries. In October 2017, for example, the current Special Rapporteur visited [Poland](#) (A/HRC/38/38/Add.1).

In addition, the Special Rapporteur can act on individual cases through the communication procedures ([urgent appeals or allegation letters](#)). While these are confidential procedures, Special Rapporteurs can also issue press releases, like the one I shared yesterday in which several UN mandate-holders publicly [call for an effective investigation into the death of Turkish human rights lawyer Ebru Timtik](#) and ask the Government of Turkey to take immediate action to release individuals detained and sentenced contrary to international law.

### **The basic principles on the role of lawyers**

In accordance with the Basic Principles on the Role of Lawyers, the primary obligation to protect lawyers lies with States, which must ensure that lawyers are able to perform their professional functions without any threat, intimidation, harassment or improper interference.

Over the years, the UN Special Rapporteur has recorded a significant number of attacks against lawyers and restrictions to the free and independent exercise of their profession. The arbitrary deprivation of liberty is the most commonly reported type of attack on lawyers. The UN Special Rapporteur on the independence of judges and lawyers has considered a large number of cases where lawyers have been subjected to arbitrary arrest and detention as a result of the legitimate exercise of their profession. Where attacks on the liberty of lawyers are frequent or systematic, they have a chilling effect on the whole category of legal practitioners.

In addition to arbitrary arrest and detention, communications by the Special Rapporteur to national authorities have also concerned threats, intimidation, external interference in the discharge of their professional activities, prosecution, disbarment and even killings. The Special Rapporteur has also taken up cases where lawyers have been killed by non-State actors as a consequence of their work, since it is the responsibility of States to protect lawyers.

I would also like to touch upon another basic principle, namely freedom of expression, association and assembly. These freedoms are of particular importance for lawyers, since lawyers use written and oral communication as an essential professional tool. As you know, the Basic Principles provide that lawyers should enjoy civil and penal immunity for statements made in good faith in the exercise of their professional functions (Principle 20).

Violations of the right of lawyers to freedom of expression occur when lawyers are targeted for expressing criticism and discontent with public authorities, as well as for denouncing impunity inside and outside the courtroom. In some cases, criminal legislation has been used to limit the freedom of expression of lawyers, particularly contempt of court proceedings. In other cases, lawyers have been subjected to threats, harassment, and surveillance because of opinions expressed in the legitimate exercise of their functions.

### **International human rights in the EU**

Now, I would like to turn to the place of international human rights in the EU. Our office will soon release a study by human rights expert Professor Olivier De Schutter, who is also the UN Special Rapporteur on Extreme Poverty. Today I would like to give you a snapshot of the findings of the study.

The study is our contribution to the discussion on the Future of Europe as it goes to the heart of the question: “What kind of Europe do we want?” When EU member States transfer certain powers to the EU, these powers must logically be exercised in accordance with the full range of human rights obligations that bind EU member States. Unfortunately, however, the anchoring of EU law, policies and programmes in UN human rights instruments, has been sporadic and ad hoc.

The EU Charter of Fundamental Rights, for example, is silent on several rights protected under international human rights law, like the right to fair remuneration, the right to water or the right to food.

Similarly, EU legislation, policy and programming on internal EU matters -- like the European Semester or the article 7 procedure to address the risk of a serious breach by a Member State of the values referred to in Article 2 of the Treaty on EU -- contain little or no reference to UN human rights instruments, mechanisms, recommendations or jurisprudence. It remains to be seen to what extent international human rights instruments will be reflected in the EU Pact on Migration and Asylum.

For its part, the Court of Justice of the EU has gone to great lengths to protect fundamental rights but has also been selective in its references to UN human rights treaties. The same goes for the various impact assessment tools that EU institutions have developed in recent years.

Not only does this make it more difficult for the EU to position itself as a champion of human rights in multilateral fora, it is also a source of legal uncertainty for national authorities and for domestic courts, as it may cause conflicting legal obligations for EU member States – stemming respectively from EU law and from the UN human rights treaties they are parties to.

Importantly, it creates a protection gap for right-holders and an accountability gap for duty-bearers, as UN monitoring bodies frequently set the bar higher than what is imposed on EU member States under EU law, for example in the area of discrimination. Yet, except for the UN Committee on the Rights of Persons with Disabilities, UN treaty monitoring bodies can, in principle, only assess measures taken by EU member States, not the EU itself. But international human rights monitoring bodies and domestic courts may well question the delegation of powers to the EU if the full range of mandatory human rights are not complied with by Member States.

There are various options to better link EU law- and policymaking to UN human rights instruments and ensure that the standards developed by UN human rights mechanisms and their findings are better taken into account. You are warmly invited to participate in the roundtable we are planning on this topic on 6 October where we will discuss the different options.

### **The rule of law**

Now, moving to the rule of law specifically. Globally, we are witnessing a decline in respect for the rule of law – whether we are talking about the independence of the judiciary, transparent and accountable governance, media freedom or the separation of powers. This is well documented.

Over the past decades, the EU has proven a formidable force for the advancement of human rights within the EU, in third countries and in the private sector. What we want is for the EU to continue to be that force for good and play its part in protecting the rule of law.

The rule of law is considered a core value of the EU in article 2 of the Treaty on EU and it is a precondition for joining the Union. But I would caution against using the term “European values.” While of course this refers to article 2 of the Treaty of the EU, in international affairs, this expression risks being interpreted as if human rights were a foreign element, imported from Europe. It may thus unwittingly reinforce cultural relativism theories.

Unfortunately, the EU and its member States have appeared hesitant and divided when faced with rule of law regression in the EU which is deeply damaging to the EU’s international standing. A coherent approach among the EU institutions has also been missing. This is not for a lack of tools, mechanisms, or ideas at EU level. But the reality is that so far these mechanisms have not managed to halt the rule of law erosion.

Interestingly, a new EU initiative on the rule of law is underway. It involves enhanced monitoring, assessment, and action, and the first step is the preparation of a report by the European Commission on the rule of law in all EU member States, which is expected to be issued this month.

In our recent publication, “[The case for a human rights approach to the rule of law in the EU](#),” we have made suggestions for optimizing this new initiative in terms of substance, methodology, process, and outcome.

As I mentioned earlier, all EU member States have binding legal obligations under the core international human rights treaties that they have ratified. UN mechanisms like the treaty bodies have been monitoring aspects of the rule of law in EU member States for decades. The new EU mechanism should use their findings to the fullest, while exercising caution not to lower the standard these international mechanisms have set.

By adopting the Sustainable Development Agenda, States have also voluntarily committed themselves to the rule of law. Progress on [Goal 16](#) should therefore be taken into account in assessing compliance with the rule of law.

Regrettably, despite the rule of law being a precondition for the realization of all human rights and a pillar of democracy, discussions on the rule of law in the EU context have tended to be artificially compartmentalized from the consideration of democracy and human rights. Yet, from a UN

perspective, human rights, democracy, and the rule of law are very much interlinked and need to be considered together.

While we understand that a rule of law assessment cannot and probably should not be a full-fledged human rights assessment, it is critical to get the scope of the rule of law mechanism right and to avoid a piecemeal approach. For example, we know already that ‘media pluralism’ will be monitored in the upcoming report by the European Commission, but this is only one element of freedom of expression. Likewise, having ‘an anti-corruption framework’ in place is insufficient to guarantee good governance. Equally important for holding the executive branch to account are the freedoms of association and assembly, and the right to participate in public affairs, enshrined in the Universal Declaration on Human Rights over 70 years ago.

Will the new rule of law mechanism of the EU be seen as objective, accurate, fair, and independent? Only an approach that adheres to the principles of accountability, participation, and transparency can guarantee this. The upcoming adoption of the multi-annual financial framework by the European Parliament further provides a unique opportunity to insist on the rule of law.

Furthermore, the EU could explicitly encourage independent national human rights institutions to monitor the rule of law in EU member States, in cooperation with the [European Network of National Human Rights Institutions](#) (ENNHRI).

And time has come to empower important human rights players like the EU’s [Fundamental Rights Agency](#) in the same manner that, let’s say, an EU agency like Frontex is being empowered.

If the new EU mechanism on the rule of law is robust, it could be the most significant act the European Commission has ever taken in its role as guardian of the EU Treaties and, with it, as guardian of people’s rights and freedoms.

### **Civic space**

The EU must also play a greater role in keeping civic space open. Staff from national human rights institutions, equality bodies, journalists, lawyers, activists, and others must be able to speak out in safety. The EU should create a mechanism to protect defenders not only outside, but also inside the EU, including by ensuring swift protection in case of emergency. The EU’s flagship [Protect Defenders program](#), under which since 2015 more than 30 000 human rights defenders in third countries have received some form of protection from the EU, can serve as a model.

This would also demonstrate that the EU is consistent in its intention to uphold the flame of human rights, whether at home or abroad. Thank you.