



# The global human rights protection governance system

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*All errors remain the authors' own.*

## Executive summary

This report was written as part of the FP7 research project ‘Fostering Human Rights Among European (External and Internal) Policies’ and falls under Work Package 4 ‘Protection of Human Rights: Institution and Instruments’. The report builds on the D 4.1 ‘Report on the mapping study on relevant actors in human rights protection’ which outlined institutions and instruments for the protection of human rights at the national, European Union (EU), regional and international level. As the objective of WP 4 is to assess the institutions and instruments operating to protect human rights at the international, regional and national levels, the specific task of D4.2 ‘Report on the global governance protection system’ is to further this investigation by identifying gaps, tensions and contradictions in the regional and global human rights protection governance system. In order to tackle the quantity of institutions, instruments and levels involved, the report focuses in particular on the regional level. The first part of the report deals with the European level. The contributions shine spotlights on different aspects of the complex European human rights system, with a particular focus on the EU. The second part concentrates on regional human rights systems in Africa, the Americas and Asia and highlights gaps, contradictions and tensions of human rights institutions and instruments in these regions. The third part briefly summarises the most important conclusions.

The review of academic legal literature at the beginning of the report (chapter II) elaborates on the broader European context by discussing the insufficiencies and inconsistencies of and the tensions and contradictions between different human rights protection systems in Europe. Examples of this are the complicated legal relationship between the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the Charter of Fundamental Rights of the European Union (CFREU) and national constitutions. Moreover, the large number of Council of Europe’s (CoE) instruments which codify diverse human rights standards lack adequate supervisory mechanisms, and the European Court of Human Rights (ECtHR) suffers from severe work overload. Concerning the human rights regime of the EU, the legal literature review discusses the fragmented EU fundamental rights framework, the subordinate role of economic, social and cultural rights and the lack of an internal EU fundamental rights monitoring mechanism.

The report then (chapter III) analyses the case law of the Court of Justice of the European Communities/Union (ECJ), the ECtHR and the European Committee of Social Rights (ECSR) in two selected areas: asylum and migration and the secondary role of economic, social and cultural rights (ESCR) in EU law and possible tensions between these rights and the four fundamental (economic) freedoms. It finds that there are serious human rights gaps concerning the protection of migrants such as, e.g. difficulties for migrant children to access basic services. It also points out that ESCR, which in any event have a weak position within the EU, are further threatened by the ongoing economic crises, amounting to serious violations of these rights e.g. in Greece.

The political science analysis of the EU’s legal and institutional fundamental and human rights frameworks (chapter IV) shows that tensions between the Member States and the EU are a problematic and disconcerting force when it comes to human and fundamental rights protection. The specific political system of the EU allows Member States to a certain extent to safeguard their national political

interests which are in some cases at odds with the human rights values laid down in the Treaties. Other problematic issues are the lack of coherence which is observable in all EU institutions, a lack of knowledge about EU human and fundamental rights competences not only among EU citizens but also among policy makers and thus, the need for a better communication to the European public as well as the necessity of revealing and addressing political aspects, processes and responsibilities concerning human rights law and policies. The analysis further points to the need for institutional learning and adequate human rights training of EU officers, the demand for a stronger focus on conceptual and strategic human rights issues and the necessity of addressing trade-offs between human rights and other interests in EU external and internal action. In addition, an analysis of EU human rights political and legal documents (chapter V) demonstrates the lack of a comprehensive and overarching EU internal human rights policy, the uneven reflection of the concept of positive duties in EU policy documents and the fact that a majority of EU policy and legal documents refer to human rights on a very general and abstract level.

The review of the outcome reports of the Universal Periodic Review of the Human Rights Council (UPR) of EU Member States (chapter VI) reveals that there is not only a lack of ratification of specific human rights instruments by EU Member States – e.g. the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families – but also a lack of, or inadequate, implementation of these instruments.

Part II of the report covers regional human rights protection systems in Africa, the Americas and Asia. The African Union (chapter VII) has developed a considerable body of human rights instruments that are distinguished from other regional systems by explicitly taking into consideration all generations of rights. Some of them offer wider protection, some of them leave out key human rights issues. The most important gaps were identified in the field of implementation of these sometimes far-reaching instruments. This is not only a result of a rather weak and ineffective institutional framework, but also of the inadequate implementation of these instruments by state parties.

The Inter-American Human Rights System (IAHRS) (chapter VIII) evolved on the initiative of the Organization of American States and has adopted various regional human rights instruments. The problems identified include the repeated overruling of human rights standards of the IAHRS through military jurisdiction and amnesties, evasion of and withdrawing from the jurisdiction of the Inter-American Court of Human Rights and difficulties of state parties to comply with judgments that involve measures regarding ESCR.

Only recently have two international organisations in Asia started to advance regional human rights protection. The Association of Southeast Asian Nations (ASEAN) adopted the ‘ASEAN Human Rights Declaration’ in 2012, which is criticised for falling far below international human rights standards and which is equipped only with a very weak and toothless supervisory body. The South Asian Association of Regional Cooperation (SAARC) mainly relies on soft law instruments and has not established any formal institutional monitoring mechanism.

## List of abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child'
ACTHPR	African Court on Human and Peoples' Rights
ACTIP	ASEAN Convention on Trafficking in Persons
AFET	Foreign Affairs Committee
AFSJ	Area of Freedom, Security and Justice
AGA	African Governance Architecture
AHRD	ASEAN Human Rights Declaration
AHRLR	African Human Rights Law Reports
AICHR	ASEAN Intergovernmental Commission on Human Rights
ALBA	Bolivarian Alliance for the People of the Americas
AP	EU Action Plan on Human Rights and Democracy
APRM	African Peer Review Mechanism
ASEAN	Association of Southeast Asian Nations
AU	African Union
AU Assembly	Assembly of Heads of State and Government
CAL	Coalition of African Lesbians
CED	International Convention for the Protection of all Persons from Enforced Disappearance'
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CESEDA	Code de l'entrée et du séjour des étrangers et du droit d'asile
CFREU	Charter of Fundamental Rights of the European Union
CoE	Council of Europe

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COHOM	Human Rights Working Group
COREPER	Committee of Permanent Representative
CP	Civil and political
CRC	UN Convention on the Rights of the Child
CRPD	UN Convention on the Rights of Persons with Disabilities
CSCE	Conference on Security and Co-operation in Europe
CSO	Civil society organisation
CSTPEP	Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others
DAC	Development Assistance Committee
DCI	Defence for Children International
DG	Directorate-General
DG CLIMA	Directorate-General for Climate Action
DG CONNECT	Directorate-General for Communications, Networks, Content and Technology
DG DEVCO	Directorate-General for International Cooperation and Development
DG EMPL	Directorate-General for Employment, Social Affairs and Inclusion
DG HOME	Directorate-General for Migration and Home Affairs
DG JUST	Directorate-General for Justices and Consumers
DG TRADE	Directorate-General for Trade
DROI	Subcommittee on Human Rights
EAC	East African Community
EACJ	East African Court of Justice
EASO	European Asylum Support Office
EAW	European Arrest Warrant
EC	European Commission

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ECCJ	ECOWAS Community Court of Justice
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	Court of Justice of the European Communities, now: Court of Justice
ECOSOC	Economic, Social and Cultural Council
ECOWAS	Economic Community of West African States
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EP	European Parliament
ESC	European Social Charter
ESCR	Economic, social and cultural rights
EU	European Union
FIDH	International Federation for Human Rights
FRA	European Union Agency for Fundamental Rights
FRAME	Fostering Human Rights among European Policies
FREMP	Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons
GISTI	Groupe d'information et de soutien des immigrés
HLHR	Hellenic League for Human Rights
HRBA	Human rights-based approach
HRC	Human Rights Council
HR/VP	High Representative of the Union for Foreign Affairs & Security Policy/Vice-President of the European Commission
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights

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IASHR	Inter-American Human Rights System
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
ICT	Information and communication technology
IDEHPUCP	Institute of Democracy and Human Rights of the Pontifical Catholic University of Peru
IDP	internally displaced person
IDP Convention	Convention for the Protection and Assistance of Internally Displaced Persons in Africa
IGO	Inter-governmental organisation
ILO	International Labour Organisation
JHA	Justice and home affairs
LGBTI	Lesbian, gay, bisexual, transgender, intersex
LIBE	Committee on Civil Liberties, Justice and Home Affairs
NGO	Non-governmental organisation
NHRIs	National Human Rights Institution
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OP-CAT	Optional Protocol to the Convention against Torture
OP-CRC	Optional Protocol to the Convention on the Rights of the Child
OP-CRPD	Optional Protocol to the Convention on the Rights of Persons with Disabilities
OP-ICCPR	Optional Protocol to the International Covenant on

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	Civil and Political Rights
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
OSCE	Organization for Security and Co-operation in Europe
RBA	Rights-based approach
RECs	regional economic communities
SAARC	South Asian Association for Regional Cooperation
SADC	South African Development Community
SF	EU Strategic Framework on Human Rights and Democracy
SuR	State under Review
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TOR	Terms of Reference
UDHR	Universal Declaration of Human Rights
UN	United Nations
UPR	Universal Periodic Review
WEOG	Western European and Others Group

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## I. Introduction<sup>1</sup>

The realisation of human rights is an ambitious and demanding task. Political entities, first and foremost the state but also inter- and supranational organisations, have to make a considerable effort to guarantee the protection, fulfilment and respect of the human rights laid down in numerous international and regional human rights instruments. They have to develop institutional capacities and structures, invest financial and other resources or train personnel in order to be capable to carry out all the tasks which are required for a well-functioning human rights system. However, the challenges associated with realising human rights are not limited to structural and procedural problems, but also refer to the human rights standards and norms themselves, which are very often vague or even inconsistent. Thus, the realisation of human rights is frequently hampered by gaps, tensions and contradictions at an instrumental as well as at an institutional level.

The present ‘Report on the global human rights protection governance system’ was written as part of work package 4 (WP 4) ‘Protection of Human Rights: Institutions and Instruments’ of the FP 7 project ‘Fostering Human Rights Among European (External and Internal) Policies’ (FRAME). The Report aims at contributing to the discussion indicated above by focussing on the EU and the EU Member States as well as other regional human rights protection systems. In doing so, it builds on the D 4.1 ‘[Report on the mapping study on relevant actors in human rights protection](#)’ (Mayrhofer et al, 2014, hereinafter ‘FRAME report D 4.1’) which outlined institutions and instruments for the protection of human rights at the national, EU, regional and international level. The said report revealed that human rights instruments have experienced an unprecedented proliferation over the last decades. As a result, not only more and more areas of human life are defined as being relevant human rights issues, but also more human rights institutions, entrusted with the task of interpreting, monitoring and observing the implementation and enforcement of these instruments, have prospered around the globe. As the objective of WP 4 is to assess the institutions and instruments operating to protect human rights at the international, regional and national levels, the specific task of D 4.2 ‘Report on the global governance protection system’ – as described in the project proposal – is to further this investigation by identifying gaps, tensions and contradictions in the regional and global human rights protection governance system.

In order to tackle the large quantity of institutions, instruments and levels involved, a decision has been made to focus in particular on the regional level.<sup>2</sup> The first part of the report will deal with the European level and will be a combination of legal and policy analysis. The contributions will shine spotlights on different aspects of the complex European human rights system, with a particular focus on the European Union (EU). Such spotlights include a review of legal academic literature, the analysis of selected case law of the Court of Justice of the European Communities/Union (ECJ),<sup>3</sup> the European Court of Human

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<sup>1</sup> Monika Mayrhofer is a researcher of the unit ‘Anti-discrimination, Asylum and Diversity’ at the Ludwig Boltzmann Institute of Human Rights and work package leader of FRAME work package 4.

<sup>2</sup> For a mapping and analysis of the UN human rights system see FRAME report D 4.1 and FRAME report D 5.1 (Baranowska et al, 2014).

<sup>3</sup> Until the entry into force of the Treaty of Lisbon, the court’s official name was ‘Court of Justice of the European Communities’. Since then, the official name is ‘Court of Justice’, while ‘Court of Justice of the European Union’ is the name of the entire court

Rights (ECtHR), on decisions by the European Committee of Social Rights (ECSR) in selected fields, an analysis of interviews carried out with EU policy makers and an analysis of documents of selected EU policy fields. As legal researchers as well as political scientists were involved in the research, the approach taken follows along disciplinary lines (legal analysis in chapter II and III; policy analysis in chapter IV and V) and focuses on specific research material respectively (see Chart 1 below). In addition, bringing together the UN-level and the EU Member states, a further contribution will scrutinise the Outcome Reports of the Universal Periodic Review (UPR) of each EU Member State. The second part of the report concentrates on regional human rights systems in Africa, the Americas and Asia and will highlight gaps, contradictions and tensions in human rights institutions and instruments in these regions, through a combination of legal and policy analysis.

Table 1: Overview of Research Areas in D4.2

Level of Analysis		Legal Analysis	Policy Analysis
<b>EU</b>	Objective	Identifying legal gaps, tensions and contradictions in EU human rights protection system	Identifying gaps, tensions and contradictions in EU human rights instruments and institutions
	Focus	EU instruments and institutions	EU instruments and institutions (Council, EP, EEAS, EC (focussing on DG DevCo, DG JUST, DG Home and DG Connect <sup>4</sup> ))
	Research Material	Academic literature, legal texts Case law of the ECJ	Policy and legal documents of the Commission and other EU institutions, Interviews, Academic Literature
	Methods	Literature review and analysis Legal analysis of case law of the CJEU	Literature review Analysis of policy documents Qualitative interviews with stakeholders
	<b>Chapters</b>	<b>II and III</b>	<b>IV and V</b>
<b>Council of Europe</b>	Objective	Identifying legal gaps, tensions and contradictions in CoE human rights protection system	-

system (Court of Justice and General Court). In this report, 'ECJ' will be the abbreviation for both the former and the current name.

<sup>4</sup> The selection of the DGs follows the requirements laid down in the project proposal.

	Focus	Implementation and violation of ECHR and ESC in EU Member States	-
	Research Material	Academic literature Case law of the ECtHR and case law and reports of the ECSR	-
	Methods	Literature review Legal analysis of case law of ECtHR and ECSR	-
	<b>Chapters</b>	<b>II and III</b>	
<b>UN standards</b>	Objective	Identifying legal gaps, tensions and contradictions concerning the protection of global human rights standards in EU Member States	-
	Focus	Implementation/violation of international human rights standards in EU Member States	-
	Research Material	Outcome Reports of the UPR	-
	Methods	Analysis of UPR documents	-
	<b>Chapter</b>	<b>VI</b>	
<b>Other regional levels</b>	Objective	Identifying legal gaps, tensions and contradictions in other regional human rights protection systems	Identifying institutional gaps, tensions and contradictions in other regional human rights protection systems
	Focus	Regional protection systems of Africa, the Americas and Asia	Regional protection systems of Africa, the Americas and Asia
	Research Material	Academic literature Documents Case law	Academic literature Documents Interviews
	Methods	Literature review	Literature review

		Document analysis Legal analysis of case law	Document analysis Interviews with Stakeholders
	<b>Chapters</b>	<b>VII, VIII, XI and X</b>	<b>VII, VIII, XI and X</b>

## A. Basic concepts

In order to analyse the gaps, tensions and contradictions of the legal and institutional global protection system, with a special focus on the EU, it is necessary to clarify some basic concepts. As a starting point it is vital to raise the question of how gaps, tensions and contradictions are defined:

Gaps in the context of a human rights protection system refer to two aspects:

- The deviance from international and regional human rights standards: Thus, ‘gaps’ refer to the differences between the status quo of human rights norms in a given country or institution (laws, policies, violations) and international and regional human rights standards.
- The difference between the human rights performance of political and administrative institutions and their desired or potential performance in reference to international and regional human rights standards and policies.

Contradictions and tensions in the context of a human rights protection system refer to frictions and trade-offs between the alleged or proposed human rights performance or standards and other – political, economic, etc. – interests, policies or programmes. They also refer to discrepancies in the standards themselves (e.g. contradictions between specific rights, different human rights standards or treaties).

Furthermore, other basic terms used in this report are ‘international human rights institutions and instruments’ as well as ‘fundamental rights’ and ‘human rights’: International human rights institutions are bodies established by (international) agreements entrusted with the task to interpret, monitor and observe the implementation and enforcement of human rights law. Their mandate, competences and *modus operandi* are defined by international law. Human rights mechanisms refer to procedures – also laid down by international agreements – which specify the course of action of international bodies in order for them to exercise their mandate.

The term ‘human rights instruments’ includes very broadly all international – binding and non-binding (soft law) – treaties and other agreements or documents including declarations, covenants, conventions, charters, protocols, work programmes, strategies and general comments, that codify and define political, civil, social, economic, cultural and other fundamental rights, and regulate their implementation.

In the context of the EU, the terms ‘fundamental rights’ and ‘human rights’, are used in policy documents as well as in literature. While the term ‘fundamental rights’ is used almost exclusively when referring to the internal EU dimensions, the use of the term human rights is more blurred. On the one hand, human rights are referred to primarily in the external context but also as an umbrella term (see also chapter V). However, Nyman-Metcalf (2014, pp. 21-35) has observed that ‘not just in the public

debate and by many authors but even by jurists the different terms related to rights are used interchangeably or at least without strict distinctions'. As the report presents the results of the analysis of policy documents, literature, law, interviews or case law, the terms used depend on the documents analysed as well as on the respective context.

## **B. Methodology**

This study brings together researchers with different disciplinary backgrounds and therefore combines insights from different perspectives. This also has consequences for the methodological conception of the deliverable. Principally, the research will pursue the approach of methodological triangulation, 'the combination of methodologies in the study of the same phenomenon' (Denzin, 1970, p. 291). Methodological triangulation, especially the combination of legal methods with qualitative methods of the social sciences, will shed light on different layers and dimensions of gaps, tensions and contradictions of the different regional human rights protection systems and will validate the outcome of the research.

The following methods were used for the research:

- A literature review aims at systematically examining, scrutinising and systematising the academic knowledge already available. The objective of this step is to ensure that the researcher is aware of the latest knowledge in the research field, to avoid repetition, to get insight into relevant findings and terminologies, to identify research gaps and, in general, to lay a foundation for further research.
- 'Document analysis is a systematic procedure for reviewing or evaluating documents – both printed and electronic (computer-based and Internet-transmitted) material. Like other analytical methods in qualitative research, document analysis requires that data be examined and interpreted in order to elicit meaning, gain understanding, and develop empirical knowledge' (Bowen, 2009, p. 27). Document analysis may comprise an inductive and deductive analysis. An inductive analysis tries to extract knowledge out of the document itself without using categories from previous research. Thus, categorisation of themes is done exclusively on the basis of the document. A deductive analysis scrutinises a document with the help of categories previously defined by the researcher.
- Qualitative interviews will provide information about the knowledge of different actors who have insights into the European human rights protection system. In contrast to quantitative interviews 'qualitative (or "semi-structured", or "depth", or "ethnographic") interviews have a more informal, conversational character, being shaped partly by the interviewer's pre-existing topic guide and partly by concerns that are emergent in the interview' (Bloor and Wood, 2006, p. 104). A qualitative design is used as the study is rather explorative. In addition, it is important to place the main focus of the analysis on the account and the interpretation of the persons involved and how they 'make sense of their lived experiences'.

## **C. Content of the report**

The Report is divided into three parts: Part I is dedicated to elaborating on the European human rights framework, with a specific focus on the EU. It starts out with a chapter written by Katharina Häusler that

summarises the most important gaps, tensions and contradictions concerning the legal aspects of the European human rights system identified by the academic legal literature (chapter II). The chapter first elaborates on the broader European context by discussing the insufficiencies and inconsistencies of, and the tensions and contradictions between, different human rights protection systems in Europe and then narrows its focus to the human rights regime of the EU.

Chapter III (Legal analysis of case law by the CJEU, the ECtHR and the ECSR) was written by Katharina Häusler and Karin Lukas and contains an analysis of case law in two selected areas: asylum and migration and then the secondary role of certain social, economic and cultural rights in EU law and possible tensions between these rights and the four fundamental (economic) freedoms. These two areas were chosen because they were identified as currently being particularly pressing issues, which reveal significant systemic deficits.<sup>5</sup> The analysis focuses on case law of the ECJ and the ECtHR, and decisions of the ECSR, as well as the differences and relationship between, and the hierarchy of, the human rights guaranteed by the EU, the CoE and the Member States in the above-mentioned areas. It further elaborates on how the differences affect the interpretation and legal balancing of the ECJ, the ECtHR and the ECSR and, lastly, points out specific legal human rights gaps and contradictions and how they might be remedied by European law.

Chapter IV ('Not politically good enough' – A policy analysis of the EU legal and institutional human rights framework) contains a political science analysis of the institutional and legal framework of the EU and was drafted by Monika Mayrhofer. Based on the analysis of interviews conducted with EU representatives and the review of mainly political science literature, the chapter sets out to analyse gaps, tensions and contradictions concerning EU human rights instruments. Topics included in this chapter are as follows: tensions concerning the values laid down in the Treaties; the complex issues of EU human rights competences; the 'Charter on Fundamental Rights of the European Union'; human rights monitoring in EU Member States; infringement procedures and the priority of politics; some aspects regarding the EU's accession to the ECHR; and anti-discrimination legislation and policies. In addition, external instruments such as the 'EU Strategic Framework and Action Plan on Human Rights and Democracy' and the 'Human Rights Guidelines' will be scrutinised. The second section deals with the unique institutional human rights framework of the EU – including a discussion of the EU as a political system and the relationship between the EU and its Member States – as well as an analysis of selected EU institutions. The chapter concludes with summarising the most important, to some extent cross-cutting, issues raised in the chapter.

Chapter V (Document analysis of policy and legal documents) concentrates on a selection of human rights related policy and legal documents in the fields of external action, development cooperation, the Area of Freedom, Security and Justice and EU Information and Communication Technology policies. In doing so, the chapter aims to analyse human rights standards of EU policy making as well as carving out contents, priorities and motivation of EU human rights policies. In addition, it identifies gaps, tensions

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<sup>5</sup> See legal literature review in chapter II and analysis of the reports of the Universal Periodic Review of European Member States in chapter VI.

and contradictions apparent in the policy and legal documents in the selected areas. The chapter was written by Jakub Jaraczewski.

Chapter VI (The EU Member States under the Universal Periodic Review of the Human Rights Council: main gaps and challenges) was drafted by Felipe Gómez Isa and María Nagore and addresses the analysis of the outcome of the UPR for each EU Member State, in order to identify the main legal gaps in the implementation as well as the violation of international human rights standards attributed to the Member States during the review process. The objective of this chapter is to identify which gaps are highlighted most in the UPR of the EU Member states in order to identify common, general or systematic patterns.

Part II deals with regional human rights protection systems in Africa, the Americas and in Asia. The authors of the first chapter (chapter VII – Africa) of part II are Magnus Killander and Bright Nkrumah, who elaborate on the African human rights system. The chapter begins with an analysis of gaps, tensions and contradictions with regard to regional instruments, such as the ‘African Charter on Human and Peoples’ Rights’, the ‘OAU Convention Governing the Specific Aspects of Refugee Problems in Africa’, the ‘African Charter on the Rights and Welfare of the Child’ and the ‘Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa’. A second section scrutinises institutional gaps, tensions and contradictions by focussing on the African Commission on Human and Peoples’ Rights, the African Committee on the Rights and Welfare of the Child, the African Court on Human and Peoples’ Rights, the African Peer Review Mechanism and the African Governance Architecture. The chapter further elaborates on sub-regional economic communities, as well as on gaps, tensions and contradictions with regard to NGOs. In a concluding section, the authors summarise the most important insights of the chapter, focussing on issues of human rights norm-setting and norm-coverage as well as aspects of implementation.

In chapter VIII (Inter-American Human Rights System), Renata Bregaglio and Carmela Chávez cover the Inter-American Human Rights System (IASHR), which evolved on the initiative of the Organization of American States (OAS). The authors will first highlight the following points: institutional gaps, challenges and tensions – including an analysis of the OAS Member States that renounce the IASHR; tensions with the Special Rapporteurship on Freedom of Expression; the issue of indirect judicialisation of economic, social and cultural rights; and the problem of reparation jurisprudence and difficulties of monitoring compliance. Following that, the chapter will elaborate on the legal perspective, specifically on tensions concerning regional instruments, such as those relating to the interaction between international human rights law and domestic law of the Member States, and evasion of the standards of the IASHR through the application of military jurisdiction and the enactment of amnesties. Finally, the chapter will analyse the role of NGOs in the IASHR from a socio-political perspective.

Chapter IX (ASEAN human rights protection system) deals with the Association of Southeast Asian Nations (ASEAN) human rights protection system and was written by Lingying Yin and Tingting Dai. It contains a section on the gaps, tensions and contradictions with regard to ASEAN instruments, focussing mainly on the ‘ASEAN Human Rights Declaration’, but also taking into consideration the ‘ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers’ and the ‘ASEAN

Declaration on the Elimination of Violence against Women'. The second part of the chapter elaborates on the performance of the ASEAN Intergovernmental Commission on Human Rights (AICHR), which was set up as the overarching body to promote and protect human rights in the ASEAN region. The chapter further analyses the AICHR's engagement with civil society organisations and presents concluding remarks concerning all aspects covered by the chapter.

The human rights framework of the South Asian Association for Regional Cooperation (SAARC) is covered by Venkatachala Hegde in chapter X (Gaps and deviances in the human rights protection system within South Asia: With specific focus on South Asian Association for Regional Cooperation). The chapter focuses on gaps and deviances of regional human rights instruments including the SAARC Charter, the SAARC Charter of Democracy, the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution and the SAARC Convention relating to Regional Arrangements for the Promotion of Child Welfare in South Asia. The chapter finalises with a concluding evaluation of these instruments including some remarks on aspects of implementation and summarising a brief survey of human rights experts, advocates and academics on the knowledge of the existence of SAARC human rights instruments, on potential deviation of these instruments from existing international human rights standards and on the performance of political and administrative institutions within South Asia.

The concluding chapter XI (Part III) of the present report aims at bringing together the results of the various chapters and summarising the most important insights.

## Bibliography

### 1. Literature

#### a) Books

Bloor, M. & Wood, F. (2006), *Keywords in Qualitative Methods, A Vocabulary of Research Concepts*, London, England: SAGE Publications Ltd.

Denzin, N. K. (1970), *The Research Act: A Theoretical Introduction to Sociological Methods*, Chicago: Aldine Transaction.

#### b) Book chapters

Nyman-Metcalf, K. (2014), 'The Future of Universality of Rights', in Kerikmäe, T. (ed), *Protecting Human Rights in the EU*, Heidelberg et al: Springer.

#### c) Journal articles

Bowen, G. A. (2009), 'Document Analysis as a Qualitative Research Method', *Qualitative Research Journal*, vol. 9 (2), pp. 27-40.

#### d) Policy and other reports

Baranowska, G. et al (2014), *Report on the analysis and critical assessment of EU engagement in UN bodies*, FP7 FRAME Deliverable 5.1, European Union, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/13-Deliverable-5.1.pdf> accessed 20 July 2015.

Mayrhofer, M. et al (2014), *Report on the mapping study on relevant actors in human rights protection*, FP7 FRAME Deliverable 4.1, European Union, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/02-Deliverable-4.1.pdf> accessed 20 July 2015.

**PART 1:**  
**European human rights framework, with a  
specific focus on the EU**

## II. Legal literature review<sup>6</sup>

### A. Introduction

Human rights protection<sup>7</sup> has undoubtedly reached a high level in Europe over the last decades. Nevertheless, the roles and the legal scope of the various systems often remain unclear to those intended to benefit from them and, at closer inspection, considerable gaps in important areas remain. This chapter summarises the main gaps, tensions and contradictions concerning the legal aspects of the European human rights systems identified in the academic literature (largely since the 2000s, focusing on the period since 2009). It will first have a look at the broader European picture and then (in section C) focus on the human rights regime of the European Union (EU).

The insufficiencies and inconsistencies of, and the tensions and contradictions, between various human rights protection systems in Europe have been the subject of extensive debate, fuelled particularly by the entry into force of the Treaty of Lisbon on 1 December 2009 on the one hand, and the growing backlog of cases at the European Court of Human Rights on the other. Thus, a large part of the legal literature analyses the implications of the entry into force of the Treaty of Lisbon and the Charter of Fundamental Rights of the European Union (CFREU) on the EU's human rights regime and its relationship to the other European human rights systems, in particular the European Convention on Human Rights (ECHR) (chapter II.B.1). The gradual integration of human rights into various EU policy areas is also analysed from legal perspectives, highlighting progress but also inconsistencies and unclear responsibilities (chapter II.C).

Another focus of the legal research in recent years was dedicated to the difficulties of the ECHR system, confronted with an enormous increase in individual applications pending before the European Court of Human Rights (ECtHR), many of them repetitive or inadmissible cases (cf. chapter II.B.2). Other authors dedicated themselves to an analysis of the European human rights landscape beyond the ECHR and the EU human rights regime, for example, the Organization for Security and Co-operation in Europe's (OSCE) framework or the Council of Europe (CoE) monitoring mechanisms. Among others, they analysed the potential overlaps but also complementary elements of these systems with the EU and ECHR system (cf. chapter II.B.3).

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<sup>7</sup> In both the treaties and the case law of the European Court of Justice, the term 'fundamental rights' is usually used to describe the obligations to which the European Union itself is bound, whereby 'human rights' is used to refer to international treaties or agreements (Witte, 1999, p. 860). National constitutional doctrines often make a similar distinction between international human rights and constitutionally guaranteed fundamental rights, sometimes only applicable to citizens. This report will follow this approach by using 'fundamental rights' when referring to treaty obligations of the European Union or the Member States and 'human rights' when speaking about broader discussions of guaranteeing rights. On this issue, see also [FRAME Deliverable 8.1](#) (section 5.2.1).

## B. Human rights protection systems in Europe – current gaps, tensions and challenges

### 1. The legal relationship between the CFREU, the ECHR and national constitutions after the Treaty of Lisbon

Ever since the Court of Justice of the European Communities (ECJ) started to develop the doctrine that fundamental rights – resulting from the ECHR and the constitutional traditions common to the Member States – formed part of the general principles of Community law (*Erich Stauder v City of Ulm*, 1969; *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970) in the 1970s, much has been written about the ‘judicial dialogue’ as well as potential discrepancies between the two highest European courts: the European Court of Human Rights (ECtHR) in Strasbourg and the ECJ in Luxembourg (see, for example, Spielmann, 1999; Bratza, 2012, p. 168). With the formalisation of this principle in EU law by the Treaty of Maastricht and following Treaty reforms, gaining an understanding of the relationship between the different European human rights orders has become ever more pertinent. The entry into force of the Treaty of Lisbon – including the CFREU – ultimately finalised the establishment of a second human rights regime in Europe, with partially overlapping guarantees and jurisdictions. The analysis of these new legal relationships (and their possible impacts), between the CFREU, the ECHR (Convention for the Protection of Human Rights and Fundamental Freedoms as amended by its Protocol No. 14 (European Convention on Human Rights, as amended), 1950) and national constitutions, has provoked lively academic debate in recent years.

The first set of discussions concerns the CFREU’s field of application. Article 51 (1) states that ‘[t]he provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law [...]’. As Cartabia, for example, convincingly argued, the primary intention of the CFREU was to capture the acts of the European institutions since it was precisely their acts, which had not been covered by a clearly defined fundamental rights regime before (Cartabia, 2010, pp. 317-318). Member States, eager to defend their national constitutional sovereignty, tried to limit the CFREU’s field of application regarding their actions (see also Piris, 2010, p. 158). Hence, ‘only when they are implementing Union law’ clearly excludes purely national law situations.<sup>8</sup> However, controversies arose over whether ‘implementing Union law’ was to be interpreted more narrowly than the ECJ’s pre-CFREU interpretation that Member States were bound by fundamental rights of the Union when ‘acting within the scope of EU law’.<sup>9</sup> Borowsky, for instance, resorting to the discussions in the Convention drafting the Charter, argued that Article 51 was deliberately phrased to narrow the scope of application to cases where Member States were acting as ‘agents’ of Union law and were not only restricting

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<sup>8</sup> The Charter is not applicable if the case at issue before a national court refers to a Charter provision but not to any other norm of Union law: cf. Rosas (2013, p. 105).

<sup>9</sup> Cf. especially *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others (ERT v DEP)* (1991) where the ECJ stated that when Member States relied on a clause of justification which allowed them not to apply a Union obligation in a specific case, such a justification must be interpreted in the light of the Union’s general principles of law and in particular of fundamental rights. See in more detail: De Witte (1999, pp. 870-871)

fundamental freedoms guaranteed by the Treaties (Borowsky, 2011, no. 24a-29).<sup>10</sup> Other authors cited the ‘Explanations relating to the Charter of Fundamental Rights’ (Explanations relating to the Charter of Fundamental Rights, 2007), arguing that the uniform interpretation and application of EU law would be jeopardised if the application of Union law did not entail the applicability of the CFREU (Rosas, 2013, pp. 104-105; Lenaerts, 2012, p. 378; Benoît-Rohmer, 2011, p. 35). The ECJ, in the case *Åkerberg Fransson* (*Åklagaren v Hans Åkerberg Fransson*, 2013), finally clarified that the Charter was binding on the Member States no matter whether they were directly ‘implementing’ or just ‘acting within the scope’ of EU law. The applicability of Union law thus always entails the applicability of the fundamental rights guaranteed by the CFREU (*Åklagaren v Hans Åkerberg Fransson* (Reference for a preliminary ruling), 2013; see also Jacqué, 2014). Therefore, the scope of application of EU law in terms of fundamental rights protection has remained substantially the same after the entry into force of the CFREU (Rosas, 2013, p. 103). Article 51 (2) further underlines that the CFREU does not affect the division of competences between the Union and the Member States and, in particular, that it does not establish any new power or task for the Union. This also means that a (possibly desired) general competence of the EU to ensure the implementation of CFREU rights that lie outside the scope of Union law would require a modification of the treaties (Cartabia, 2010, p. 21).<sup>11</sup>

A second set of questions concerns the level of protection offered by the various human rights regimes in Europe and potential grounds for discrepancies between the interpretation of similar provisions of the ECHR and the CFREU. Several authors have pointed to the fact that the various protection schemes potentially applicable may in fact confuse European citizens (Douglas-Scott, 2011, p. 647). While national constitutions and the long-established ECHR might be relatively well-known and somewhat ‘palpable’ for individuals, the different layers of protection EU law provides are not always easy to disentangle, even for lawyers. At first glance, the CFREU represents the long-awaited ‘cataloguing’ of fundamental rights in the legal order of the Union, but it is still not the only source mentioned by the Treaty of Lisbon. Article 6 of the consolidated version of the ‘Treaty on European Union’ (TEU) does not only refer to the CFREU, whose provisions ‘shall have the same legal value as the Treaties’ but also keeps the reference to fundamental rights as ‘general principles of the Union’s law’ insofar as they result from the ECHR or the constitutional traditions common to the Member States. Additionally, the very same article provides in paragraph 2 that the Union shall accede to the ECHR bringing in – at a still unknown point in the future – another jurisdictional level of fundamental rights protection. Smith concluded that while ‘in the beginning [of European integration] there was silence’, today there is a ‘cacophony of claims’ (Smith, 2013, cop. 2011, p. 35).

This potentially confusing variety of sources might, however, be attenuated by the fact that in most cases the provisions of these sources would produce more or less the same outcomes in substance (Rosas, 2013, p. 100). Not only are many CFREU rights inspired (or even copied) from the ECHR,<sup>12</sup> the CFREU also provides in Article 52 (3) that ‘[i]n so far as this Charter contains rights corresponding to

<sup>10</sup> ‘Agent’ in the sense of implementing Union law without much leeway.

<sup>11</sup> This lack of Union competence for internal human rights matters will be further analysed below in chapter III B.

<sup>12</sup> According to Weiß (2011, p. 69) and Douglas-Scott (2011, p. 655) about half of the 50 substantial Charter provisions are taken from the ECHR and relevant ECtHR case law.

rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’ Therefore, the ECHR serves as a sort of ‘minimum standard’ of fundamental rights protection within the EU and it precedes in case of multiple protection (in different terms) of the same right in various sources of EU law (Weiß, 2011, p. 72; Douglas-Scott, 2011, p. 655; Lenaerts, 2012, p. 394).

Additionally, the much-discussed discrepancy of jurisprudence between the ECJ and the ECtHR is limited to few cases.<sup>13</sup> The ECJ has already cited ECtHR case law on many occasions when confronted with the interpretation of fundamental rights, leading to an increasing – although somewhat unpredictable – ‘judicial dialogue’ between the two institutions (Bratza, 2012, p. 167; Varju, 2013, cop. 2011, pp. 52-53; Piris, 2010, p. 166). The ECtHR, on the other hand, has recognised the independent legal order of the EU’s fundamental rights system as ‘at least equivalent’ to the protection system provided by the ECHR.<sup>14</sup> Therefore, the entry into force of the CFREU and the possible accession of the EU to the ECHR may open up various routes for judicial recourse to individuals but does not mean that two substantially different sets of fundamental rights interpretation will develop. Some authors even argue that the accession of the EU to the ECHR (if not already the incorporation of ECHR provisions into the CFREU) will strengthen the authoritativeness of the ECtHR in human rights jurisprudence, particularly as its decisions have a *de facto* binding effect beyond the individual case, which the ECJ would have to respect (Weiß, 2011, p. 81; Smith, 2013, cop. 2011, p. 45). In fact, the ECJ has already confirmed in its recent case law that where CFREU rights correspond to the rights guaranteed by the ECHR, the clear and consistent jurisprudence of the ECtHR should be followed.<sup>15</sup> On the other hand, the new rights of the CFREU could also inspire the methodology and case law of the ECtHR, since they reflect the most recent ‘crystallisation of a consensus’ of a large part of its contracting parties (Bratza, 2012, p. 168; Benoît-Rohmer, 2011, p. 35).<sup>16,17</sup> Some authors, such as Greer and Williams (Greer and Williams, 2009), paint a more pessimistic picture. In their opinion, the two systems are too distinct to easily accommodate the EU’s accession to the ECHR in practice, comparing the ‘individual’ approach of the ECHR to the ‘institutional’ model of protecting human rights in the EU (Greer & Williams, 2009, pp. 481-482). In fact, the ECJ’s opinion on the ‘draft agreement on the accession of the EU to the ECHR’ pointed to possible legal difficulties in case of accession (ECJ, Opinion 2/13, 2014). This negative opinion itself will make the accession process a lot more difficult (if not impossible) during the next years – a challenge to which the other EU institutions still have to respond.<sup>18</sup>

<sup>13</sup> Cf. examples analysed by e.g. Weiß (2011, pp. 77-80) (right to remain silent in antitrust enforcement/protection of business premises); Spielmann (1999, pp. 764-766) (including examples where the ECJ left the fundamental rights question undecided).

<sup>14</sup> Cf. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (2005); Piris (2010, p. 147).

<sup>15</sup> *J. McB. v L. E.* (2010) para. 53: ‘[...] it is clear that the said Article 7 contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights [...]’.

<sup>16</sup> Examples of case law, where the ECtHR already used the Charter to argue a departure from previous case law: Bratza (2012, pp. 172-173).

<sup>17</sup> Douglas-Scott (2011, p. 657), Benoît-Rohmer (2011, pp. 37-39) and Lenaerts (2012, p. 396) cite examples where the ECtHR referred to ECJ case law.

<sup>18</sup> Most academic authors harshly criticised the ECJ’s opinion. Cf. e.g. Douglas-Scott (2014), Odermatt (2015), Gragl (2015).

Another difficult question is how the (constitutional) courts of Member States will accommodate the EU's fundamental rights regime, particularly the CFREU, in the future. While European constitutional or supreme courts often refer to international norms – in particular the ECHR – when examining the fundamental rights compatibility of national legislation or acts, so far they seem to be hesitant to use the CFREU as an explicit (and not only supporting) source (Visser, 2014, p. 43).<sup>19</sup> First cases making such an explicit reference to the CFREU have been decided by the Belgian and Austrian constitutional courts, the latter clarifying that in the scope of application of the CFREU, the CFREU rights were to be regarded as 'constitutionally guaranteed rights', at least when they are equal to national constitutional rights in terms of wording and certainty (Decision in the case U466/11 and joined cases, 2012, para. 5.5). The Austrian Constitutional Court further concluded – resulting from Article 52 of the CFREU – that the fundamental rights guaranteed by national constitutions, international treaties and the CFREU have to be interpreted as coherently as possible (Decision in the case U466/11 and joined cases, 2012, para. 5.9).<sup>20</sup>

While the variety of sources and the relationships between them might seem confusing at first, Weiß also pointed out that a similar variety of fundamental rights sources also exist in many national legal systems: explicit human rights catalogues or constitutional guarantees; non-written constitutional principles (e.g. the rule of law); and of course the ECHR, which is incorporated in various ways into national legal systems. These different sources, according to his argument, coexist in a 'mutually complementary way' without causing major confusion (Weiß, 2011, p. 66). At the national level, however, there is usually only one constitutional or supreme court empowered with the authority to interpret (and ensure harmonisation between) these different sources. At the European level, whether we will see an increasing convergence and harmonisation between the three levels of fundamental rights protection will thus mainly depend on the degree to which constitutional/supreme courts will consider both the ECHR and the CFREU in their work, and the degree to which the ECJ will reflect the ECHR and ECtHR case law in its decisions (Visser, 2014, p. 44). Ultimately, such clarity would serve individuals, whose effective enjoyment of human rights requires that these rights are applied 'reasonably uniformly by any entity which [they] have easy recourse to' (Smith, 2013, cop. 2011, p. 45).

## 2. The overload of the ECtHR and the need for reform

Concerns over the increasing backlog of cases and corresponding calls for reform have accompanied the ECHR system since the 1980s, and the ECtHR's constant overload has been identified by many authors as a major shortcoming of the European system of human rights protection (Harmsen, 2011, p. 119; Greer & Williams, 2009, pp. 464-465).<sup>21</sup> The profound reform of the ECHR system by Protocol No. 11 in the

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<sup>19</sup> The European Commission's report on the application of the Charter in 2012 shows that the references to the Charter by national courts are generally increasing: the survey cited in this report found numerous references in national judgements of administrative courts, especially in the areas of immigration and asylum (European Commission (2013, pp. 14-15)). Examples of the use of the Charter as inspirational source in the jurisdiction of selected EU Member States can also be found in Palmisano (2015).

<sup>20</sup> For a detailed analysis of this decision see e.g. Klaushofer & Palmstorfer (2013), Frahm & Mayer (2015); in German: Granner (2013), Kirchmair (2013).

<sup>21</sup> During the first 30 years of its existence, the ECtHR only received about 800 applications per year, then the numbers began to increase dramatically, finally reaching over 40,000 by the late 2000s (Greer & Williams, 2009, p. 464).

1990s (Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, 1994) dissolved the European Commission of Human Rights and introduced a full-time court with compulsory jurisdiction in individual cases. Soon however, the new system was struggling to deal with the ever-growing caseload (Greer & Williams, 2009, p. 467). Indeed, many authors have even argued that the ECtHR became a ‘victim of its own success’. As Protocol No. 11 offers individuals direct access to the ECtHR – the jurisprudence of which is often perceived as more progressive and generous than that of national courts – it has made the Convention system even more attractive (Helfer, 2008, p. 126; Keller, Fischer & Kühne, 2011, pp. 1025-1026; Bychawska-Siniarska, 2013, p. 314; Caflich, 2006, pp. 405-406). The increasing number of individual applications filed with the ECtHR during the 1990s was, however, not only due to the increased ‘attractiveness’ of the system, but also to the accession of many former communist Central and Eastern European countries throughout the decade. This major accession process expanded the reach of the Convention’s jurisdiction to practically the whole continent – a unique feature in the international human rights landscape (Wildhaber, 2011, p. 206)<sup>22</sup> – but also transferred many of these states’ unsolved problems regarding rule of law and human rights to Strasbourg. Keller et al (Keller, Fischer & Kühne, 2011, p. 1029) summarised the main problems challenging the ECtHR’s functioning in three main categories: first, the mass of manifestly ill-founded applications (90-95% of all applications); second, the high proportion of repetitive cases; and third, the fact that the majority of cases are filed against only a handful of countries (at the end of 2013, more than half of the nearly 100,000 pending applications had been lodged against the Russian Federation, Italy, Ukraine or Serbia) (European Court of Human Rights, 2014, p. 3).

While the ECtHR itself tried to cope with its enormous workload by adapting its procedures and improving its case management (Wildhaber, 2011, p. 223; O’Boyle, 2008, p. 4), another inter-governmental reform process was initiated, leading to the adoption of Protocol No. 14 (Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, 2004) in May 2004. Due to the late ratification by the Russian Federation, Protocol No. 14 could only enter into force on 1 June 2010 and foresaw a number of changes that should help the ECtHR to reduce its enormous backlog, meanwhile grown to well over 100,000 cases.<sup>23</sup> Most importantly, it introduced a single-judge formation empowered to declare applications inadmissible, ‘where such a decision can be taken without further examination’, and enabled the three-judges committees to simultaneously deliver judgements on the admissibility and merits of a case if there existed already ‘well-established case law of the Court’ on the relevant issue.<sup>24</sup> Additionally, it added a contested new admissibility criterion to Article 35 (3), whereby the ECtHR might declare an application inadmissible if ‘the applicant has not suffered a significant disadvantage, unless respect for human rights [...] requires an examination of the application on the merits and provided that

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<sup>22</sup> O’Boyle also highlights the influence the ECHR had in shaping Eastern European constitutions (O’Boyle, 2008, p. 2).

<sup>23</sup> On 1 January 2011 139,650 cases were pending before a judicial formation and the backlog further grew to a total of 151,600 cases by the end of that year: European Court of Human Rights, 2012.

<sup>24</sup> Cf. the consolidated version of Articles 27-28 Convention for the Protection of Human Rights and Fundamental Freedoms as amended by its Protocol No. 14.

no case may be rejected on this ground which has not been duly considered by a domestic tribunal'.<sup>25</sup> Even though this provision provided the Court with a considerable power of discretion, so far it cannot be said whether that made individual applications significantly more difficult.<sup>26</sup> However, it is questionable whether this criterion – presupposing a well-functioning domestic judiciary – will really help to reduce the ECtHR's caseload drastically without lowering the Court's quality standards, as the majority of applications concern repetitive cases against only a few states (Keller, Fischer & Kühne, 2011, p. 1039).<sup>27</sup>

In view of the urgency to relieve the Court, reflections about further reforms had already started before the entry into force of Protocol No. 14, notably with the High Level Conference on the Future of the European Court of Human Rights held during the Swiss Chairmanship of the CoE in February 2010 in Interlaken (Cardona et al, 2012, pp. 218-219).<sup>28</sup> At the same time, in literature, two divergent concepts gained ground: first, those authors who suggested a radical reform allowing the ECtHR to choose the exemplary cases it handles, thereby acting as a 'pan-European standard-setter' (establishing a form of 'constitutional justice' similar to the US Supreme Court model); and secondly, those who defend the right to individual application as a distinctive feature of the ECHR system and instead propose further reforms within the current system, coupled with better implementation at the national level (Harmsen, 2011, p. 129; Helfer, 2008, p. 127).

One of the most prominent representatives of the first group is the former ECtHR president and Swiss judge, Luzius Wildhaber. He argued that the ECtHR's accumulated backlog had in fact led to an implicit restriction of the right to individual application, as many cases were pending before it for several years or – worse – were summarily declared inadmissible (Wildhaber, 2011, p. 224). Therefore, in his opinion, a system where the ECtHR would select only about 1,000 (exemplary) cases per year – in addition to certain categories of cases it would have to examine automatically<sup>29</sup> – would be more predictable, transparent and honest (Wildhaber, 2011, pp. 225-226). Similarly, Greer and Williams have advocated for a radical change as, in their view, the ECtHR was not able to systematically deliver justice to all applicants anymore, and so should focus on adjudicating '[...] the most serious alleged violations [...] with maximum authority and impact in the states concerned', thereby pushing the Contracting States towards fuller respect for the Convention rights as a whole (Greer & Williams, 2009, p. 466).

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<sup>25</sup> On the debates about this new criterion cf. e.g. Harmsen (2011, p. 128); Keller, Fischer & Kühne (2011, pp. 1037-1039).

<sup>26</sup> In a recently published article, Gerards criticised the ECtHR's lack of comprehensible reasoning in admissibility decisions, illustrating her criticism with a concrete case declared 'manifestly ill-founded' by the Court according to Article 35 (3) b (a criterion that already existed before Protocol No. 14) and was later also examined by the UN Human Rights Committee which found a violation (Gerards, 2014). The problem was also flagged by Keller, Fischer and Kühne (2011). The ECtHR's Research Division conducted a first case law analysis on the application of the new criterion in 2012 (Council of Europe/European Court of Human Rights, 2012).

<sup>27</sup> Meanwhile, Protocol No. 15 (not yet in force) deleted the words 'and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal' making this criterion possibly even more problematic.

<sup>28</sup> Prior to the Interlaken conference two major reports had already proposed reforms of the system: the 'Lord Woolf report' in 2005 (Woolf, 2005) and the 2006 report of the Group of Wise Persons (Council of Europe, 2006).

<sup>29</sup> Those categories would include particularly cases of severe forms of alleged human rights violations (e.g. right to life, prohibition of torture, and prohibition of slavery), pilot judgements, and guidelines for structural and systemic problems or interstate applications (cf. Wildhaber, 2011, p. 225).

On the other side of the spectrum, a number of authors have argued that describing the ECtHR as a 'victim of its own success' was too simplistic. In their view, what made the ECtHR so attractive for individuals was not only its independence and progressive jurisprudence, but also the lack of adequate remedies at the national level, coupled with an increasing number of systemic human rights violations (Harmsen, 2011, pp. 120-121; Costa, 2011, p. 179; O'Boyle, 2008, pp. 6-7). In addition to the high number of 'repetitive cases', concerning structural problems in national administrations and/or jurisdictions (in particular, fair trial and length of proceedings), the ECtHR is also confronted with a high number of particularly serious human rights violations such as torture, enforced disappearances or extrajudicial killings, against which domestic jurisdictions fail to provide adequate remedies (Helfer, 2008, p. 129; Gerards, 2012, p. 176). The former president of the ECtHR, Jean-Paul Costa, thus vocally stressed that the Contracting States have a primary role within the Convention system, whereas the ECtHR is a subsidiary actor. Where human rights are fully respected by the authorities – respectively, where there exist adequate national remedies – there is no need for an international court to step in (Costa, 2011, p. 179). In the same vein, Helfer advocates for re-focusing the debate on how the CoE system can '[...] bolster the remedies that domestic judges and legislatures provide to individuals whose rights have been violated' (Helfer, 2008, p. 130). As a complement of the principle of subsidiarity, he calls for a stronger 'embeddedness' of the ECtHR in national jurisdictions, displaying a more assertive guiding and supervisory role vis-à-vis national jurisdictions (Helfer, 2008, p. 159).

Some authors also argue that the Committee of Ministers – the guardian over the execution of the ECtHR's judgements, according to Article 46 ECHR – should play a stronger role in this regard. Bychawska-Siniarska, for instance, recalls the Committee of Minister's strong procedural competences for putting pressure on Member States which fail to abide by a judgement, which it has mostly avoided making use of thus far (Bychawska-Siniarska, 2013, p. 314). Protocol No. 14, and accompanying decisions by the Committee of Ministers, include measures that should enhance domestic enforcement, such as the obligation to submit action plans and action reports (Department for the Execution of Judgments of the European Court of Human Rights, 2009) or the Committee of Minister's possibility to refer the question of whether a contracting state has failed to abide by a judgement back to the Court.<sup>30</sup> However, effective monitoring of this process often comes to grief due to diplomatic restraint displayed by the Committee of Ministers and a lack of resources of the CoE's Department for the Execution of Judgments (Bychawska-Siniarska, 2013, pp. 316; 320).<sup>31</sup> In the view of these authors, it is thus primarily the Contracting States' failure to duly implement their treaty obligations which causes the overload of the Court. Hence, effective measures to decrease the ECtHR's caseload must include reforms at the domestic level, an aspect that has so far received little consideration in the reform process.

The dividing lines in the academic discussion of reform proposals were mirrored at the political level. At the high-level conferences in Izmir (2011) and Brighton (2012), following the process started in Interlaken in 2010, advocates for and against limiting the access to the ECtHR brought forward a series

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<sup>30</sup> Cf. Article 46 (4) ECHR.

<sup>31</sup> The Department for the Execution of Judgments is supervising the implementation of more than 10,000 judgments with only 30 members of staff, more than half of whom are employed on temporary basis or seconded by governments (Bychawska-Siniarska, 2013, pp. 316, 320).

of proposals.<sup>32</sup> In Brighton, a first consensus was reached with a decision to develop two additional protocols to the ECHR, both of which have been adopted in the meantime. Protocol No. 15 (Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, 2013) brings further – small – procedural reforms (e.g. the reduction of the time limit for application from six months to four months after the final domestic decision) and Protocol No. 16 (Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 2013) introduces the possibility of requesting ‘advisory opinions’ from the ECtHR, similar to the ECJ’s preliminary ruling procedure. As the ratification process of these protocols moves forward slowly – at the time of writing only ten Contracting States had ratified Protocol No. 15, which has to be ratified by all state parties to the ECHR to enter into force, and only San Marino had ratified Optional Protocol No. 16<sup>33</sup> – discussions continue both at the political and academic level.

Meanwhile, the first successes of Protocol No. 14 are already visible, as the ECtHR has considerably reduced its backlog throughout 2012 and 2013: At the end of 2013, 99,900 applications were pending before a judicial formation, which is over 50,000 cases less than two years earlier (European Court of Human Rights, 2014, p. 3). While Protocol No. 14 has thus clearly helped the Court to process applications more quickly, it does not solve the underlying problem that a mass of inadmissible or repetitive cases continues to reach the ECtHR every year (Keller, Fischer & Kühne, 2011, p. 1030; O’Boyle, 2008, p. 5). The possibility of national courts requesting ‘advisory opinions’, according to Protocol No. 16, could solve cases of systemic human rights violations already at the national level, but presupposes a well-functioning and well-trained domestic judiciary, sensitive to possible Convention violations. Further reform discussions will thus have to address the enhancing of national capacities and strengthening of the supervisory process of the execution of judgements – politically, a far more difficult issue. Concerning the latter, some authors have also suggested that civil society could be given a stronger role, providing the Committee of Ministers with additional information and putting pressure on governments to fully execute judgements (Bychawska-Siniarska, 2013, pp. 318-319). This would require an adaption of the working methods of the Committee of Ministers though and could be opposed by governments trying to limit the space for civil society action in the CoE human rights system.

### **3. European human rights protection systems beyond the ECHR and the CFREU – advantages and challenges**

#### ***a) Other Council of Europe mechanisms***

While the development of the EU’s human rights regime and the reform of the ECHR system have attracted most of the academic attention in recent years, human rights protection in Europe is not limited to these two regimes. Within the framework of the CoE a detailed system of human rights

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<sup>32</sup> All relevant text of these discussions are collected in Council of Europe (2014)

<sup>33</sup> Information based on <http://conventions.coe.int>, last updated on 9 March 2015.

treaties and monitoring bodies has developed over the past decades, often either pioneering or mirroring, on a regional level, comparable United Nations (UN) standards.<sup>34</sup>

For example, the ‘European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment’ (ECPT), adopted in 1987, realised the idea of torture prevention through regular monitoring and exchange. More specifically, the method developed by the ECPT foresees unannounced visits to places of detention by delegations from the 47 independent expert members of the European Committee for the Prevention of Torture (CPT), every four to six years in each state party. The visits and reports issued following these visits should open a dialogue with state authorities, resulting in the gradual improvement of national standards. This method has influenced legislation and practice in the CoE Member States<sup>35</sup> and the ECtHR has also cited the Committee’s findings in its jurisprudence (Greer, 2014, p. 421). Similarly, the ‘Framework Convention for the Protection of National Minorities’, adopted in 1995, has also had a pioneering role in recognising collective rights at the European level and defining core standards for the protection of minorities, to be guaranteed by all states parties.

In contrast to the ECHR, however, all other CoE human rights treaties<sup>36</sup> were equipped with non- or quasi-judicial monitoring mechanisms, usually involving various forms of regular country monitoring, standard setting through the collection of recommendations and the issue of commentaries, and cooperation with NGOs and national human rights institutions to gather information. Independent expert bodies exercise these functions and to various degrees, the Committee of Ministers plays a role in the monitoring process (See Kicker, Möstl & Lantschner, 2011, pp. 464-465; Beco, 2012, pp. 172-178).

As advanced as the CoE human rights standards are, the system of reporting and monitoring is also confronted with various problems, which hamper the effective implementation and monitoring of these standards. A comparative analysis of the work of four CoE expert bodies,<sup>37</sup> conducted by Kicker et al, showed that the monitoring reports ‘often reiterate the same critical findings and recommendations in consecutive monitoring cycles’. This illustrates that states often fail to remedy shortcomings pointed out in the monitoring process (Kicker, Möstl & Lantschner, 2011, p. 462). Despite the differences of these bodies – in terms of their competences and the procedures they follow – the research team identified four common procedural deficits impeding effective human rights monitoring by the bodies: First, the information deficit (i.e. that the monitoring bodies heavily depend on the information provided to them by governments and civil society organisations as they have limited resources to conduct information gathering themselves); second, the long intervals between monitoring cycles; third, the lack of human resources to undertake the monitoring task; and finally, limitations related to the principle of

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<sup>34</sup> As of 26 May 2014, 214 treaties have been adopted in the framework of the CoE, a large part of which aims to enhance the standards of protection concerning human rights, democracy, and rule of law.

<sup>35</sup> Ratification of or accession to the ECPT is now a condition of CoE membership.

<sup>36</sup> The European Commission against Racism and Intolerance, having similar monitoring competences, was instead not created by a treaty but by Resolution Res(2002)8 of the Committee of Ministers (Council of Europe, 2002).

<sup>37</sup> The Advisory Committee on the Framework Convention for the Protection of National Minorities, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the European Commission against Racism and Intolerance, and the European Committee of Social Rights.

confidentiality (in particular, the limited publicity, and hence transparency, of the monitoring process) (Kicker, Möstl & Lantschner, 2011, pp. 467-473). De Beco similarly identified a lack of resources both on the side of the states parties and on the side of the committees; many human rights reporting obligations have led to a certain ‘monitoring fatigue’ in the member states, which thus submit their periodic reports late or not at all. On the other hand, secretariats are too small to provide in-depth evaluations, and committees often cannot afford to hire external experts for country visits. Finally, the system also lacks an institutionalised follow-up mechanism to evaluate whether states parties have implemented the recommendations issue to them, but monitoring bodies can only refer to their previous reports during the subsequent periodic examination (Beco, 2012, pp. 191-194).

Among the conventions and their monitoring bodies mentioned above, the European Social Charter (ESC) merits closer inspection as it is the direct counterpart of the ECHR. Originally adopted in 1961, and substantially revised in 1996, the ESC captures social, economic and cultural rights, which were (deliberately) left out when the ECHR was drafted at the end of the 1940s.<sup>38</sup> Even though the ESC is also a binding treaty, it is in several ways a ‘weaker’ human rights instrument than the ECHR: First, apart from seven core standards from which states have to accept at least five, the ESC is an ‘à la carte-instrument’, offering states the possibility to choose the standards they wish to ratify. Second, ratification of or accession to the ESC is not a prerequisite for membership in the CoE (nor the EU).<sup>39</sup> Third, monitoring only works through a quasi-judicial mechanism,<sup>40</sup> and fourth, the ESC only applies to citizens of states parties and to foreign nationals of other contracting parties lawfully resident or working regularly within the territory of the state concerned (cf. Appendix to the European Social Charter, 1961, para. 1). This short comparison illustrates the imbalance between civil and political and social and economic rights in the CoE human rights regime.<sup>41</sup> Even though states generally seem to respond positively to findings of violations by the Committee, these findings have neither the judicial value nor the political weight of ECtHR judgements and thus full compliance depends even more on the political will of the state concerned (Greer, 2014, pp. 420-421). Additionally, the ESC system is confronted with the challenge that many states have not accorded to the ESC the same status in national law as to the ECHR, which can render national litigation difficult (Alston, 2005, p. 60). Ultimately, the whole CoE human rights regime – including the ECHR system – is confronted with the problem that legal and political means are limited if a member state fails to address persistent human rights violations; The Council of Ministers can only decide to suspend the voting rights of a member or to

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<sup>38</sup> Greer explained the ‘almost exclusive emphasis on civil and political rights in the ECHR’ as a deliberate choice to contrast with ‘Soviet-style communism’ in other parts of Europe (Greer, 2014, p. 418). *Steiner et al.* cite one of the drafters of the ECHR, Pierre-Henri Teitgen, according to whom the priority in 1949 was first ‘to guarantee political democracy in the European Union and then to co-ordinate our economies, before undertaking the generalisation of social democracy’ (Steiner, Alston & Goodman, 2008, p. 1018).

<sup>39</sup> Nevertheless, today all EU Member States have either ratified the 1961 Charter or the revised ESC.

<sup>40</sup> Alleged violations of ESCR cannot be brought before the ECtHR by individuals but only as a ‘collective complaint’ before the European Committee of Social Rights (ECSR), which can issue reports containing non-enforceable decisions, but even this only if the State concerned has agreed to this optional procedure. According to the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (1995), organisations of employers and trade unions as well as other NGOs having consultative status with the CoE can submit complaints alleging unsatisfactory application of the ESC to the ECSR. For details, see e.g. Lukas (2014).

<sup>41</sup> This issue will be further analysed in chapter III.C below in respect to the EU.

expel it from the CoE. Both options are considered such a political affront that they would probably only be used in extreme cases of massive human rights violations by a Member State (Greer, 2014, pp. 434-435).<sup>42</sup>

### ***b) The human rights component of the Organization for Security and Co-operation in Europe (OSCE)***

The Conference on Security and Co-operation in Europe (CSCE) – the informal cold war-era predecessor of the OSCE – played an important role in legitimising human rights discourses in Eastern Europe in the 1980s and early 1990s. Based on the ten fundamental principles of the Helsinki Final Act (Conference on Security and Co-operation in Europe – Final Act ('Helsinki Final Act'), 1975), signed in August 1975, the OSCE aims to realise a comprehensive concept of security covering ‘three dimensions’: the politico-military, the economic and environmental and the human security dimension. This was in itself an innovation at that time as it attributed human rights the same value for regional security as to politico-military or economic issues (Zannier, 2012, p. 210). None of the OSCE agreements are legally binding; in view of their role in the European human rights protection system they will be nevertheless briefly be analysed here.

Over the last two decades, the OSCE has developed particular competence in fostering the rule of law and strengthening democratic institutions (including the conduct of election observation missions) and assisting states in realising anti-racism, non-discrimination and anti-trafficking policies, under the heading of the ‘third (i.e. human security) dimension’. Two special institutions, the Representative on Freedom of the Media and the High Commissioner on National Minorities,<sup>43</sup> have developed early warning mechanisms, which aim to prevent conflicts, but also to promote the rights of individuals in the OSCE area (Greer, 2014, p. 417). Although non-binding, the political agreements reached within the CSCE/OSCE have created important, and often ground-breaking, standards, particularly in the areas of democracy, rule of law, minority rights and freedom of expression (Steiner, Alston & Goodman, 2008, p. 1017; Strohal, 2011, p. 503). The principle of consensus should ensure that all governments of participating states are politically committed to agreements and can be held accountable by their peers (Zannier, 2012, p. 211). However, in practice the organisation has often suffered from political differences hampering its ‘technical work’ and a lack of firm commitments by states to the organisation’s principles and standards.

With the end of the Cold War, the OSCE had to find a new role as a platform for exchange on political and security issues in Europe. In the ‘Charter of Paris for a New Europe’ (Paris Charter), signed in 1990, the CSCE Participating States firmly committed to democracy based on human rights and fundamental freedoms, and acknowledged that the protection and promotion of human rights was ‘the first responsibility of government’ (Charter of Paris for a New Europe, 1990). Translating these principles into concrete commitments – and even more into action on national levels – has been more arduous. The

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<sup>42</sup> Only once a Member State – Greece in 1969 – was threatened with expulsion following the ECtHR’s finding of severe human rights violations by the military regime in the ‘Greek Case’ (joined cases 3321/67, 3322/67, 3323/67, 3344/67). Greece anticipated this step by withdrawing its membership in December 1969 (cf. Council of Europe, 1970).

<sup>43</sup> For a detailed analysis of the OSCE’s important work in this field see Heintze (2012).

OSCE's broad membership – comprising also former Soviet republics in Central Asia, as well as Canada and the USA – opens both opportunities to expand basic democracy and fundamental rights standards over the whole continent (and beyond) and makes it more difficult to reach agreements among its participating states. Wake highlighted that some of the commitments reached within the OSCE – for example, on democratic elections – ‘go well beyond anything accepted internationally in any other forum by a group that includes the United States and Russia, as well as all the other states of Europe and Eurasia’ (Wake, 2013, p. 350). On the other hand, however, he also described the heated debates among participating states concerning contested missions, or the anxiety and lack of cooperation by states when it comes to the fulfilment of concrete human rights or democratic obligations (Wake, 2013, p. 341). In view of the shrinking commitment to human rights and democracy in some of the participating states, Strohal underlined the continuing role of the OSCE's ‘third dimension’ and insisted that the organisation remain steadfast in its principles and focused on the areas where it could facilitate change, in particular election observation and the strengthening of civil society. To be able to fulfil these tasks, the OSCE, however, also has to overcome its structural deficits by building a more robust institutional framework for more systematic engagement (Strohal, 2011, pp. 503-505; 510). As long as the OSCE's structures and agreements are built entirely on full consensus of all participating states, the implementation of its standards – but also the success of its projects and missions – will depend on the individual commitment displayed by states.

#### 4. Conclusions

The literature reflected in this chapter portrays a complex and diversified human rights system in Europe, which offers a generally high standard of protection. Nevertheless, it also displays a number of gaps, tensions and contradictions within and between the different protection regimes. Firstly, the legal relationships between the ECHR, the EU Charter of Fundamental Rights and national constitutions remain complicated, but a series of procedural provisions should ensure as much coherence as possible (e.g. the ECtHR's indirect authority of interpretation of CFREU rights, which are identical to ECHR rights, according to Article 52 (3)). However, as most authors stress, whether we see more tension or coherence in the future will depend on the effective interaction of the jurisdictional levels involved. In part, such a ‘judicial dialogue’ already exists – notably between the ECJ and the ECtHR – but with regard to the application of the CFREU there still seems to be some hesitation both on the part of the ECJ and national courts.

Secondly, the debate about the reform of the ECtHR and the ECHR reveals two fundamentally different visions of what the Court should be and how the implementation of the ECHR can best be guaranteed. While the reforms introduced by Protocol No. 14 show first successes in terms of the reduction of the ECtHR's backlog, in the long run, governments will not be able to shy away from the question of enhancing national capacities for the effective implementation of the ECHR. A ‘pick and choose’-system, as proposed by some authors, would certainly deprive the ECtHR's docket of the many inadmissible or repetitive cases, but it would not solve the underlying problem of systemic gaps and deficiencies at national levels, including a distrust of national jurisdictions.

Thirdly, the – relatively few – academic studies on the CoE's human rights instruments and corresponding monitoring mechanism, besides the ECHR, display a richness of advanced standards in

practically all human rights areas, but also highlight inherent weaknesses of their supervisory systems. These monitoring systems primarily suffer from a lack of resources, insufficient follow-up procedures at the political level and – in some cases – also from inadequate commitment by Contracting States. These gaps are particularly obvious when comparing the ESC’s ‘low scale’-system to the advanced ECHR regime and contradict the CoE’s Member States’ commitment to the indivisibility and equality of all human rights. Thus, reflections on strengthening the European human rights system should not neglect the topic of the improvement of the CoE’s human rights instruments and monitoring systems beyond the ECHR. What is needed are proposals that strengthen the implementation of all human rights standards and hold Contracting States effectively accountable without frustrating them with lengthy and complicated monitoring procedures. This could include, in particular, the strengthening of the monitoring function of the Committee of Ministers and a systematic follow-up procedure to recommendations by treaty bodies.

This chapter also displays several research gaps. While there is abundant literature on some issues, others have received little attention from the academic community so far. There is, for example, only scarce literature on the OSCE standards of human rights protection and how they interrelate with similar CoE or UN standards. Even though these agreements are only politically binding and thus probably less interesting for lawyers, their influence in the regional context would certainly merit more profound examination. Another topic which is under-researched is the legal relationship between the Charter and the ESC, respectively Union Law as such and the ESC. While the EU does not envisage accession to the ESC, all Member States are parties to it, and the Charter of Fundamental Rights refers to these international obligations in its preamble. More research into this relationship might thus help to avoid possible tensions between Union law and Member States’ obligations under the ESC.

## **C. Gaps, tensions and contradictions in the human rights system of the European Union (EU)**

### **1. A global actor, but without a comprehensive human rights regime?**

Over the last sixty years, European integration has moved forward – albeit with some setbacks – at a great pace and has turned a small regional organisation, focused on sectorial economic cooperation, into a supranational union of 28 nations, governing many policy areas. Today the EU aims not only at strengthening internal integration but also at playing a visible role as a ‘unified actor’ in the global arena. However, while European integration was also motivated by the wish to consolidate peace and democracy on the continent, human rights law and policy have long been absent in the EU’s treaties and common policy frameworks. Many authors have explained this absence with the primarily economic focus intended by the founders of the European Coal and Steel Community in 1951, and later the European Economic Community in 1957. Only growing pressure from national constitutional courts, which questioned the primacy of community law if it did not guarantee the same fundamental rights protection as national constitutions,<sup>44</sup> have pushed the ECJ and – much later – also the European

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<sup>44</sup> Notably the German Federal Constitutional Court in its well-known decision *Solange I* (1974) 271 2 BvL 52/71.

legislators to gradually develop an autonomous fundamental rights regime.<sup>45</sup> Some authors additionally suggested that the founders might have considered human rights protection in Europe adequately covered by the CoE, which had an explicit human rights mandate in its founding treaty (Statute of the Council of Europe, 1949)<sup>46</sup> and had already adopted the ECHR (Douglas-Scott 2011, pp. 647-648; Greer, 2014, p. 435).

Building on the ECJ's early interpretation that fundamental rights formed part of the general principles of Community law (cf. *supra* section II.A), the Treaty of Maastricht, in 1992, explicitly mentioned the respect for fundamental rights as one of the aims of the newly-built European Union for the first time (Treaty on European Union, 1993, Art. F (2)).<sup>47</sup> This basic principle was confirmed and further elaborated five years later in the Treaty of Amsterdam, which proclaimed that '[t]he Union [was] founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which [were] common to the Member States' (Treaty of Amsterdam, 1997, Article F (1)). The decision to include only a general commitment but not a full bill of rights, as had been proposed by a '*Comité des Sages*' appointed by the European Commission already a year earlier (European Commission, 1996), disappointed many academics and civil society activists who had positively assessed that proposal (European Commission, 1999, p. 9). Authors further criticised that the formal commitment expressed in the Treaty of Amsterdam was not followed by consistent implementation, for example, by creating legal monitoring and enforcement mechanisms. This shortfall was even more distressing as the Treaty of Amsterdam significantly expanded the Union's competences, including in certain areas of justice and home affairs, strengthened inter-governmental cooperation in other areas of police and criminal justice matters, as well as the beginning of a common foreign and security policy. All of these are particularly sensitive human rights areas (Douglas-Scott, 2011, p. 648; van den Berghe, 2010). Thus, already at the end of the 1990s, prominent human rights lawyers had advocated for a comprehensive EU human rights policy, consistent with the legal framework of the Treaty of Amsterdam. Building on the basic principles formulated by a '*Comité des Sages*' in 1998 (Cassese et al, 1999),<sup>48</sup> Alston/Weiler developed detailed recommendations for such an institutional, legal and policy framework (Alston and Weiler, 1998). Among other suggestions, they proposed the following: to designate a Directorate-General and a separate EC member responsible for human rights; to develop a monitoring function, either through the creation of a new agency or through the expansion of the then existing European Monitoring Centre on Racism and Xenophobia in Vienna; to attach a 'human rights clause' to new legislation; to forward the Community's accession to the ECHR; to enhance the status of social and

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<sup>45</sup> Cf. e.g. Steiner, Alston & Goodman (2008, pp. 1014-1015); Morano-Foadi & Andreadakis (2011, pp. 597-598); Besson (2006, pp. 343-344); Sarmiento (2013, p. 1269); Smith (2013, cop. 2011, p. 35); Piris (2010, pp. 146-147)

<sup>46</sup> Article 1 letter b: 'This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.'

<sup>47</sup> Treaty on European Union, 1993, Article F (2): 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

<sup>48</sup> The '*Comité des Sages*' was composed of Antonio Cassese, Catherine Lalumière, Peter Leuprecht and Mary Robinson and presented its agenda at a conference held in Vienna on 9-10 October 1998.

economic rights in practice; and to further develop the integration of human rights in other policy areas, such as development cooperation and trade (Alston & Weiler, 1998).

The postulation for a modern ‘European Bill of rights’ was realised with the proclamation of the Charter of Fundamental Rights of the European Union by the European Parliament (EP), the Council and the European Commission on 7 December 2000, at the margins of the Nice European Council.<sup>49</sup> It had been developed by a Convention composed of representatives of the EC, the EP, national governments and parliaments,<sup>50</sup> and its objective was to make the fundamental rights enjoyed by citizens at the EU level more visible. The CFREU thus assembles rights stemming from various sources, including most notably the ECHR, the ESC as well as UN and International Labour Organisation treaties. Since the CFREU was not inserted into the reformed TEU (Treaty of Nice), it was not legally binding until the entry into force of the Treaty of Lisbon, which finally awarded it the same legal value as the Treaties, but again did not incorporate it directly (Benoît-Rohmer, 2011, p. 28).<sup>51</sup>

The Treaty of Lisbon, signed in December 2007 and finally entered into force two years later, addressed some of the earlier criticism concerning the EU’s fundamental rights framework. It accorded a central role to human rights, democracy and the rule of law in the external relations of the EU (Article 21 TEU). This entailed making the High Representative of the Union for Foreign Affairs and Security Policy – together with the newly created European External Action Service – responsible for formulating and implementing the EU’s human rights policy (Theuermann, 2013, p. 33). Thus some of the discrepancies described by Alston/Weiler have meanwhile been addressed: the European Union Agency for Fundamental Rights (FRA) was established in 2007,<sup>52</sup> the CFREU (including a chapter on social rights) has been in force since 2009, there has been an EU Commissioner for Justice, Fundamental Rights and Citizenship since 2010<sup>53</sup> and the Treaty of Lisbon foresees the EU’s accession to the ECHR (Douglas-Scott, 2011, p. 646). But has the ‘paradox’ they described in the following words been solved?

On the one hand, the Union is a staunch defender of human rights in both its internal and external affairs. On the other hand, it lacks a comprehensive or coherent policy at either level and fundamental doubts persist as to whether the institutions of the Union possess adequate legal competence in relation to a wider range of human rights issues arising within the framework of the Community policies. (Alston & Weiler, 1998, p. 661)

So far, the results are ambivalent. The CFREU has not only made rights more visible for individuals, it has also forced the EU to take fundamental rights more seriously in all policy areas, and all legislative proposals have to undergo a ‘fundamental rights check’ (Sarmiento, 2013, p. 1270). Ultimately, Union legislation and administrative acts can also be struck down by the ECJ for failure to respect the

<sup>49</sup> On the origins and drafting process of the Charter see e.g. Piris (2010, pp. 147-148).

<sup>50</sup> Cf. [http://www.europarl.europa.eu/charter/composition\\_en.htm](http://www.europarl.europa.eu/charter/composition_en.htm) accessed 30 March 2015. The ‘Convention method’ was critically analysed by a number of political scientists cf. e.g. Deloche-Gaudez (2001), Pollak (2004).

<sup>51</sup> For a detailed discussion on the Charter and its implications for Union (and national) laws cf. *supra* chapter II.

<sup>52</sup> On the FRA cf. *infra* chapter III.C.

<sup>53</sup> In the new EC (2014-2019) the responsibility for fundamental rights is mainly the competence of the First Vice-President/Commissioner for Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights, Frans Timmermans (see also below).

fundamental rights guaranteed by the CFREU (Visser, 2014, p. 44; Benoît-Rohmer, 2011, pp. 28-29). Thus, Benoît-Rohmer concluded that ‘after ten years of its existence, the CFREU has become the central reference point concerning fundamental rights in the Union.’ (Benoît-Rohmer, 2011, p. 39). The CFREU cannot redress, however, all the deficits in the Union’s human rights regime and, in particular, institutional weaknesses persist. As the accession procedure to the ECHR is protracting, the EU is still the only public authority in the CoE area not subject to external control (Douglas-Scott, 2011, p. 669). Regarding external action, the Union, led by the European External Action Service, has only recently started to formulate a coherent human rights policy. This fundamental revision, which is ongoing since 2010, has led to the adoption of a new EU Strategic Framework and Action Plan on Human Rights and Democracy (Council of the European Union, 2012) by the Council in June 2012 (Theuermann, 2013).<sup>54</sup> As part of this ‘human rights package’, a Special Representative for Human Rights was also appointed in 2012 (European Union External Action, 2012). More recently, debates about strengthening the rule of law internally have started, particularly broaching the issue of closing ‘fundamental rights gaps’ of both EU internal policies and within Member States.<sup>55</sup> However, to date the EU has no fundamental right strategy and action plan on internal policies which is comparable to the Strategic Framework and Action Plan for external action. Moreover, discussions about the EU’s lack of coherence between internal and external action and within these policies persist – both in academia<sup>56</sup> and in practice, as interviews with EC and EEAS officials revealed.<sup>57</sup> As the EU’s competences have expanded during the last decade (particularly in external action), the issue of coherence across all policy fields is today even more pertinent than ever and will remain one of the Union’s biggest challenges over the next years.

## 2. The weak role of social rights in Union law

The EU’s relation to social rights has been difficult in several respects. First, the primarily economic orientation of the Community during its first decades left social issues rather on the side-line (Jääskinen, 2014, p. 1704). Therefore, the harmonisation of economic policies to the establishment of a single market was not accompanied by a similar shift of competences to the Union level with regard to social policy. As a result, the Member States are still primarily responsible for legislation in the social field and it is difficult for the Union to guarantee rights in an area where it enjoys only limited competences. Secondly, the historic dividing lines between civil and political rights and social, economic and cultural rights have resulted in a strong preference for civil and political rights in Western Europe throughout the Cold War era, even though the EU Member States have developed welfare state-models, which aim to guarantee most social and economic rights in practice. Resulting from these political prejudices, states were reluctant to recognise social and economic rights formally, whether at national or supranational levels.<sup>58</sup> This had consequences for the Union’s external policies – whether as an actor in international

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<sup>54</sup> At the time of writing, the Council was still in the process of developing a new Action Plan on Human Rights and Democracy for the years 2015-2019, based on the Joint Proposal by the EC and the HR/VP (European Commission and the High Representative of the European Union for Foreign Affairs Security Policy, 2015). The new Action Plan was finally adopted by the Council shortly before the submission of this report: Council of the European Union (2015).

<sup>55</sup> Cf. *infra* section 3. b).

<sup>56</sup> Cf. FRAME report 8.1 (Lewis et al, 2014).

<sup>57</sup> Interviews with EC and EEAS officials in Brussels in September 2014 and January 2015. Most interview partners mentioned ‘coherence’ as one of the biggest challenges for the EU’s human rights law and policy (cf. also Chapter IV below).

<sup>58</sup> In fact, several EU Member States only ratified the ESC in the 1980s or early 1990s (de Schutter, 2010, p. 102).

fora, as a dialogue partner, or as donor – where it is still struggling to fully integrate social and economic rights and to make these efforts visible (Behrmann & Zaru, 2013).<sup>59</sup>

The 1957 Treaty establishing the European Economic Community made only few references to social policy, among others to the promotion of a ‘high level of employment and of social protection’ as one of the tasks of the Community.<sup>60</sup> Soon, however, it became clear that certain social policies – which might be linked to individual social rights, such as labour standards – have a direct effect on the economic exchange among Member States and thus needed to be regulated at a European level. In many cases, these social minimum standards were established to create a ‘level playing field’ for all companies in EU Member States (de Schutter, 2010, pp. 103-105). The driving force behind the development of common European social standards was, however, more the ECJ’s jurisprudence in individual cases<sup>61</sup> (which mostly referred to equality and social protection rather than explicitly to fundamental social rights), rather than deliberate policy making (de Witte, 2005, p. 156). Overall, during the first decades of European integration, the concern for social rights remained rather a ‘by-product’ of the concern for the good functioning of the common market – the primary goal of the treaties (Benlolo-Carabot, 2012, p. 87; de Schutter, 2010, p. 96). Even worse, the four fundamental (economic) freedoms were often perceived as a risk to protective national social rights regimes, as the ECJ aimed to effectively remove all barriers hampering the free circulation of goods, services and persons (Benlolo-Carabot, 2012, p. 90; Jääskinen, 2014, p. 1706).

Only slowly was the Community provided with competences in the area of social and labour market policies, which encompassed the realisation of certain social rights. Following the ‘path of harmonisation’ – initiated with the Single European Act in 1986 – the Treaties of Maastricht (1992) and Amsterdam (1997) empowered the Community to regulate, mostly by directives, important areas such as labour standards, equality and anti-discrimination legislation or common measures to combat social exclusion (cf. e.g. Article 118 Treaty establishing the European Community as amended by the Treaty of Amsterdam).

In 1989 the Member States, except the United Kingdom, adopted a non-binding ‘Community Charter of the Fundamental Social Rights of Workers’, which laid down a minimum standard of social rights for workers that states had to guarantee (concerning labour market, vocational training, social protection, equal opportunities and health and safety at work). As de Schutter put it, this was the ‘clearest display of the wish to endow the construction of the single market with a social dimension’ although its scope was limited compared to earlier drafts (encompassing social rights as such) and it did not attribute any

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<sup>59</sup> This political aspect goes beyond the scope of this report though.

<sup>60</sup> Part One (Principles), Article 2: ‘The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.’

<sup>61</sup> E.g. *Unger v Bedrijfsvereniging voor Detailhandel en Ambachten* (1964), *Defrenne v SABENA* (1976), *Werner Mangold v Rüdiger Helm* (2005). For a summary of the rich jurisprudence in this area see Benlolo-Carabot (2012, pp. 88-92)

additional competences to the Community (de Schutter, 2010, p. 123).<sup>62</sup> The Community Charter of the Fundamental Social Rights of Workers gained little importance as a point of reference for the ECJ (Benlolo-Carabot (2012, p. 90). However, the common standards set out in it influenced the social policy programmes of the following years and became an important source of inspiration in the drafting process of the Charter of Fundamental Rights eleven years later (European Commission, 1996, p. 37).

Based on the aforementioned competences, the Union contributed to the social rights protection, for example by significantly increasing the level of anti-discrimination protection in the Member States. However, as the common market doctrine continued to prevail, and competences in the social area remained piecemeal, the EU's image as a protector of social rights remained blurred. The Treaty of Amsterdam only referred vaguely to both the ESC and the Community Charter of the Fundamental Social Rights of Workers, disappointing academics and civil society activists who had advocated for a strong commitment to social rights (de Witte, 2005, pp. 157-158).<sup>63</sup> In fact, other than in the ECHR, the ESC was not mentioned in the Treaties as a source of fundamental rights prior to the adoption of the Charter of Fundamental Rights,<sup>64</sup> nor has a possible accession of the EU to the ESC been envisaged in a treaty reform process (de Witte, 2005, p. 154).<sup>65</sup> Equally, the ECJ has never explicitly cited the ESC as one of its sources to determine the fundamental rights guaranteed as 'general principles' of Community law (de Schutter, 2010, p. 115).

The Charter of Fundamental Rights was the first time when social and economic rights were comprehensively included alongside civil and political rights in a legally binding instrument at the Union level. As much as this development was welcomed by academics and civil society, there remain certain limits to the full and equal recognition of social rights. Many of the rights under the titles 'Equality' and 'Solidarity' were inspired by the ESC, but not all rights guaranteed by the latter are equally protected by the CFREU and no reference is made to the European Committee of Social Rights as an 'authoritative interpreter' (de Schutter, 2010, pp. 135-136; Jääskinen, 2014, p. 1707). Apart from the limited scope of application of the CFREU (described above in chapter II.B.1), it also distinguishes between rights, freedoms and principles without defining precisely which of its provisions fall under which category. Still, it makes a notable differentiation in Articles 51 and 52 as regards the level of their implementation: while rights shall be 'respected' and are directly enforceable, principles shall be 'observed' and implemented by legislation (Lenaerts, 2012, p. 399). Only three articles explicitly use the term 'principle' – Article 23 (principle of equality between men and women), Article 37 (sustainable development) and Article 49 (proportionality and legality of criminal offences) – while the Explanations only give a few

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<sup>62</sup> The original quote reads as: '[...] constitue peut-être la manifestation la plus claire de cette volonté de doter la construction du marché intérieur d'une dimension sociale.' (translation by the author)

<sup>63</sup> In the Preamble to the Treaty Member States confirm '[...] their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers', leaving unclear the legal value of this 'attachment'.

<sup>64</sup> As the preamble states, '[t]he Charter reaffirms, [...], the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe [...]'.

<sup>65</sup> The accession was proposed though by the 'Spinelli project', a project to draft a European constitution by a group of MEPs led by Altiero Spinelli, in 1984 and by a Parliamentary Resolution in 1989 (de Schutter, 2010, pp. 124-125).

examples of principles<sup>66</sup> and further state that ‘[i]n some cases, an Article of the CFREU may contain both elements of a right and of a principle’ (Explanations relating to the Charter of Fundamental Rights, 2007, Article 52). This distinction, which can be explained by the drafting history of the CFREU, and in particular the opposition of some governments to the inclusion of any sort of justiciable social rights, has added a considerable element of confusion and controversy to the text (de Witte, 2005, p. 160; Lenaerts, 2012, p. 399). As the ECJ had already recognised the enforceability of certain social rights prior to the CFREU, Article 52 cannot be interpreted as generally excluding the justiciability of social rights. However, the determination of whether an article can be considered as an individual right or as mere principle, will have to be undertaken by the ECJ (Lenaerts, 2012, p. 400). Some authors suggest that principles could still be indirectly justiciable if the Union’s institutions failed to act in accordance with those principles when adopting new legislation, in order to guarantee the level of social protection already achieved (‘non-regression’) (Benlolo-Carabot, 2012, pp. 97-98; Lenaerts, 2012, pp. 400-401; Jääskinen, 2014, p. 1711). Since the entry into force of the Lisbon Treaty, the ECJ has only decided on a few cases concerning social rights, wherein it referred to the Charter. In these cases, the Court cited CFREU provisions to support its argumentation for the promotion of certain social rights already well-established in the Union’s legal order (such as non-discrimination of various grounds), but it has not yet decided on the determination of certain provisions as ‘rights’ or ‘principles’ (Benlolo-Carabot, 2012, pp. 98-99).

### **3. Lack of internal monitoring and complaint mechanisms, unclear responsibilities**

As illustrated in the previous sections, the EU human rights landscape has considerably developed over the last decade, a process triggered mainly by the Amsterdam and Lisbon Treaty reforms and the new Charter of Fundamental rights. These documents entrusted various institutions and persons with human rights responsibilities, but none has an overall coordinating function or is ultimately responsible for shaping the EU’s human rights agenda. The principle reason for this lacuna is the complex division of competences between the Union and the Member States (Douglas-Scott, 2011, p. 680).<sup>67</sup> While the Treaty of Lisbon concentrated much of the EU’s external human rights agenda around the new High Representative of the Union for Foreign Affairs and Security Policy, there is no comparable coordinating role with regard to internal fundamental rights questions.<sup>68</sup>

#### **a) The EU Agency for Fundamental Rights (FRA)<sup>69</sup>**

The lack of an overall human rights competence of the Union, and the fragmentation of responsibilities, meant that the EU had no human rights monitoring or complaint mechanism for a long time – neither

<sup>66</sup> Articles 25 (The rights of the elderly), 26 (Integration of persons with disabilities) and 37 (Environmental protection).

<sup>67</sup> Cf. also *supra* chapter III.A.

<sup>68</sup> In the new EC (2014-2019) the competences for internal fundamental rights questions (in a large sense) are split between the First Vice-President/Commissioner for Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights, the Commissioner for Migration, Home Affairs and Citizenship, the Commissioner for Employment, Social Affairs, Skills and Labour Mobility, and the Commissioner for Justice, Consumers and Gender Equality.

<sup>69</sup> On the structure and mandate of the FRA as well as its cooperation with other agencies and institutions, see [FRAME report 8.1](#) (sections 3.3.4.7, 5.1.1 and case study in Annex 1). This section will focus solely on how the FRA’s (possible) role in the EU’s internal human rights monitoring is discussed in literature.

relating to action that was taken by the Union nor by Member States. This cast a shadow on the EU's sincerity to live up to the standards it demanded from other states, in particular that adequate protection of human rights required a system ensuring compliance with agreed norms. Additionally, although the European Commission was (and still is) responsible for monitoring the compliance of candidate countries with the so-called 'Copenhagen criteria',<sup>70</sup> there is no comparable monitoring of the human rights performance of states once they are EU members ('Copenhagen dilemma') (Smith, 2013, p. 37). Alston and Weiler, in their seminal 1998 study on a genuine EU human rights policy, argued for the separation of supervisory and executory functions and proposed the development of a 'veritable Monitoring Agency, with monitoring jurisdiction over all human rights in the field of application of Community Law' (Alston & Weiler, 1998, pp. 676-677). Their idea to transform the European Monitoring Centre on Racism and Xenophobia, established in 1997, into a human rights agency gained momentum during the following years and after a lengthy negotiation process, the FRA was established in early 2007 (Regulation (EC) n° 168/2007 establishing a European Union Agency for Fundamental Rights (2007)).

Those who had hoped that the new agency would comprehensively monitor the human rights compliance of Union institutions and Member States were nevertheless disappointed by the FRA's mandate, which was strictly limited to the application of Community law (Regulation (EC) n° 168/2007 establishing a European Union Agency for Fundamental Rights, 2007, para. 8). This does not only mean that Member States' actions are only covered 'when implementing Community law' (Regulation (EC) n° 168/2007 establishing a European Union Agency for Fundamental Rights, 2007, para. 7) but – at the time of the FRA's establishment – also excluded actions under the so-called second and third pillars (common foreign and security policy, respectively police and judicial cooperation in criminal matters), which were outside Community law. The Commission's original proposal to empower the FRA (by a decision taken simultaneously with the establishment of the Agency), to pursue its activities also with regard to the 'third pillar' (cf. European Commission, 2005), was ultimately not followed by the Council. Since this was one of the most controversial issues during the debates in the Council, the Regulation was accompanied by a compromise declaration, which stated that the FRA could still operate under areas of the 'third pillar', but only upon request by a Union institution (von Bogdandy & von Bernstorff, 2009, p. 1047).

While Smith argued that limiting the FRA's competences to the scope of application of Community law was a 'significant but arguably necessary limitation' in order not to interfere with the comprehensive machinery of the CoE (Smith 2013, p. 39),<sup>71</sup> the exclusion of the human rights-sensitive activities of police and judicial cooperation in criminal matters remained problematic. As the Treaty of Lisbon communitised police and judicial cooperation in criminal matters, some authors and Member States

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<sup>70</sup> 'Any country seeking membership of the European Union (EU) must conform to the conditions set out by Article 49 and the principles laid down in Article 6(1) of the Treaty on European Union. Relevant criteria were established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995.' They include, among others, the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (European Council, 1993).

<sup>71</sup> Similarly: Benoît-Rohmer (2011, p. 33). This concern was not unfounded as some actors – particularly inside the CoE – were fearful of the competition the new agency could mean for the CoE as the primary human rights institution in Europe (von Bogdandy and Bernstorff, 2009, p. 1049). On this issue see more in detail: de Schutter (2008, pp. 509; 517-522).

argued that activities under this title were thus automatically brought under the FRA's remit (von Bogdandy & von Bernstorff, 2009, p. 1068; Tretter & Müller-Funk, 2010, p. 110). The Council did, however, once again not follow this view when it adopted the agency's Multiannual Framework for 2013-2017 (Council of the European Union 2013c): the list of thematic areas within which the FRA has to carry out its tasks, does not include police and judicial cooperation in criminal matters. While the Council Decision still refers to 'within the scope of Union law' in paragraph 3, and would thus arguably cover all areas under the Treaty on the Functioning of the European Union (the reformed EC Treaty), the list of thematic areas explicitly excludes judicial cooperation in criminal matters (Cf. Article 2 (e): 'judicial cooperation, except in criminal matters'). Nevertheless, some other sensitive areas of common Union action, such as immigration and integration of migrants, visa and border control and asylum, are listed among the FRA's thematic areas. In a declaration made at the adoption of the new Multiannual Framework, the Council at least agreed that in the context of the review of the FRA's ongoing work at that time, it would '[...] examine any proposals for amendments to the Regulation that the Commission might submit to it pursuant to Article 31(2) of the mentioned Regulation, and to consider in that context the amendment of this Decision as regards the inclusion of police cooperation and judicial cooperation in criminal matters in the list of thematic areas' (Council document 7007/13). The review of the FRA was concluded in 2013,<sup>72</sup> but as the outgoing European Commission did not make any proposals for amendments to the founding regulation, this discussion will continue during the term of the new Commission.

The FRA's mandate and its role in the Union's institutional framework are different to other Union agencies with a technical advisory function. On this account, some authors have compared its functions to that of national human rights institutions (NHRIs) (Smith, 2013, pp. 40-42).<sup>73</sup> Indeed, the FRA covers several core functions of NHRIs (cf. Annex to General Assembly Resolution 48/134 'National institutions for the promotion and protection of human rights', 1994): namely, to advise authorities; to publish reports on relevant human rights issues; to raise awareness about human rights and promote human rights education; and to cooperate with regional and international human rights organisations. However, with regard to some of these functions, its competences are limited. This includes the FRA's involvement in the legislative process (only upon request by a Union institution) or its research and advisory capacity (only in the areas specified by the Multiannual Framework unless if formally requested) (Tretter & Müller-Funk, 2010, pp. 111; 116). The agency's monitoring function is even more weakly developed. In accordance with its Founding Regulation, the FRA presents annual reports on fundamental rights issues covered by its areas of activities and can also issue reports on especially important topics, in which it evaluates the Union's and Member States' implementation of Union law. The FRA, however, cannot be addressed by individuals and has no 'quasi-judicial competences'

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<sup>72</sup> Cf. the report of the external evaluation of the European Union Agency for Fundamental Rights (European Commission, 2012) and the Council conclusions on the evaluation of the European Union Agency for Fundamental Rights adopted at the Justice and Home Affairs Council meeting on 5-6 December 2013 in Brussels (Council of the European Union, 2013b).

<sup>73</sup> The FRA's Founding Regulation also refers to the Principles relating to the status and functioning of national institutions for the protection and promotion of human rights ('Paris Principles') with regard to the appointment of independent experts to the agency's management board (Regulation (EC) n° 168/2007 establishing a European Union Agency for Fundamental Rights (2007, para. 20)), indicating a certain similarity of functions.

comparable to that of national ombudspersons, who can conclude on human rights violations by state authorities (von Bogdandy & von Bernstorff, 2009, p. 1051; Toggenburg, 2014, p. 1614). Some of these structural weaknesses were also identified as obstacles in the external evaluation report on the FRA's work. For example, several stakeholders advanced the view that the FRA 'could have a clearer position in the legislative process' and that the exclusion of the former 'third pillar' was inconsistent from a European citizens' perspective (European Commission, 2012).

***b) Ensuring internal coherence: How can the human rights compliance of EU Member States be monitored?***

As the FRA only operates in the scope of application of Community law, its analysis of the human rights situation in Member States is fragmented. With regard to the areas under its mandate, it can examine specific situations in Member States, publish its findings and indicate critical situations, but it is not authorised to 'single out' states or conclude that a certain fundamental rights violation has occurred (von Bogdandy and von Bernstorff, 2009, p. 1054).<sup>74</sup> It can be argued that prospective Member States have to undergo a human rights screening before joining the EU, which also includes the ratification of core international human rights instruments and the adaption of national legislation in line with EU requirements. Thus, external human rights monitoring of the Member States' performance could be – in parts – 'outsourced' to UN and CoE treaty bodies and/or national human rights institutions, monitoring these national obligations. Many authors argued, however, that the EU, as a value-based organisation with fundamental rights forming an integral part of its law, needed to ensure that human rights were respected in its Member States, even if the areas of concern were exclusive Member States competences (Alston and Weiler, 1998, p. 670; Greer and Williams, 2009, p. 473). So far, the specificities of the division of competences between the Union and the Member States entail that all mechanisms based on Union law are necessarily limited by the scope of the application of Union law (Kumin, 2014). Thus, debates about the need to establish any sort of robust monitoring and/or enforcement mechanism<sup>75</sup> have recurred whenever political crises or particularly concerning human rights violations have occurred in Member States.

Actions for non-compliance, to which the European Commission can resort if a Member State fails to comply with Union law ('infringement proceedings'), have been mentioned as one option in this regard, but are usually considered as too 'case-specific' to capture complex situations of multiple human rights violations (Kumin, 2014).<sup>76</sup> Another option to respond to serious human rights violations in Member States would be to utilise the mechanism introduced by the Treaty of Amsterdam, whereupon the rights of Member States can be suspended in case of a 'serious and persistent breach' or even the 'clear risk of serious breach' of the principles enounced in Article 6 (1) TEU (Treaty of Amsterdam, 1997; cf. Article 7 (1) of the amended TEU ('sanction procedure')). Introducing such a procedure against a Member State would, however, be extremely difficult both for legal/procedural and political reasons, as necessary

<sup>74</sup> The FRA would not even be formally involved in an 'Article 7 TEU-procedure' described below (Tretter & Müller-Funk, 2010, p. 112).

<sup>75</sup> With the possibility to put pressure on the Member State concerned and, ultimately, to restrict its membership rights.

<sup>76</sup> Article 258 TFEU refers to '[the failure] to fulfil an obligation under the Treaties'. The procedure is thus designed to respond to isolated and very specific acts of non-compliance with Union law.

measures to make this provision workable have never been introduced (Greer & Williams, 2009, p. 474; Kumin, 2014).<sup>77</sup>

Another possible starting point for enhancing internal monitoring, are the debates on ‘strengthening the rule of law’ in the EU. These debates were triggered by reports (also by the FRA) on an increasing number of racist or xenophobic assaults and incidents of hate speech in a number of Member States, as well as political/constitutional and judicial crises in Hungary, Romania and Bulgaria in 2012/2013.<sup>78</sup> As a result, a number of new proposals were brought forward. During the first half of 2013, the Irish Presidency of the Council launched a series of initiatives, among others a conference on strengthening fundamental rights, particularly in the justice sector, as well as regarding the fight against racism and intolerance (Irish Equality Authority et al., 2013). It also initiated an informal ad-hoc group of ‘like-minded’ states on the rule of law, which reflected on the necessary definition of rule of law, the criteria and indicators for objectively evaluating and measuring the rule of law, as well as the institutional framework of a possible mechanism in this field. On Irish invitation, the FRA participated actively in this process and dedicated its own annual symposium, in June 2013, to the promotion of the rule of law in the European Union (FRA, 2013). At the same time, the EP (European Parliament, Directorate-General for Internal Policies, 2013), the European Commission and a group of four Member States (Germany, the Netherlands, Finland and Denmark) problematised the challenges to the rule of law in some Member States and presented first ideas of an internal monitoring and compliance mechanism (Kumin, 2014; von Bogdandy and Ioannidis, 2014, p. 61). These initiatives follow a broad approach, which aims at not only strengthening human rights but also constitutional principles in general, the legality of the justice system and the fight against corruption (‘thick definition’ of the rule of law).<sup>79</sup> Nevertheless, fundamental rights are a core component of all the proposals and some of the concepts explicitly refer to reports by regional and international human rights bodies as a basis for indicators, in particular to the CoE monitoring mechanisms. In fact, it has been underlined by experts and policy-makers, in and outside the CoE, that any sort of ‘rule of law’ mechanism must not duplicate work already done at the level of the CoE.<sup>80</sup>

In conclusions, adopted at the Justice and Home Affairs Council in June 2013, the Council recognised the importance of respecting the rule of law as a prerequisite for the promotion of human rights and called on the Commission ‘[...] to take forward the debate in line with the Treaties on the possible need for and shape of a collaborative and systematic method to tackle these issues’, ensuring the participation of all stakeholders and making use of existing mechanisms (Council of the European Union, 2013a). In addition, the EP called on the Commission to immediately set up a ‘new Copenhagen mechanism’ to monitor compliance with the fundamental rights and values of the Union, in an objective manner

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<sup>77</sup> *Alston/Weiler* had suggested in literature a series of institutional arrangements, which have not been followed by policy makers (Alston & Weiler, 1998, p. 696).

<sup>78</sup> For more information on these ‘rule of law’-debates and suggestions for possible mechanisms see von Bogdandy and Ioannidis (2014), Szklanna (2014).

<sup>79</sup> On conceptions of the ‘rule of law’ see [FRAME report D 3.2](#) (Timmer et al, 2014).

<sup>80</sup> Szklanna discussed these proposals from a CoE perspective (Szklanna, 2014).

(European Parliament, 2014).<sup>81</sup> This includes the set-up of a ‘Copenhagen Commission’ with a strong role for the FRA (whose mandate would need to be amended) (ibid, para. 11). Following these invitations, the Commission presented its proposals in March 2014 (European Commission, 2014). Based on its competences as ‘guardian of the Treaties’, it proposed a preventive three-stage process within the current legal framework of the Treaties. The main aim of this process would thus be to respond quickly to systemic threats to the rule of law in Member States, before the conditions for activating a procedure foreseen in Article 7 TEU were met. According to the proposed model, the Commission would first make a thorough assessment if there was a systemic threat to the rule of law in a Member State, based on the information received from recognised institutions, such as the FRA and CoE bodies. If the Commission concluded on the existence of such a threat, it would enter into a dialogue with the Member State concerned and could issue, in a second stage, a recommendation, which would also set a time limit for solving the indicated problems. In a third step, the Commission would monitor the Member State’s follow-up to the recommendation issued and, only if there was no satisfactory follow-up within the time limit set, would it assess the possibility of activating the procedures set out in Article 7 TEU. As logical as the proposed mechanism seems in principle, the proposed definition of the rule of law – a non-exhaustive list of principles derived from case law of the ECJ, the ECtHR and CoE documents – remains vague and it is thus also unclear what would trigger the start of the mechanism. This could reinforce the fear of some Member States that such a mechanism would be unfairly applied and could therefore entail their rejection of the proposal. In addition, the actions to be taken are very soft, and also leave a lot of discretion to the Commission and the Member States on how to address (and remedy) the situation of concern. At the time of writing this report, the Council had not formally followed-up on this EC communication. However, it adopted conclusions on ensuring respect for the rule of law on 16 December 2014, in which it decided to establish an annual dialogue between all Member States on the Rule of Law (Council of the European Union, 2014).

#### 4. Conclusions

Many efforts have been undertaken during the last decade to implement the EU’s commitment to human rights in practice, but the legal framework for the protection of fundamental rights in the Union remains fragmented. The failure of the Constitution for Europe and the following lengthy discussions to reach an agreement on a treaty reform have watered down some progressive ideas (such as the incorporation of the Charter directly into the treaty) and reinforced the hesitation among governments to entrust the Union with further substantial competences. As a result, the Union enjoys only limited competences with regard to the promotion and protection of fundamental rights and there is no person or institution which coordinates the various responsibilities. Despite a number of harmonised social standards in secondary law (particularly labour law standards), the protection of social rights still does not have the same value in the Union’s primary law as civil and political rights or the four fundamental economic freedoms. This is illustrated by the marginal role the ESC plays as both source and point of reference for fundamental rights interpretation. Furthermore, the unfortunate distinction between rights and principles in the CFREU, without clear definitions, has added an element of confusion to the

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<sup>81</sup> The resolution refers to the EP study on this issue cited above (European Parliament, Directorate-General for Internal Policies, 2013).

text and left room for an – inadequate – interpretation that social rights, as such, are not justiciable under the CFREU. As in the case of the CoE, this ‘social rights gap’ also contradicts the EU’s commitment to the indivisibility of all human rights it particularly stresses in external action.

The lack of EU internal monitoring and complaint mechanisms, as well as unclear responsibilities for ensuring coherence, are regularly mentioned in the literature. Surprisingly, however, there exist few in-depth analyses on these issues and few authors have suggested possible models to fill this void. As long as the EU has not acceded to the ECHR – and the process leading towards accession is likely to last longer following the ECJ’s Opinion 2/13 –, the EU will lack any external control mechanism which is easily accessible to Union citizens. To fill internal monitoring and compliance gaps, it will be necessary to reflect further on the FRA’s mandate, taking into consideration the suggestions of the external evaluation in 2013. Particular attention should be paid to the extension of the FRA’s mandate to all justice and home affairs matters, but also a possible role of the Agency in an internal human rights monitoring mechanism. With regard to ensuring the Member States’ compliance with fundamental rights and the rule of law, a first proposal drafted by the European Commission is now on the table. An in-depth discussion could probably solve the weaknesses of this proposal – in particular the missing criteria – but it will depend on the Council’s commitment whether this idea is followed-up at all. So far, Member States show little interest in giving the Union a role in assessing their national fundamental rights compliance.

## Bibliography

### 1. Legal and policy instruments

*Charter of Fundamental Rights of the European Union* (2000/2007), 2010/C 83/02.

*Conference on Security and Co-operation in Europe, Final Act* ('Helsinki Final Act') (1975).

Council of Europe (2002), *Resolution Res(2002)8 on the statute of the European Commission against Racism and Intolerance*, Adopted by the Committee of Ministers on 13 June 2002 at the 799<sup>th</sup> meeting of the Ministers' Deputies, available at <https://wcd.coe.int/ViewDoc.jsp?id=289019> accessed 17 July 2015.

Council of Europe (1970), *Resolution (70) 34*, Adopted by the Ministers' Deputies on 27 November 1970, Legal and Financial Consequences of the Withdrawal of Greece from the Council of Europe, available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=962980&SecMode=1&DocId=639864&Usage=2> accessed 17 July 2015.

Council of Europe (1950), *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by its Protocol No. 14* (European Convention on Human Rights, as amended), Strasbourg.

Council of Europe (1949), *Statute of the Council of Europe: London, 5th May, 1949*. London.

Council of the European Union (2015), *Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019*, 20 July 2015, 10897/15, available at [http://www.consilium.europa.eu/en/meetings/fac/2015/07/st10897\\_en15\\_pdf/](http://www.consilium.europa.eu/en/meetings/fac/2015/07/st10897_en15_pdf/) accessed 24 July 2015.

Council of the European Union (2014), *Conclusions of the Council of the European Union and the member states meeting within the Council on ensuring respect for the rule of law*, Brussels, 16 December 2014, <http://www.consilium.europa.eu/en/workarea/downloadasset.aspx?id=40802190993> accessed 10 July 2015.

Council of the European Union (2012), *EU Strategic Framework on Human Rights and Democracy*, 11855/12, available at [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/131181.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf) accessed 8 April 2014

Council of the European Union (2007), Council Regulation (EC) No 168/2007 of 15 February establishing a European Union Agency for Fundamental Rights 2007.

European Commission and the High Representative of the European Union for Foreign Affairs Security Policy (2015), *Joint Communication to the European Parliament and the Council: Action Plan on Human Rights and Democracy (2015-2019) 'Keeping human rights at the heart of the EU agenda'*, JOIN(2015) 16 final, [http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf) accessed 10 July 2015.

European Commission (2005), *Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union*, COM(2005) 280 final.

European Council (1993), *The European Council Copenhagen 21-22 June 1993*, available at [http://aei.pitt.edu/1443/1/Copenhagen\\_june\\_1993.pdf](http://aei.pitt.edu/1443/1/Copenhagen_june_1993.pdf) accessed 17 July 2015.

European Parliament (2014), *Resolution of 27 February 2014 on the situation of fundamental rights in the European Union 2012, 2013/2078(INI)*.

European Parliament, Directorate-General for Internal Policies (2013), *The triangular relationship between Fundamental rights, Democracy and Rule of law in the EU - Towards an EU Copenhagen Mechanism. Study* (2013), PE 493.031.

General Assembly Resolution 48/134, National institutions for the promotion and protection of human rights (1993), A/RES/48/134.

Heads of State or Government of the States participating in the Conference on Security and Co-operation in Europe (1991), *Charter of Paris for a new Europe: done at Paris on 21 November 1990*.

Praesidium of the Convention of the Charter of Fundamental Rights of the European Union (2007), *Explanations relating to the Charter of Fundamental Rights* (2007/C 303/02), Official Journal of the European Union, C 303, 14 December 2007.

*Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts* (1997), 97/C 340/01.

*Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (2007), OJ C306/01.

*Treaty on European Union*, signed at Maastricht on 7 February 1992 (1993).

## 2. Case law

*M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* (1964), Case C-75/63 [1964] ECR 347.

*Erich Stauder v City of Ulm* (1969), Case C-29/69 [1969] ECR 419.

*Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970), Case C-11/70 [1970] ECR 1125.

*Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* (1976), Case C-43/75 [1976] ECR 455.

*Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others (ERT v DEP)* (1991), Case C-260/89 [1991] ECR I-2925.

*Werner Mangold v Rüdiger Helm* (2005), Case C-144/04 [2005] ECR I-9981.

*J. McB. v L. E. (Reference for a preliminary ruling)* (2010), Case C-400/10 [2010] ECR I-8965.

*Åklagaren v Hans Åkerberg Fransson (Reference for a preliminary ruling)* (2013), Case C-617/10 [2013] ECLI:EU:C:2013:105.

*Stefano Melloni v Ministerio Fiscal (Reference for a preliminary ruling)* (2013), Case C-399/11 [2013] ECLI:EU:C:2013:107.

*Opinion pursuant to Article 218(11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties* (2014), Opinion 2/13 [2014] ECLI:EU:C:2014:2454.

*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (2005) App no 45036/98 (ECtHR, 30 June 2005)

*Decision in the case U466/11 and joined cases* (2012) VfSlg 19632/2012 (Verfassungsgerichtshof/Austrian Constitutional Court, 14 March 2012).

*Solange I* (1974), 2 BvL 52/71, BVerfGE 37, 271 (Bundesverfassungsgericht/German Federal Constitutional Court, 29 May 1974).

### 3. Literature

#### a) Journal articles

Alston, P. & Weiler, J. H. (1998), 'An Ever Closer Union in Need of a Human Rights Policy', *European Journal of International Law*, vol. 9 (4), pp. 658-723.

Benlolo-Carabot, M. (2012), 'Chapitre 2. Les droits sociaux dans l'ordre juridique de l'Union Européenne', *La Revue des droits de l'homme*, (1), pp. 84-102.

Besson, S. (2006), 'The European Union and Human Rights: Towards A Post-National Human Rights Institution?', *Human Rights Law Review*, vol. 6 (2), pp. 323-360.

Búrca, G. (2011), 'The Road Not Taken: The European Union as a Global Human Rights Actor', *The American Journal of International Law*, vol. 105, pp. 649-693.

Caflich, L. (2006), 'The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond', *Human Rights Law Review*, vol. 6 (2), pp. 403-415.

Cartabia, M. (2009), 'Europe and Rights: Taking Dialogue Seriously', *European Constitutional Law Review*, vol. 5 (1), pp. 5-31.

Costa, J. (2011), 'On the Legitimacy of the European Court of Human Rights' Judgments', *European Constitutional Law Review*, vol. 7 (2), pp. 173-182.

De Schutter, O. (2008), 'The Two Europes of Human Rights. The Emerging Division of Tasks Between the Council of Europe and the European Union in Promoting Human Rights in Europe', *The Columbia Journal of European Law*, vol. 14 (3), pp. 509-563.

Douglas-Scott, S. (2011), 'The European Union and Human Rights after the Treaty of Lisbon', *Human Rights Law Review*, vol. 11 (4), pp. 645-682.

Gerards, J. (2012), 'The prism of fundamental rights', *European Constitutional Law Review*, vol. 8 (2), pp. 173-202.

Gerards, J. (2014), 'Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning', *Human Rights Law Review*, vol. 14 (1), pp. 148-158.

- Greer, S. & Williams, A. (2009), 'Human Rights in the Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice?', *European Law Journal*, vol. 15 (4), pp. 462-481.
- Helfer, L. R. (2008), 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', *European Journal of International Law*, vol. 19 (1), pp. 125-159.
- Keller, H., Fischer, A. & Kühne, D. (2011), 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals', *European Journal of International Law*, vol. 21 (4), pp. 1025-1048.
- Kicker, R., Möstl, M. & Lantschner, E. (2011), 'Reforming the Council of Europe's Human Rights Monitoring Mechanisms', *Netherlands Quarterly of Human Rights*, vol. 29 (4), pp. 460-491.
- Klaushofer, R. & Palmstorfer, R. (2013), 'Austrian Constitutional Court Uses Charter of Fundamental Rights of the European Union as Standard of Review: Effects on Union Law', *European Public Law*, vol. 19 (1), pp. 1-11.
- Lenaerts, K. (2012), 'Exploring the Limits of the EU Charter of Fundamental Rights', *European Constitutional Law Review*, vol. 8 (3), pp. 375-403.
- Lukas, K. (2014), 'The Collective Complaint Procedure of the European Social Charter: Some Lessons for the EU?', *Legal Issues of Economic Integration*, vol. 41 (3), pp. 275-288.
- Martinico, G. (2010), 'Judging in the Multilevel Legal Order: Exploring the Techniques of 'Hidden Dialogue'', *King's Law Journal*, vol. 21, pp. 257-281.
- Morano-Foadi, S. & Andreadakis, S. (2011), 'Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights', *European Law Journal*, vol. 17 (5), pp. 595-610.
- Muir, E. (2014), 'The fundamental rights implications of EU legislation: Some constitutional challenges', *Common Market Law Review*, vol. 51 (1), pp. 219-245.
- O'Boyle, M. (2008), 'On Reforming the Operation of the European Court of Human Rights (Opinion)', *European Human Rights Law Review*, issue. 1, pp. 1-11.
- Odermatt, J. (2015), 'A giant step backwards? *Opinion 2/13* on the EU's accession to the European Convention on Human Rights', *Leuven Centre for Global Governance Studies*, Working Paper No. 150, available online at <https://ghum.kuleuven.be/ggs/wp150-odermatt.pdf>.
- Sarmiento, D. (2013), 'Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe', *Common Market Law Review*, vol. 50 (5), pp. 1267-304.
- Van den Berghe, F. (2010), 'The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?', *European Law Journal*, vol. 16 (2), pp. 112-57.
- Van Elsuwege, P. (2012), 'New Challenges for Pluralist Adjudication After Lisbon: The Protection of Fundamental Rights in a *Ius Commune Europaeum*', *Netherlands Quarterly of Human Rights*, vol. 30 (2), pp. 195-217.

Von Bogdandy, A. & von Bernstorff, J. (2009), 'The EU Fundamental Rights Agency within the European and international human rights architecture: The legal framework and some unsettled issues in a new field of administrative law', *Common Market Law Review*, vol. 46 (4), pp. 1035-1068

Von Bogdandy, A. & Ioannidis, M., (2014) 'Systemic deficiency in the rule of law: What it is, what has been done, what can be done', *Common Market Law Review*, vol. 51 (1), pp. 59-96

Visser, M. (2014), 'National Constitutional Courts, the Court of Justice and the Protection of Fundamental Rights in a Post-Charter Landscape', *Human Rights Review*, vol. 15 (1), pp. 39-51.

Weiß, W. (2011), 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon', *European Constitutional Law Review*, vol. 7 (1), pp. 64-95.

### **b) Books**

Alston, P., Goodman, R. & Steiner H. J. (2012), *International human rights: Text and materials*, Oxford: Oxford University Press

Craig, P. & de Búrca, G. (2011), *EU law: Text, cases, and materials*, 5th edition, New York: Oxford University Press.

Kirchmair, E. (2013), *Die Anwendung der Grundrechtecharta durch den Verfassungsgerichtshof*, Saarbrücken: Akademikerverlag.

Piris, J. (2010), *The Lisbon Treaty: A legal and political analysis*, Cambridge: Cambridge University Press.

Steiner, H., Alston, P. & Goodman, R. (2008), *International human rights in context: Law, politics, morals: text and materials*, 3rd edition, New York: Oxford University Press.

### **c) Book chapters**

Alston, P. (2005), 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System', in de Búrca, G., de Witte, B. & Ogertschnig, L. (eds), *Social rights in Europe*, New York: Oxford University Press, pp. 45-69.

Behrmann, C. & Zaru, D. (2013), 'The External Promotion of Economic, Social and Cultural Rights by the EU: Some Lessons for the Future', in Benedek, W., Benoît-Rohmer, F., Karl, W., Kettemann, M. C. & Nowak, M. (eds), *European Yearbook on Human Rights 2013*, Antwerp: Intersentia, pp. 113-144.

Benoît-Rohmer, F. (2011), 'La Charte des droits fondamentaux de l'Union européenne dix ans après sa proclamation', in Benedek, W., Benoît-Rohmer, F., Karl, W. & Nowak, M. (eds), *European yearbook on human rights 2011*, Antwerp: Intersentia, pp. 25-40.

Borowsky, M. (2011), 'Artikel 51', in Meyer, J. (ed), *Charta der Grundrechte der Europäischen Union*, 3rd edition, Baden-Baden: Nomos, pp. 642-667.

Bratza, N. (2012), 'The European Convention on Human Rights and the Charter of Fundamental Rights of the European Union: A Process of Mutual Enrichment', in Rosas, A., Levits, E. & Bot, Y. (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, Dordrecht: Springer, Dordrecht, pp. 167-181.

Bychawska-Siniarska, D. (2013), 'Why (and How) the Committee of Ministers Needs to Be Reformed in Order to Enhance Implementation of ECtHR Judgments', in Benedek, W., Benoît-Rohmer, F., Karl, W.,

Kettemann, M. C. & Nowak, M. (eds), *European Yearbook on Human Rights 2013*, Antwerp: Intersentia, pp. 313-322.

Cardona, T. et al (2012), 'ECtHR Jurisprudence in 2011: An Overview', in Benedek, W., Benoît-Rohmer, F., Karl, W., Kettemann, M. C. & Nowak, M. (eds), *European Yearbook on Human Rights 2012*, Antwerp: Intersentia, pp. 217-232.

Cartabia, M. (2010), 'Article 51 - Field of Application', in Mock, W. B. & Demuro, G. (eds), *Human rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union*, Durham: Carolina Academic Press, pp. 315-322.

Cassese, A., Lalumière, C., Leuprecht, P. & Robinson, M. (1999), 'Leading by Example: A Human Rights Agenda For the European Union for the Year 2000', in Alston, P., Bustelo, M. R. & Heenan, J. (eds), *The EU and human rights*, Oxford: Oxford University Press, pp. 921-927.

De Beco, G. (2012), 'Conclusion: A comparative analysis of European human rights monitoring mechanisms', in de Beco, G. (ed), *Human rights monitoring mechanisms of the Council of Europe*, Abingdon: Routledge, pp. 171-197.

De Schutter, O. (2010), 'Le rôle de la Charte sociale européenne dans le développement du droit de l'Union européenne', in de Schutter, O. (ed), *The European social charter/La Charte sociale européenne: A social constitution for Europe/Une constitution sociale pour l'Europe* (In English, with contributions in French), vol. 7, Bruxelles : Bruylant, pp. 95-146.

De Schutter, O. (2009) 'The Division of Tasks between the Council of Europe and the European Union in the Promotion and Protection of Human Rights', in Europe: Conflict, Competition and Complementarity' in Kozma, J., Nowak, M. & Schmidt, R. (eds), *Indicators and monitoring systems as preventive tools for ensuring peace and security and respect for human rights in external policy-making of the EU: Proceedings of the COST workshop "Human Rights, Peace and Security in EU Foreign Policy"*, Wien: Neuer Wissenschaftlicher Verlag, pp. 23-81.

De Witte, B. (1999), 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in Alston, P., Bustelo, M. R. & Heenan, J. (eds), *The EU and human rights*, Oxford: Oxford University Press, pp. 859-897.

De Witte, B. (2005), 'The Trajectory of Fundamental Social Rights in the European Union', in de Búrca, G., de Witte, B. & Ogertschnig, L. (eds), *Social rights in Europe*, Oxford: Oxford University Press, pp. 153-168.

Frahm, M. & Mayer, A. (2015), 'The Legal Importance and Implementation of the Charter in Austria', in Palmisano, G. (ed), *Making the EU Charter of Fundamental Rights a Living Instrument*, Leiden/Boston: Brill Nijhoff, pp. 246-275.

Gragl, P. (2015), 'The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR', in Benedek, W. et al. (eds), *European Yearbook on Human Rights 2015*, Antwerp/Vienna/Graz: Intersentia/Neuer Wissenschaftler Verlag, pp. 27-49.

Granner, G. (2013), 'Grundrechtecharta und Verfassungsgerichtsbarkeit', in Kahl, A., Raschauer, N. & Storr, S. (eds), *Grundsatzfragen der europäischen Grundrechtecharta*, Wien: Verlag Österreich, pp. 27-42.

- Greer, S. (2014), 'Europe', in Moeckli, D., Shah, S., Sivakumaran, S. & Harris, D. J. (eds), *International human rights law*, 2nd edition, Oxford: Oxford University Press, pp. 416-440.
- Harmsen, R. (2011), 'The Reform of the Convention System: Institutional Restructuring and the (Geo-) Politics of Human Rights', in Christoffersen, J. & Madsen, M. R. (eds), *The European Court of Human Rights between law and politics*, Oxford: Oxford University Press, pp. 119-143.
- Heintze, H. (2012), 'The Unique Contribution of the OSCE in the Field of Minority Protection', in Benedek, W., Benoît-Rohmer, F., Karl, W. & Nowak, M. (eds), *European yearbook on human rights 2012*, Antwerp/Vienna/Graz: Intersentia/Neuer Wissenschaftler Verlag, pp. 349-361.
- Jacqué, J.-P. (2014), 'La Cour de Justice de l'Union et l'application de la Charte dans les Etats membres: «Mehr Licht?»', in Benedek, W., Benoît-Rohmer, F., Karl, W., Kettemann, M. C. & Nowak, M. (eds), *European Yearbook on Human Rights 2014*, Antwerp: Intersentia, pp. 125-148.
- Jääskinen, N. (2014), 'Fundamental Social Rights in the Charter—Are They Rights? Are They Fundamental?', in Peers, S. (ed), *The EU charter of fundamental rights: A commentary*, Oxford: Hart, pp. pp. 1703-1714.
- Kenner, J. (2012), 'The Court of Justice of the European Union and Human Rights in 2011', in Benedek, W., Benoît-Rohmer, F., Karl, W. & Nowak, M. (eds), *European yearbook on human rights 2012* Antwerp: Intersentia, pp. 81-98.
- Kumin, A. (2014), 'Rechtsstaatlichkeit in Gefahr? Aktuelle Initiativen zur Stärkung der Grundwerte der Europäischen Union in den Mitgliedstaaten', in Benedek, W., Folz, H., Isak, H., Kettemann, M. C. & Kicker, R. (eds), *Bestand und Wandel des Völkerrechts: Beiträge zum 38. Österreichischen Völkerrechtstag 2013 in Stadtschlaining*, Frankfurt am Main: Peter Lang Academic Research, pp. 157-174.
- Möstl, M. (2012), 'Monitoring Human Rights by Council of Europe Bodies: Quo Vadis?', in Benedek, W., Benoît-Rohmer, F., Karl, W. & Nowak, M. (eds), *European yearbook on human rights 2012*, Antwerp: Intersentia, pp. 303-311.
- Rosas, A. (2013), 'The Applicability of the EU Charter of Fundamental Rights at National Level', in Benedek, W., Benoît-Rohmer, F., Karl, W., Kettemann, M. C. & Nowak, M. (eds), *European Yearbook on Human Rights 2013*, Antwerp: Intersentia, pp. 97-112.
- Szklanna, A. (2014), 'The Council of Europe's Position vis-à-vis the Proposal to Establish a "Rule of Law Mechanism" in the European Union', in Benedek, W., Benoît-Rohmer, F., Karl, W., Kettemann, M. C. & Nowak, M. (eds), *European Yearbook on Human Rights 2014*, Antwerp: intersentia, pp. 333-346.
- Smith, R. K. M. (2013), cop. 2011, 'Monitoring and enforcing fundamental rights: Can the European Union measure up against other international organisations?', in Wetzel, J. (ed), *The EU as a "Global Player" in human rights?*, London: Routledge, pp. 32-48.
- Spielmann, D. (1999), 'Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities', in Alston, P., Bustelo, M. R. & Heenan, J. (eds), *The EU and human rights*, Oxford: Oxford University Press, pp. 757-780.

Strohal, C. (2011), 'Renewal or Stagnation? The OSCE and the Protection of Human Rights After the Astana Summit', in Benedek, W. & Kettemann, M. C. (eds), *European yearbook on human rights 2011*, Antwerp: Intersentia, pp. 499-512.

Theuermann, E. (2013), 'The Review of the EU Human Rights Policy: A Commitment to Strengthened EU Action on Human Rights', in Benedek, W., Benoît-Rohmer, F., Karl, W., Kettemann, M. C. & Nowak, M. (eds), *European Yearbook on Human Rights 2013*, Antwerp: Intersentia, pp. 31-42.

Toggenburg, G. N. (2014), 'The EU Fundamental Rights Agency and the Fundamental Rights Charter: How Fundamental is the Link Between them?', in Peers, S. (ed), *The EU charter of fundamental rights: A commentary*, Oxford: Hart, pp. 1613-1626.

Tretter, H. & Müller-Funk, A. (2010), 'The European Agency for Fundamental Rights in 2009: Opportunities, Responsibilities and Prospects', in Benedek, W., Benoît-Rohmer, F., Karl, W., Kettemann, M. C. & Nowak, M. (eds), *European yearbook on human rights 2010*, Antwerp: European Academic Press, Antwerp, pp. 109-123.

Varju, M. (2013), cop. 2011, 'European Human Rights Law as a Multi-Layered Human Rights Regime: Preserving Diversity and Promoting Human Rights', in Wetzels, J. (ed), *The EU as a "Global Player" in human rights?*, London: Routledge, pp. 49-65.

Wake, D. (2013), 'Is There Life after Astana? Recent Developments in the OSCE's 'Human Dimension' in Historical Perspective', in Benedek, W., Benoît-Rohmer, F., Karl, W., Kettemann, M. C. & Nowak, M. (eds), *European Yearbook on Human Rights 2013*, Antwerp: Intersentia, pp. 337-356.

Wildhaber, L. (2011), 'Rethinking the European Court of Human Rights', in Christoffersen, J. & Madsen, M. R. (eds), *The European Court of Human Rights between law and politics*, Oxford: Oxford University Press, pp. 204–229.

Zannier, L. (2012), 'Human Rights and OSCE's Comprehensive Security Concept', in Nowak, M., Januszewski, K. M. & Hofstätter, T. (eds), *All human rights for all: Vienna manual on human rights*, Antwerp: Intersentia, pp. 210-214.

#### d) Policy and other reports

Council of Europe (2014), *Reforming the European Convention on Human Rights: Interlaken, Izmir, Brighton and beyond. A compilation of instruments and texts relating to the ongoing reform of the ECHR*, available at [http://www.coe.int/t/DGHL/STANDARDSETTING/CDDH/REFORMECHR/Publications/Compilation%20ReformECHR2014\\_en.pdf](http://www.coe.int/t/DGHL/STANDARDSETTING/CDDH/REFORMECHR/Publications/Compilation%20ReformECHR2014_en.pdf) accessed 28 May 2014.

Council of Europe/European Court of Human Rights (2012), *Research Report – The new admissibility criterion under Article 35 § 3 (b) of the Convention: case-law principles two years on*, available at [http://www.echr.coe.int/Documents/Research\\_report\\_admissibility\\_criterion\\_ENG.pdf](http://www.echr.coe.int/Documents/Research_report_admissibility_criterion_ENG.pdf) accessed 09 March 2015.

Council of Europe (2009), *Action Plans – Action Reports. Definitions and objectives*. Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights, available at <https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Inf/DH%282009%2929&Language=lanEnglish&Ver=rev> accessed 22 May 2014.

Council of Europe (2006), *Report of the Group of Wise Persons to the Committee of Ministers*, CM(2006)203, available at <https://wcd.coe.int/ViewDoc.jsp?Ref=CM%282006%29203&Language=lanEnglish&Site=COE&BackColorIntranet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864> accessed 16 May 2014.

Council of the European Union (2013a), *Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union*, JUSTICE and HOME AFFAIRS Council meeting Luxembourg, 6 and 7 June 2013, available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/137404.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf) accessed 17 July 2015.

Council of the European Union (2013b), *Council conclusions on the evaluation of the European Union Agency for Fundamental Rights*, JUSTICE and HOME AFFAIRS Council meeting, Bruxelles, 5 and 6 December 2013, available at [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/jha/139961.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/139961.pdf) accessed 13 June 2014.

Council of the European Union (2013c), *Council Decision No 252/2013/EU of 11 March 2013 establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights*, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013D0252> accessed 24 July 2015.

Douglas-Scott, S. (2014), *Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice*, U.K. Const. L. Blog, available at <http://ukconstitutionalaw.org> accessed 27 March 2015.

European Commission (2014), *Communication from the Commission to the European Parliament and the Council. 'A new EU Framework to strengthen the Rule of Law'*, COM(2014) 158 final, available at [http://ec.europa.eu/justice/effective-justice/files/com\\_2014\\_158\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf) accessed 17 June 2014.

European Commission (2013), *2012 Report on the Application of the EU Charter of Fundamental Rights*, available at [http://ec.europa.eu/justice/fundamental-rights/files/charter\\_report\\_2012\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/charter_report_2012_en.pdf) accessed 27 June 2014.

European Commission (2012), *External evaluation of the European Union Agency for Fundamental Rights*, available at [http://ec.europa.eu/justice/fundamental-rights/files/fra\\_evaluation\\_final\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/fra_evaluation_final_en.pdf) accessed 13 June 2014.

European Commission (1999), *Affirming fundamental rights in the European Union. Time to act: Report of the Expert Group on Fundamental Rights*, available at [http://bookshop.europa.eu/en/affirming-fundamental-rights-in-the-european-union-pbCE2199181/downloads/CE-21-99-181-EN-C/CE2199181ENC\\_001.pdf;pgid=y8dIS7GUWMDsR0EAIIMEUUsWb00008BR\\_Mmdd;sid=q4ng-7rouAbg\\_TN3ld-XNjN5ur-ib07rVo=?FileName=CE2199181ENC\\_001.pdf&SKU=CE2199181ENC\\_PDF&CatalogueNumber=CE-21-99-181-EN-C](http://bookshop.europa.eu/en/affirming-fundamental-rights-in-the-european-union-pbCE2199181/downloads/CE-21-99-181-EN-C/CE2199181ENC_001.pdf;pgid=y8dIS7GUWMDsR0EAIIMEUUsWb00008BR_Mmdd;sid=q4ng-7rouAbg_TN3ld-XNjN5ur-ib07rVo=?FileName=CE2199181ENC_001.pdf&SKU=CE2199181ENC_PDF&CatalogueNumber=CE-21-99-181-EN-C) accessed 24 April 2014.

European Commission (1996), *For a Europe of civic and social rights: Report by the Comité des Sages chaired by Maria de Lourdes Pintasilgo* 1996, available at [http://bookshop.europa.eu/en/for-a-europe-of-civic-and-social-rights-pbCM9796297/downloads/CM-97-96-297-EN-C/CM9796297ENC\\_001.pdf;pgid=y8dIS7GUWMDsR0EAIIMEUUsWb0000UeR\\_7DRv;sid=R6WA6v9xRsOAe](http://bookshop.europa.eu/en/for-a-europe-of-civic-and-social-rights-pbCM9796297/downloads/CM-97-96-297-EN-C/CM9796297ENC_001.pdf;pgid=y8dIS7GUWMDsR0EAIIMEUUsWb0000UeR_7DRv;sid=R6WA6v9xRsOAe)

[a9YXOgeTZ1UCsaemPiiQXY=?FileName=CM9796297ENC\\_001.pdf&SKU=CM9796297ENC\\_PDF&CatalogueNumber=CM-97-96-297-EN-C](http://www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf) accessed 25 April 2014.

European Court of Human Rights (2014), *The ECHR in Facts & Figures 2013*, available at [http://www.echr.coe.int/Documents/Facts\\_Figures\\_2013\\_ENG.pdf](http://www.echr.coe.int/Documents/Facts_Figures_2013_ENG.pdf) accessed 19 May 2014.

European Court of Human Rights (2012), *Statistics 2011 (compared to 2010)*, available at [http://www.echr.coe.int/Documents/Stats\\_annual\\_2011\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_annual_2011_ENG.pdf) accessed 19 May 2014.

European Union Agency for Fundamental Rights (2013), *Promoting the rule of law in the European Union. 4th Annual FRA Symposium, Vienna, 7 June 2013, Symposium report*, available at <http://fra.europa.eu/sites/default/files/fra-2013-4th-annual-symposium-report.pdf> accessed 17 June 2014.

European Union External Action (2012), *Stavros Lambrinidis appointed first EU Special Representative for Human Rights*, Press Release 25 July 2012, available at [http://eeas.europa.eu/top\\_stories/2012/250712\\_euenvoy\\_en.htm](http://eeas.europa.eu/top_stories/2012/250712_euenvoy_en.htm) accessed 31 March 2015.

Irish Equality Authority, Human Rights Commission, Department of Justice and Equality and European Union Agency for Fundamental Rights (2013), *A Europe of Equal Citizens: Equality, Fundamental Rights and the Rule of Law. Summary conference conclusions*, Conference held in Dublin on 9-10 May 2013, available at <http://eu2013.ie/media/eupresidency/content/documents/Europe-of-Equal-Citizens-Conference-conclusions.pdf> accessed 15 May 2014.

Lewis, T. et al (2014), *Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies*, FRAME research report Work Package No. 8, Deliverable No. 1, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 10 July 2015.

Timmer, A. et al (2014), *Critical analysis of the EU's conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law*, FRAME research report Work Package No. 3, Deliverable No. 2, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf> accessed 10 July 2015.

Woolf, H. (2005), *Review of the Working Methods of the European Court of Human Rights*, available at [http://www.echr.coe.int/Documents/2005\\_Lord\\_Woolf\\_working\\_methods\\_ENG.pdf](http://www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf) accessed 16 May 2014.

### III. Legal analysis of selected case law by the CJEU, the ECtHR and the ECSR<sup>82</sup>

#### A. Introduction

The legal literature review (chapter II) and the analysis of the reports on the Universal Periodic Review (UPR) of European Union (EU) Member States (chapter VI) highlight a number of gaps, tensions/contradictions and challenges in EU and national laws concerning the realisation of human rights.

In two areas, particular systemic deficits became evident: (a) asylum and migration law, in particular regarding the rights of migrant children; and (b) the secondary role of certain social, economic and cultural rights in EU law and possible tensions of these rights with the four fundamental (economic) freedoms. As this report cannot look into the entire case law dealing with fundamental rights implications of Union law, this chapter limits itself to case law of the Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) as well as decisions of the European Committee of Social Rights (ECSR) in these two areas and analyses the legal obstacles to effective human rights protection.

This analysis is guided by the following questions: (1) What are the differences between the human rights guarantees of the EU, the Council of Europe (CoE) and both of their Member States in these areas, and what is the relationship/hierarchy between those norms? (2) How do differences between the human rights frameworks affect the interpretation and legal balancing of the ECJ, the ECtHR and the ECSR? (3) Does the case law point at specific legal ‘human rights gaps and contradictions’ and, if so, how could those gaps be closed by European law?

#### B. EU migration and asylum law – basic principles, possible human rights gaps, contradictions, tensions, and interactions

FRAME Report D 11.1 has comprehensively mapped the EU’s law and policies in the so-called area of freedom, security and justice, including EU migration and asylum law (Engström and Heikkilä, 2014). Thus only the most important instruments and basic principles of EU migration and asylum law will be recalled here. The following sections will further explore the possible human rights gaps, contradictions and tensions of the EU’s legal framework, as well as interaction between the different legal systems (EU law, CoE framework, national laws of the Member States of both organisations) based on case law by the European Courts (ECJ, ECtHR) as well as decisions by the ECSR.

The EU Member States began to cooperate on the issue of immigration, outside the legal framework of the European Community, in the 1980s. The Schengen process, started by a group of Member States in

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1985,<sup>83</sup> aimed at the abolishment of internal border controls by the Member States. This process went hand in hand with a common system of integrated external border controls, the harmonisation of visa policies and rules for the allocation of the responsibility of processing asylum applications. Common rules on criminal justice and police cooperation supported the system, thus complementing the ‘compensatory security measures’ for the abolition of internal border controls (Peers, 2011, p. 140). The Treaty of Maastricht in 1992 added a pillar of intergovernmental cooperation in ‘Justice and Home Affairs’ (‘third pillar’) to the new Union structure, as well as a number of competences regarding visa questions, allocated to the Community (‘first pillar’). Five years later, the Treaty of Amsterdam ushered in a new era of common European migration and asylum law. The insertion of Title IIIa (‘Visas, asylum, immigration and other policies related to free movement of persons’) to Part III of the ‘Treaty establishing the European Community’ (TEC) – and thus the ‘communitarisation’ of parts of the so-called third pillar – paved the way for a common policy of the Community in the field of immigration, asylum and border control. On this new legal basis, the Community engaged in intense legislative activity regarding various aspects of (im-)migration and asylum over the following decade. Although the competences under Title IIIa (later: Title IV) of the TEC are broadly formulated, the focus of the EU’s legislative activity over the last fifteen years has been on migration control, while few common standards on immigration and residence<sup>84</sup> or on the rights of migrants<sup>85</sup> have been developed. Some of the directives and regulations adopted in this period will be dealt with in the following sections.

It is important to note though, that Denmark, Ireland and the United Kingdom are only partly bound by the Justice and Home Affairs (JHA) *acquis*, as protocols to the Treaty of Amsterdam and the Treaty of Lisbon grant various ‘opt-outs’ and ‘opt-ins’ to these states.<sup>86</sup>

The Treaty of Lisbon entered into force on 1 December 2009, bringing about the most recent fundamental change in the legal structure of the Union’s immigration and asylum law and policies. It incorporated the previous ‘third pillar’ into the Community legal order (‘first pillar’), which in turn became the new Treaty on the Functioning of the European Union (TFEU). In this way, the Treaty reunited the basic rules governing cooperation in JHA under one title. More importantly, following the Treaty’s entry into force, the European Parliament is involved as co-legislator concerning legal migration and most criminal law and policing measures. Furthermore, the ECJ has jurisdiction over all matters, except for policing and criminal law and transitional rules for pre-Lisbon ‘third pillar’ acts (Peers, 2011, pp. 42-45). Despite the full ‘communitarisation’ of JHA, this area of EU action is, however, still not

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<sup>83</sup> The Schengen Agreement, adopted in 1985, was followed by the Convention implementing the Schengen Agreement in 1990, as well as a number of further implementing measures over the years.

<sup>84</sup> Legislative actions in these areas have focused on ‘high-skilled workers’ and on long-term residents, cf. notably the Long-Term Residents Directive (2003/109/EC as amended by Directive 2011/51/EU) and the ‘Blue Card Directive’ (2009/50/EC) with the exception of family reunification (Family Reunification Directive, 2003/86/EC).

<sup>85</sup> While e.g. Council Directive 2004/81/EC aims at providing protection to victims of trafficking in human beings, Council Directive 2009/52/EC (‘Sanctions Directive’) also provides certain employment rights to irregular migrant workers but is more aimed at deterring and sanctioning the employers of irregularly staying third-country nationals.

<sup>86</sup> For details see e.g. Peers (2011, pp. 73-88).

included in the European Union Agency for Fundamental Rights' mandate, pending the amendment of the latter's founding regulation.<sup>87</sup>

By virtue of Article 6(1) of the TEU, the Treaty of Lisbon also raised the legal value of the Charter of Fundamental Rights of the European Union (CFREU) to the level of the treaties. The CFREU has thus become a veritable 'constitutional layer' to which all legislative and implementing acts of the EU (and the Member States when implementing Union law) have to live up.

In addition to the CFREU, the European Convention on Human Rights (ECHR) and the European Social Charter (ESC), also set human rights standards that European immigration and asylum law has to comply with. While the EU has not acceded to any of these instruments (yet),<sup>88</sup> all of its Member States are parties to these instruments and are therefore bound by them when implementing EU law.<sup>89</sup> Based on individual applications, the ECtHR has developed a rich jurisprudence on legitimate and forbidden inferences with individual human rights in the area of asylum and migration. This report cannot cover all aspects of this jurisprudence but will focus on those questions having the strongest connection to Union law.

The provisions of the ESC are particularly important when it comes to migrants' and asylum seekers' rights as workers or their access to public services. However, both the original 1961 Charter and the Revised ESC have a certain anomaly regarding their scope of application, compared to other human rights treaties: both specify in their appendices that foreigners are only covered by the scope of the enshrined rights if they are nationals of other Contracting Parties and lawfully resident or working regularly within the territory of the Contracting Party concerned. This does not prejudice the extension of rights to other persons though.<sup>90</sup> Based on this 'opening clause' in the appendix and the general purpose of the ESC, the ECSR has stated that the scope of persons protected by the ESC had to be interpreted in the light of the social rights at stake. Therefore, rights of fundamental importance to an individual, for instance, connected to the rights to life and dignity (such as access to emergency health care) should be extended to all persons within the jurisdiction of a Contracting Party.<sup>91</sup> While at first glance the wording of the appendices does not cover such an interpretation, any other conclusion would be at odds with the Contracting Parties' (positive) obligations under the ECHR, particularly Articles 2 and

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<sup>87</sup> Cf. chapter II of this report.

<sup>88</sup> Article 6 (2) TEU, as amended by the Treaty of Lisbon, foresees the EU's accession to the ECHR, however not to the ESC.

<sup>89</sup> Please note that Greece and the UK have not ratified Protocol No.4 to the ECHR, while Germany, the Netherlands and the UK have not ratified Protocol No. 7 (according to information provided by the Council of Europe on <http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?CL=ENG&MA=3> accessed 26 November 2014). Regarding the ESC, all Member States are either parties to the original (1961) Charter or to the revised Charter (1996) but Contracting Parties can decide if they consider themselves bound by a number of articles (cf. Part III ESC).

<sup>90</sup> See Appendix to the ESC. The appendices are an integral part of the two treaties and specify certain additions and exceptions.

<sup>91</sup> This was decided for the first time in *International Federation of Human Rights Leagues v. France* (Complaint No. 14/2003, para. 30-32). See also the ECSR's reasoning in *Defence for Children International v. Belgium*, Complaint No. 69/2011: '(...)the restriction of the personal scope included in the Appendix should not be read in such a way as to deprive foreigners coming within the category of unlawfully present migrants of the protection of the most basic rights enshrined in the Charter or to impair their fundamental rights such as the right to life or to physical integrity or the right to human dignity.' (para. 28). Both cases will be dealt with in more detail below.

3, as well as with the nature of the ESC as a human rights treaty. In a number of collective complaints,<sup>92</sup> which will be analysed in this report, the ECSR has therefore dealt with migrants' and asylum seekers' rights under the ESC, even if the persons concerned were not nationals of other Contracting Parties.

### 1. The 'Dublin system' and its implications for the human rights of asylum-seekers in the EU

Council Regulation (EC) No 343/2003 of 18 February 2003 (Dublin II Regulation), recast by Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 (Dublin III Regulation),<sup>93</sup> establishes a method for determining the Member State responsible for the examination of an application for international protection.<sup>94</sup> If none of the Regulation's other criteria prevails (e.g. in the case of minors or families, see Dublin II Regulation, Chapter III, Articles 6-14; Dublin III Regulation, Chapter III, Articles 7-15<sup>95</sup>), it is then the responsibility of the Member State whose territory the person first entered to examine the application for international protection. The intention of this Regulation was to avoid the filing of multiple applications in various EU Member States and, on the other hand, to avoid no Member State accepting responsibility for the examination of an asylum application (Mallia, 2011, p. 115). What seems to be a set of clear criteria in theory often turns out to be difficult to determine in practice, as asylum-seekers are not necessarily registered according to the 'Eurodac Regulation'<sup>96</sup> in the country where they first enter. This preliminary process of determining which Member State is responsible can leave asylum-seekers in a situation of uncertainty for several weeks and can also run counter to the obligation to decide on the application for asylum 'as soon as possible' as prescribed by the Asylum Procedures Directive (cf. Article 31 (2)).<sup>97</sup> In addition, the 'formalistic' procedure risks disregarding the asylum seekers' individual situations (e.g. state of health). The system has two inherent weaknesses: first, the entire Common European Asylum System, builds on the assumption that all Member States have asylum procedures that – as a minimum requirement – respect human rights and the principle of *non-refoulement* (Cf. Regulation (EU) No 604/2013, recital 3). Reports from a number of international (including CoE) bodies and NGOs published in recent years, evidenced, however, that it was no longer legitimate to uphold this assumption.<sup>98</sup> Second, the 'first entry'-criterion

<sup>92</sup> Please note that contrary to the mandatory state reporting procedure, the acceptance of the collective complaint procedure is optional for Contracting Parties (cf. Par IV Article D ESC of the revised ESC). As of November 2014 only 12 EU Member States (Belgium, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Portugal, Sweden) are parties to the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (cf. <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=158&CM=&DF=&CL=ENG> accessed 26 November 2014)

<sup>93</sup> Regulation (EU) No 604/2013 entered into force on 19 July 2013. Some of the case law analysed here is, however, still based on Council Regulation (EC) No 343/2003.

<sup>94</sup> In Union legal terminology 'international protection' applies to both asylum and subsidiary protection.

<sup>95</sup> The case of unaccompanied minors can be seen as a positive example, where an initial gap in the Dublin II Regulation has been filled by ways of jurisprudential interpretation (*MA and Others v Secretary of State for the Home Department*, 2013), which has subsequently led to a clarification (in the sense of the ECJ's interpretation) by the recast Dublin Regulation.

<sup>96</sup> The Eurodac Regulation establishes a central EU asylum fingerprint database: each Member State has to take the fingerprints of every applicant for asylum of at least 14 years of age promptly and has to transmit the data to the Central Unit. The Regulation was adopted specifically to assist in determining the Member State responsible for examining an application for asylum according to the 'Dublin system' (cf. Eurodac Regulation Article 1; 4).

<sup>97</sup> The ECJ has underlined in its case law (cf. *H. I. D. and B. A. v Refugee Applications Commissioner and Others*, 2013) the 'importance of expediency in processing asylum applications' (cf. para. 60 of the judgment).

<sup>98</sup> The judgement in the *M.S.S.* case provides a comprehensive collection of the most important reports concerning Greece until 2011. For a more recent description of the situation (also in other countries) see e.g. European Committee for the Prevention of

puts the burden of dealing with the bulk of applications for international protection on the Member States with external borders, in particular the Mediterranean countries. Their frequently poor reception and asylum systems have proven to be incapable of dealing with the large number of incoming asylum-seekers, leading to a disrespect of asylum-seekers' basic rights, as recognised by a number of judgements of European courts.

In a landmark judgment, *M.S.S. v. Belgium and Greece*, the ECtHR found such severe deficiencies in the Greek asylum system that they amounted to violations of Article 3 ECHR, the prohibition of torture and inhuman or degrading treatment or punishment. It noted that the systematic placement of asylum-seekers in detention was a widespread practice in Greece and that the circumstances under which the applicant in the case at issue was held in detention constituted degrading treatment. In addition the remarked that after being transferred back from Belgium, the applicant was practically left to live on the streets with no assistance by the Greek authorities. He thus had no food and no access to sanitary facilities and lived in constant fear of being attacked and robbed – a situation in which many asylum-seekers in Greece appear to find themselves, as the ECtHR noted (*M.S.S. v. Belgium and Greece*, 2011, paras. 226-234; 238; 255). It therefore also found a violation of Article 3 ECHR with regard to the applicant's living conditions in Greece.<sup>99</sup> The ECtHR's own caseload also reflected the severe deficiencies in the Greek asylum system: according to Clayton, the ECtHR had, at the time of *M.S.S.*'s application, more than 960 cases before it relating to the Dublin (II) Regulation, many of them concerning Greece (Clayton, 2011, p. 760). The recent case *AL.K. v. Greece*, which takes the *M.S.S.* judgment as a point of reference, shows that while there have been some improvements, the detention of and living conditions for asylum-seekers in Greece remain problematic. In its reasoning in this case, the ECtHR pointed to the very core of the problem, lying in the malfunctioning of the Greek asylum system, where applications or appeals proceeded very slowly and made it difficult for asylum seekers to follow their cases. Referring to the applicant's living conditions, it concluded that 'only a careful examination of the asylum application could have ended the situation in which the applicant found himself' (*AL.K. v. Greece*, 2014, para. 61).<sup>100</sup> The ECtHR thus suggested that if Greece improved its asylum system it would automatically reduce the number of persons dependent on its assistance, as applicants would receive a quicker decision about their status.

Severe deficiencies in the handling of asylum applications, including long procedures and the long detention of asylum seekers in poor conditions are, however, not limited to Greece. The ECtHR has also found violations of Articles 3 and 5 ECHR, linked to a malfunctioning of the respective asylum systems, in a number of other cases in recent years,<sup>101</sup> even if the number of cases suggests that these deficiencies

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Torture and Inhuman or Degrading Treatment or Punishment (2012), Amnesty International (2012), Report of the Special Rapporteur on the human rights of migrants, François Crépeau (2013).

<sup>99</sup> The violation of Article 3 by Greece because of the applicants living conditions is discussed in more detail below (cf. section III.B.2).

<sup>100</sup> At the time of writing, this judgement was only available in French. The translation is the author's own. The original quote reads as: '[...] la Cour estime en l'occurrence que seul un examen diligent de la demande d'asile du requérant aurait pu mettre un terme à la situation dans laquelle il s'est trouvé – et se trouve encore probablement – depuis le 16 mai 2011.'

<sup>101</sup> See e.g. *Suso Musa v. Malta* (2013) 42337/12 (European Court of Human Rights) and *Aden Ahmed v. Malta* (2013) 55352/12 or the recent Grand Chamber judgment in the case *Tarakhel v. Switzerland* described below.

might not be as systemic as in Greece.<sup>102</sup> The dysfunction of the asylum system in some Member States has serious repercussions on the common European asylum system as a whole, as other Member States cannot rely on the presumption that persons transferred can expect a fair asylum procedure in these countries.

Already in an admissibility decision taken in 2000, the ECtHR reminded EU Member States that any international agreement that they make does not absolve them from their responsibilities under the ECHR. Even though it did not conclude on a violation in the case at issue, it underlined that the United Kingdom could not automatically rely on the procedures established by the (then) Dublin Convention, but had to examine in each case if the expulsion of an asylum-seeker to another Member State would violate the ECHR (*T.I. v. United Kingdom*, 2000). This approach follows the logic of an international human rights treaty but is contradictory to the principle of mutual trust in EU law on which also the 'Dublin system' is built. The ECtHR, nevertheless, confirmed this approach in the later decision *K.R.S. v. the United Kingdom*, although— based on the available information at that time – it did not find a violation due to the transfer of the applicant to Greece (*K.R.S. v. the United Kingdom*, 2008). In 2011 however, the ECtHR ruled in the *M.S.S.* judgment that Belgium had violated its obligations under Article 3 ECHR by transferring the applicant to Greece. It argued that since the adoption of the *K.R.S.* judgement, numerous reports about the dramatic deterioration of the conditions for asylum-seekers and the de facto collapse of the asylum system in Greece had been published. The Belgian authorities must have therefore been aware of the general situation for asylum-seekers in Greece. By transferring the applicant to Greece, both knowing that he had no guarantee that his asylum application would be duly examined and that he would be exposed to detention and living conditions that amounted to degrading treatment, Belgium thus violated the *non-refoulement* principle of Article 3 ECHR (*M.S.S. v. Belgium and Greece*, 2011, paras. 344-358; 366-367). In addition, the ECtHR also found a violation of Article 13, in conjunction with Article 3, as the applicant had no effective remedy against the expulsion order (*M.S.S. v. Belgium and Greece*, 2011, paras. 385-597).

Only a couple of months after the Grand Chamber's ruling in the *M.S.S.* case, the ECJ also stated, in the preliminary ruling on two joined cases, that Member States could not rely on a conclusive but only on a rebuttable presumption that the Member State responsible according to the 'Dublin Regulation' observed the fundamental rights guaranteed by Union law. If a Member State must be aware of systemic deficiencies of the asylum procedure and the reception arrangements in another Member State, a transfer could amount to inhuman or degrading treatment, violating Article 4 of the Charter (which is identical to Article 3 ECHR) (*N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 2011, para. 123).

In the recently decided case, *Tarakhel v. Switzerland*, the Grand Chamber of the ECtHR reaffirmed the Contracting Parties' obligation to carefully examine in each case whether a transfer to another country

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<sup>102</sup> The ECtHR's Grand Chamber also noted in its judgment in the case *Tarakhel v. Switzerland* with regard to Italy '[...] although that situation is not comparable to the situation in Greece which the Court examined in *M.S.S.*, [...]' (cf. paragraph 120).

would constitute a violation of Article 3 ECHR. This is particularly significant as the ECtHR had previously denied the existence of systemic failures concerning the treatment of asylum-seekers in Italy.<sup>103</sup> In the case at issue, the ECtHR considered, however, that in view of the current reception arrangements for asylum-seekers in Italy, transferring the applicants (an Afghan couple and their six children) to Italy, without having first obtained individual guarantees from the Italian authorities, would violate Article 3. Such individual guarantees needed to include assurances that the applicants would be taken care of in a manner adapted to the age of the children and that the family could stay together (*Tarakhel v. Switzerland*, 2014, para. 122).<sup>104</sup> States can therefore not rely on an abstract assumption or general assurance that human rights will be respected by another Member State; nor can they rely on previous case law that did not find systemic deficiencies of the asylum system in the state concerned. As every person's circumstances might be different, and the conditions for asylum-seekers in other Member States might have changed, each case has to be examined on an individual basis. This precludes standardised procedures, which leave no room for individual enquiries.

As we have already seen above, the ECtHR's jurisprudence in *Tarakhel* contradicts, however, the principle of mutual trust in the legal, administrative and judicial systems of other Member States, which is not only the main basis of the 'Dublin system' but also a cornerstone of EU law as such. While in *M.S.S. v Belgium and Greece* the ECtHR found a violation by Belgium on the basis that the authorities must have known that the asylum system in Greece was deficient (an argument the ECJ followed in *N. S. and M. E. and Others*, see above), *Tarakhel* goes a step further. The ECtHR does not assume that the Swiss authorities must have known that Italy was unable to provide adequate protection for asylum-seeking families but they would have needed to examine if adequate protection would be provided in the concrete case of the applicants. Arguably this means a 'reversal of assumption' for the authorities: from 'blind' trust to a 'preliminary mistrust' in the asylum systems of other Member States.

In response to the ECtHR's and ECJ's jurisprudence, the recast Dublin Regulation provides for a subsidiary competence if the transfer to a Member State originally designated as responsible is impossible due to 'substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union' (Dublin III Regulation, 2014, Article 3 (2)). However, the recast Regulation does not include a mandatory procedure to examine the situation the person concerned can expect in the 'Member State responsible' to which he/she should be transferred.

In acknowledging the serious problems a large influx of asylum seekers can cause for the asylum systems of Member States, the recast Dublin Regulation also provides for an 'early warning mechanism' with a central role for the new European Asylum Support Office (EASO), headquartered in Malta.<sup>105</sup> It should

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<sup>103</sup> Cf. e.g. *Halimi v. Austria and Italy* (2012), *Abubeker v. Austria and Italy* (2013), *Samsam Mohammed Hussein and others v. the Netherlands and Italy* (2013).

<sup>104</sup> The ECtHR referred, among others, to Article 6 of the Dublin III Regulation, which states that '[t]he best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation.' (*Tarakhel v. Switzerland*, 2014, para. 35).

<sup>105</sup> The agency was established by Regulation (EU) 439/2010 of the European Parliament and the Council.

alert the EU if there is a concern that the functioning of the ‘Dublin system’ is ‘jeopardised as a result of particular pressure on, and/or deficiencies in, the asylum systems of one or more Member States’ (Dublin III Regulation, 2013, Article 33). However, this provision only foresees ‘soft’ measures to be undertaken as a consequence of such ‘early warnings’, such as recommendations by the EC and EASO to the Member State concerned, which could lead to a ‘preventative action plan’.<sup>106</sup> In response to increasing numbers of persons seeking protection in Europe in early 2015 and the loss of hundreds of lives of those who tried to reach Europe on dangerous routes via the Mediterranean, the European Commission issued a ‘European Agenda for Migration’ in May 2015. In this document, the EC suggested, among others, a temporary distribution scheme to relieve local reception and processing facilities. Based on a ‘redistribution key’ which takes into account criteria such as GDP, size of population, unemployment rate and past numbers of asylum seekers and of resettled refugees, persons in need of protection should be (re-)distributed among Member States to ensure a ‘fair and balanced participation’ (European Commission, 2015, p. 4). However, at the time of writing, the Council could only agree on the goal of a ‘temporary and exceptional relocation over two years from the frontline Member States Italy and Greece to other Member States of 40.000 persons in clear need of international protection’ but could not agree a concrete redistribution key (Council of the European Union, 2015). Furthermore, the Council has stressed the exceptionality of such a measure while the ‘Agenda for Migration’ underlined that the EU ‘need[ed] a permanent system for sharing the responsibility for large numbers of refugees and asylum seekers among Member States’ (European Commission, 2015, p. 4). While we can see the EU’s institutions efforts to remind Member States of their international and community obligations, and to support them in improving their asylum systems, the central weakness of the common asylum system thus remains unchanged for the time being. The unequal sharing of responsibilities puts considerable pressure on the reception and asylum systems of the Member States with external borders, bearing a high risk of violating basic rights of those persons looking for protection in Europe.

## **2. Access to basic services for asylum seekers and migrants, in particular migrant children**

Access to basic services such as housing, healthcare, education and livelihood support is often difficult for migrants<sup>107</sup> and asylum seekers present on the territory of Member States. While the Reception (Conditions) Directive (2003/9/EC) establishes minimum standards for the access to certain services for asylum seekers (e.g. education, vocational training, healthcare), case law shows that asylum seekers often face difficulties in accessing these services. Unaccompanied minors are in a particularly difficult situation as they might be more dependent on certain services (especially education and vocational training) but might need assistance from legal representatives to know about their rights and how to access them. Irregular migrants are frequently in an even more vulnerable position, as national laws

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<sup>106</sup> In its initial proposal for the recast Dublin Regulation, the EC had suggested to introduce the possibility of a ‘temporary suspension of Dublin transfers’ in a ‘particularly urgent situation which places an exceptionally heavy burden’ on a Member State’s reception capacities (Commission of the European Communities, 2008, Section VII) but this proposal did not find its way into the final Regulation.

<sup>107</sup> This section only includes case law concerning third country nationals (i.e. not EU citizens exercising their right to freedom of movement) and excludes those who qualify as ‘long-term residents’ in the sense of Directive 2003/109/EC. On the different protection levels for ‘long-term residents’ see below section III.C.2.b.

considerably limit their access to basic services and even where access is provided they might be hesitant to make use of services out of fear of being detected by the authorities.<sup>108</sup> While the ECtHR acknowledged in the case *Ponomaryovi v. Bulgaria* that states could legitimately curtail irregular migrants' access to public services (*Ponomaryovi v. Bulgaria*, 2011, para. 54), it also recognised, in its case law (including in the case at issue), that an individual's interest in having access to a certain right in a particular situation could be attributed more weight.

The following paragraphs will highlight the problems identified in case law, with the help of exemplary cases concerning access to housing, healthcare and education for asylum-seekers and (irregular) migrants. It will cover, however, only legal obstacles (i.e. if national laws exclude the access to basic services for certain groups of migrants or asylum-seekers) and does not deal with possible practical obstacles to access services, or cases where services are withheld for discriminatory reasons.

#### a) *Right to adequate housing*

Regarding the access to adequate housing, both the ECJ and the ECtHR, as well as the ECSR, have heard cases during the last years which have made obvious the obstacles of asylum seekers and (in particular, irregular) migrants in accessing this right and have clarified the minimum standards that Member States have to fulfil. The Reception Conditions Directive provides that Member States have to provide minimum livelihood subsistence to asylum-seekers as long as they are allowed to remain on the territory (Article 3 (1)). The ECJ has clarified that this means that Member States have to provide either in-kind support or financial allowances or vouchers to asylum seekers from the moment the application for asylum is filed (*Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and others*, 2014). When it intends to transfer the person concerned to another Member State, according to the Dublin Regulation, it has to provide such support until the person is effectively transferred (*Cimade et Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, 2012). If a Member State opts to provide financial allowances instead of in-kind support, these have to meet the standards foreseen by the Reception Conditions Directive, in particular 'a standard of living adequate for the health of applicants and capable of ensuring their subsistence' (Council Directive 2003/9/EC, Article 13 (2)). The Court stresses that the total amount of the allowances has to be 'sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence, enabling them in particular to find housing'. The amount must also be sufficient to allow the housing of minor children together with their parents as the best interests of the child shall be a primary consideration of the implementation of the Reception Conditions Directive, according to its Article 18 (1).

In the two cases at issue, the ECJ referred to Article 1 of the CFREU – to which the Reception Conditions Directive itself also refers (Council Directive 2003/9/EC, recital 5) – and argued that the respect and protection of human dignity 'preclude[d] the asylum seeker from being deprived – even for a temporary period of time [...] – of the protection of the minimum standards laid down by that directive' (*Cimade et Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des*

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<sup>108</sup> For details on these issues see e.g. European Union Agency for Fundamental Rights (2011a); European Union Agency for Fundamental Rights (2011b)

*Collectivités territoriales et de l'Immigration*, 2012, para. 56). This interpretation reinforces the Directive's aim to harmonise reception standards while leaving it to the Member States' authorities (or ultimately courts) to determine the necessary level of subsistence according to the housing situation in the state concerned. Only indirectly but not less importantly, it therefore underlined that these minimum standards are so important for human dignity that Member States have to fulfil them, notwithstanding any difficulties they may face in accommodating asylum seekers (as with Belgium in the *Saciri* case). In addition, the ECJ also stated that, in accordance with the 'best interests of the child', family unity needs to be preserved during the asylum procedure. This interpretation suggests that a separation of minor children and parents would only be permissible if this separation were in the best interest of the child and that Member States could not invoke any other (possibly logistic) reasons. It therefore gives a very narrow meaning to the respective 'if appropriate' and 'as far as possible'-clauses in the Reception Conditions Directive.<sup>109</sup>

In a first decision concerning access to accommodation for irregular migrant children, the ECSR held in 2009 that Article 31 (2) (prevention and reduction of homelessness) required States Parties to provide adequate shelter for as long as children were under their jurisdiction as '[a]ny other solution would run counter to the respect for their human dignity and would not take due account of the particularly vulnerable situation of children' (*Defence for Children International (DCI) v. the Netherlands*, 2009, para. 64). Access to housing is, however, not only an important right in itself but is in many cases also essential to access further rights, including procedural rights in the asylum procedure, where authorities often require a permanent address. This close link was demonstrated in a case against Belgium by the same NGO, concerning the saturation of accommodation services for unaccompanied minors and irregular migrant families with minor children (who are also entitled to material assistance under Belgian law) (*Defence for Children International (DCI) v. Belgium*, 2012). The ECSR found that due to the lack of reception places, Belgium had failed to take the 'necessary and appropriate measures to guarantee the minors in question the care and assistance they need[ed] and to protect them from negligence, violence and exploitation [...]' thereby violating Article 17 (1) of the ESC (*Defence for Children International (DCI) v. Belgium*, 2012, para. 82). The ECSR thus followed the complainant's argument that the lack of accommodation hindered the minors' effective access to their right to appropriate social, legal and economic protection. Furthermore, the incapacity to provide housing for a significant number of minors exposed those children to very serious physical and moral hazards, including trafficking, exploitation of begging and sexual exploitation. Therefore, it also found in this case a violation of Article 7 (10), the right of children and young persons to protection, in particular against physical and moral hazards.

Prior to these cases, the ECtHR had ruled on the conditions under which the ECHR obliged Contracting Parties to provide housing assistance to asylum seekers present on their territory. In the case *Muslim v. Turkey* the Court stated that Article 8 did not oblige states to provide financial assistance to refugees to

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<sup>109</sup> Cf. Article 8 ('Member States shall take appropriate measures to maintain as far as possible family unity as present within their territory, if applicants are provided with housing by the Member State concerned. [...]') and Article 14 (3) Reception Conditions Directive ('Member States shall ensure, if appropriate, that minor children of applicants or applicants who are minors are lodged with their parents or with the adult family member responsible for them whether by law or by custom.')

allow them to maintain a certain standard of living.<sup>110</sup> By further elaborating that the applicant in this case was not in such a state of necessity that his situation was no longer viable, but rather that his situation was comparable to less well-off citizens, it already indicated when states would be obliged to support asylum seekers. Indeed, the landmark *M.S.S.* judgment four years later recognised that a state's indifference towards an asylum seeker's living conditions could amount to a violation of Article 3 ECHR in particularly serious cases. The authorities' inaction in this case showed a lack of respect for his dignity, which amounted to humiliating treatment and – combined with the prolonged uncertainty in which he had remained – attained the level of severity required to fall within the scope of Article 3 (*M.S.S. v. Belgium and Greece*, 2011, para. 263).<sup>111</sup> In comparing this case to the *Muslim* case, the ECtHR also referred to the Reception Conditions Directive and argued that the obligation to provide accommodation and decent material conditions to impoverished asylum-seekers had entered into positive law that had to be respected by the Greek authorities (*M.S.S. v. Belgium and Greece*, 2011, para. 250). This interpretation of state obligation became a reference point for both national jurisdictions and further cases before the ECtHR. Based on this judgement, the ECtHR ruled, for example, in the case *Rahimi v. Greece* that the applicant, as an unaccompanied minor in an irregular situation in an unknown country, undoubtedly belonged to the group of most vulnerable persons in society. The Contracting State thus had a particular duty to protect him and take care of him, arising from the positive obligations of Article 3 ECHR (*Rahimi v. Greece*, 2011, para. 87). By not providing the applicant (once released from immigration detention) with any accommodation, means of subsistence or protection against violence and exploitation, Greece therefore clearly violated its obligations under this article.

The analysis of case law regarding the right to adequate housing conducted in the previous paragraphs shows that despite different legal bases, the ECJ, ECtHR and ECSR arrive at similar conclusions. In the absence of a provision recognising the right to housing or an adequate standard of living in the CFREU or other EU primary law, the ECJ uses the respect for human dignity as a baseline standard; Member States have to provide such support that allows the individuals to lead dignified lives. This is similar to the case law of the ECtHR, which has argued that particularly adverse living conditions constitute inhuman or degrading treatment, in the sense of Article 3 ECHR, and thus a violation of the positive aspect of this provision. Even though the explicit guarantee of a 'right to housing' by the ESC would arguably allow for a wider interpretation of this right by the ECSR, the ESC's limitation with regard to non-citizens has led, in the cases analysed, to a very similar interpretation in substance. The ECSR has thus also portrayed the right to housing as an indispensable right for the fulfilment of other important rights, such as the social, legal and economic protection of minors. The case law regarding the right to adequate housing can thus be seen as an example which illustrates the indivisibility of civil and social rights – even when a certain right is not explicitly guaranteed, its scope could be indirectly protected by another (civil) right. In this sense the ECJ's and ECtHR's judicial interpretation has filled a gap that existed in the CFREU and ECHR.

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<sup>110</sup> In this case the ECtHR refers to an older case decided by the former European Commission of Human Rights, which already spelt out this principle (cf. *Ulf Andersson and Monica Kullman v. Sweden* no 11776/85).

<sup>111</sup> For a more detailed analysis of the judgement, particularly also the aspect of the applicant's living conditions in Greece, see e.g. Clayton (2011).

However, judicial interpretation can only fill, to a limited extent, certain legislative gaps in individual cases, while it is the obligation of Member States/Contracting Parties to address systemic gaps in practice – such as inadequate reception conditions for a high number of asylum-seekers.

### *b) Access to healthcare*

With regard to the right to healthcare, the ECSR held, in the case *FIDH v. France*, that as a prerequisite for the preservation of human dignity, health care was such an essential right that the denial of medical assistance to foreign nationals was contrary to the ESC, even if the persons concerned were irregularly staying (*International Federation of Human Rights Leagues v. France*, 2004, paras. 31-32). In the case at issue however, it differentiated between the general right to social and medical assistance (Article 13) and the more far-reaching right of children and young persons to social, legal and economic protection, pursuant to Article 17. As the French health system covered treatment in case of emergencies and life-threatening conditions of irregular migrants, and because certain further costs could be covered once an uninterrupted stay of more than three months can be proved, the ECSR decided that France did not violate Article 13. Regarding minors, it referred to the Convention on the Rights of the Child, which inspired Article 17 of the Revised ESC, and argued that this right provided a general right to care and assistance. Since medical assistance was only available to minors in case of emergency or after a certain period of time, French law violated the right of irregular migrant children to (health)care and assistance (*International Federation of Human Rights Leagues v. France*, 2004, paras. 36-37).

In the cases *Médecins du Monde v. France* and *DCI v. Belgium*, the ECSR equally underlined the right of children to healthcare, even when they were irregularly staying. It stated that whenever ruling on situations where the interpretation of the ESC concerned the rights of a child, it considered itself bound by the principle of the 'best interest of the child' stemming from the Convention on the Rights of the Child (*Médecins du Monde – International v. France*, 2012, para. 141). This principle requires states to take all necessary measures to make healthcare accessible for all children present on its territory and to address the specific health problems of disadvantaged children (*Médecins du Monde – International v. France*, 2012, paras. 143-144).<sup>112</sup> In *DCI v. Belgium*, the ECSR concluded that the lack of accommodation for unaccompanied minors or those staying irregularly with their families in Belgium forced many of them to live on the streets. This situation exposed them to increased threats to their health and physical integrity, whilst rendering their access to the health system very difficult (*Defence for Children International (DCI) v. Belgium*, 2012, para. 116-118). It therefore found a violation of Article 11 (1) and (3) of the ESC. Similarly to the *FIDH* case, it did, however, not find a violation of Article 13 (right to social and medical assistance) because of the existence of a form of medical assistance guaranteed by law (which entitled migrant minors to medical assistance on the same basis as the country's nationals) and due to a lack of evidence showing serious shortcomings of this system. Even though there might be many difficulties for the practical implementation of this urgent medical assistance, Belgium could not

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<sup>112</sup> If children are by law entitled to (certain) healthcare measures but cannot access them in practice due to practical hurdles, the state equally fails to provide effective access for children.

be considered as having failed to take the necessary measures (*Defence for Children International (DCI) v. Belgium*, 2012, paras. 129-132).<sup>113</sup>

The lack of cases concerning the access to healthcare of regularly staying third-country nationals and/or adult asylum-seekers before any of the three European bodies could be an indicator, however, that in these cases states provide at least some basic legal entitlements.<sup>114</sup>

### c) *Right to education*

The right to education has a special status in the European human rights system, as all three major human rights instruments (ECHR, ESC, CFREU) guarantee this rights without any stated limitations. The ECtHR has confirmed this special position of the right to education in the case *Timishev v. Russia*, concerning the refusal of access to school for the children of a Chechen father who had lost his residence status in another Russian republic. The Court underlined that the right to education played such an important role in a democratic society that a restrictive interpretation would not be consistent with the aim and purpose of this right. Referring also to other international instruments, such as the International Covenant on Economic, Social and Cultural Rights or the Convention on the Rights of the Child, it thus ruled that without any doubt the right to education guaranteed access to primary education (*Timishev v. Russia*, 2005, para. 64). Similarly, in the case *Ponomaryovi v. Bulgaria*, the Court underlined that it regarded the education differently than other public services, not only because it is a right directly guaranteed by the Convention, but also because it served broader societal functions in democracies (*Ponomaryovi v. Bulgaria*, 2011, para. 55). In the case at issue, it also recognised that in the ‘knowledge-based’ societies of today, not only primary education but also secondary education played an ‘[...] ever-increasing role in successful personal development and in the social and professional integration of the individuals concerned’. Under particular circumstances (in the case at issue, the state had no substantive objection to the applicants remaining in Bulgaria as they had arrived as children and were fluent in Bulgarian), Contracting Parties might thus be obliged to provide (free) secondary education to irregular migrants on an equal footing to its nationals (*Ponomaryovi v. Bulgaria*, 2011, paras. 57-64).<sup>115</sup>

Similar to the ECtHR’s reasoning, but going beyond it in substance, the ECSR held in the case *Médecins du Monde v. France* that access to education was so ‘[...] crucial for every child’s life and development’ that all children, whatever their status, enjoyed the right to free primary and secondary education, guaranteed by Article 17 (2) of the Revised ESC. That provision also required states parties to encourage regular attendance at schools, entailing that the educational system has to be accessible and effective in practice, particularly for disadvantaged children (which might require the state to take special measures for the profit of these children) (*Médecins du Monde – International v. France*, 2012, paras. 128-132).

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<sup>113</sup> On the practical difficulties to access social care and assistance due to the lack of accommodation, see above the paragraph on the right to housing.

<sup>114</sup> Through research via the databases of the two courts and the list of collective complaints of the ECSR no cases concerning the violation of the right to access to healthcare of these groups could be found (as of 16 December 2014).

<sup>115</sup> The ECtHR did not specify whether Bulgaria could legitimately deprive all irregularly-residing aliens of educational benefits, such as free secondary education, but stressed that under the specific circumstances of the applicants there was no legitimate justification (violation of Article 14 taken in conjunction with Article 2 of Protocol No. 1).

### 3. The 'Return Directive' – an example of interaction between EU law and the legal systems of the Member States

The return of persons who have been denied refugee status or who are irregularly residing in the EU to their countries of origin (or their former countries of residence) is a particularly human rights-sensitive action. While deportation in itself might constitute a violation of the *non-refoulement* principle (Article 3 ECHR, Article 4 CFREU), it could also interfere with the right to private and family life. Lastly, also the return process could lead to further interferences with a person's human right to liberty and security, especially if the person is held in detention pending deportation. The following analysis focuses on the ECJ's case law on the Return Directive (2008) and aims to identify the main human rights gaps and challenges of the legal regime for returning irregularly staying third-country nationals. It also highlights the interactions between EU law and the legal system of the Member States in the application of these rules, in particular the positive and negative influences regarding the protection of human rights.

The Return Directive was adopted in 2008, after a lengthy negotiation process, and can be seen as an example of how EU legislation has established a common legal basis for a whole area of migration control that was previously governed by very diverse national rules and practices.<sup>116</sup> Opinions on the Return Directive have been very critical in the European Parliament and among civil society representatives, but also internationally (Baldaccini, 2010, p. 135-136).<sup>117</sup> This criticism focused not only on the 'spirit' of the directive, which reinforced migration control policies, but also on some particular provisions concerning the detention of irregular migrants and re-entry bans. Although the Directive allows detention only for facilitating removal, and for the shortest time possible, the maximum period of detention which it established – six months, which can be extended to 18 months in exceptional cases<sup>118</sup> – was criticised as being excessive in relation to the individual right to liberty (Baldaccini, 2010, p. 130). In fact, the establishment of a maximum period beyond which detention cannot be justified in any case showed both progress (as national law in nine Member States did not lay down a maximum time limit for pre-removal detention before), as well as a deterioration (as the majority of periods established previously by national laws had been shorter).<sup>119</sup>

As its title indicates, the Directive's main aim is to establish common standards and procedures for returning irregularly staying third-country nationals. Member States are therefore only allowed to depart from the Directive's rules if explicitly authorised by the text.<sup>120</sup>

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<sup>116</sup> For details on the development of this directive and its possible human rights implications see e.g.: Canetta (2007).

<sup>117</sup> Criticism was also voiced by a common statement of 10 UN special procedures mandate holders in a joint letter to the Presidency of the Council of the European Union (Office of the High Commissioner for Human Rights, 2008).

<sup>118</sup> Pursuant to Article 15 paragraph 6, Member States May extend the period 'for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to (a) a lack of cooperation by the third-country national concerned, or (b) delays in obtaining the necessary documentation from third countries.'

<sup>119</sup> For details see European Union Agency for Fundamental Rights (2010, pp. 31-35). According to this report, the periods ranged from 32 days in France or 60 days in Spain to 20 months in Latvia or two years in Romania. Fifteen Member States had a maximum period of detention of between one and twelve months.

<sup>120</sup> In the case *El Dridi*, which will be dealt with below, the ECJ recalled that while Article 4 of the Directive allowed States to adopt or maintain more favourable provisions, provided that they were compatible with it, no rule allowed them to apply stricter standards. (Raffaelli, 2011, p. 480)

Early cases decided by the ECJ mostly relate to questions concerning the maximum length of detention and the permissibility of criminal charges (including prison sentences) solely on the grounds of irregular entry or stay. Both questions relate to fundamental human rights of migrants: their right to liberty, as well as procedural safeguards in the event of expulsion, guaranteed by the ECHR and the CFREU as well as (indirectly through procedural guarantees) by the Directive itself.

The ECtHR, however, has already cited the ‘Return Directive’ as part of ‘applicable law’ in a number of cases,<sup>121</sup> but it has not to date heard comparable cases concerning the length of detention or the legitimacy of criminal procedures against irregular immigrants. Given the more general wording of the ECHR as a human rights instrument – compared to the detailed rules of ‘technical’ legislation such as the Return Directive – the cases concerning detention pending deportation before the ECtHR usually relate to the lawfulness of detention as such or the detention conditions.

#### *a) The maximum length of detention pending deportation and its human rights implications*

In *Kadzoev (Said Shamilovich Kadzoev (Huchbarov))*, (2009), the first case concerning the Return Directive brought before the ECJ, the latter had already clarified a number of important points regarding the maximum length of detention pending deportation, including how it must be calculated. Most importantly, it stated that once the maximum period of detention has expired, the person has to be released immediately, as the Directive does not provide any grounds for a further exceptional extension (such as on grounds of public order and public safety as argued by Bulgaria in the case at issue). This interpretation follows from a careful reading of Article 15 (6) of the Directive and forces the Member States to make every effort to conduct return procedures as quickly as possible. The judgment is thus strictly based on the wording of the law and the Court avoids bringing the individual’s right to liberty into play, as has been suggested by the Advocate General in his conclusions.<sup>122</sup> Apart from clarifying the basic understandings of the Directive, the judgement also (indirectly) highlights some underlying problems of the common European asylum and immigration law. In an analysis of the case, Mincheva points out that EU legislation, including the Return Directive, regulates the legal entry and stay of third country nationals, as well as the removal of irregularly staying persons, but it does not provide standards for the regularisation of a person’s status (Mincheva, 2010, pp. 368-370). Unless national law provides for solutions to such cases, this legal gap can lead to bizarre situations where irregularly staying persons cannot be removed from the territory, are released from detention and find themselves without any documents on the streets, where they cannot pursue any legal activity.

When clarifying further procedural questions concerning the extension of pre-removal detention in the case *Bashir Mohamed Ali Mahdi* (2014), the ECJ referred to those recitals in the preamble of the Directive that underline that the removal has to be carried out in full accordance with the rights of the

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<sup>121</sup> See e.g. *De Souza Ribeiro v. France* (2012), *Aden Ahmed v. Malta* (2013), *M.A. v. Cyprus* (2013).

<sup>122</sup> Contrary to the Court, Advocate General Mazák explicitly referred to Article 5 ECHR. According to him, the compulsory detention of Mr. Kadzoev constituted a deprivation of liberty which could only be justified (in line with the ECtHR case law) as long as national authorities act with due diligence: *Said Shamilovich Kadzoev (Huchbarov) – View of Advocate General Mazák* (2009) C-357/09 PPU, para. 52.

persons concerned (*Bashir Mohamed Ali Mahdi*, 2014, paras. 38-40).<sup>123</sup> Additionally, the ECJ was asked in this case if a Member State would be required to issue an autonomous residence permit or other authorisation, conferring a right to stay to a third-country national who had no identity documents and was released because there was no longer a reasonable prospect of removal. The ECJ's answer remained cautious. While it recalled that the regulation of the conditions of stay was no objective of the Directive, it also mentioned the Member States' possibility to grant an autonomous residence permit or other authorisation to a third-country national staying irregularly on their territory (cf. Article 6 (4)). As a minimum, however, Member States were obliged to provide third-country nationals staying irregularly, but who cannot be removed, with a written confirmation of their situation (*Bashir Mohamed Ali Mahdi*, 2014, para. 88, based on recital 12 of the preamble to the directive). This interpretation confirms the gap in the Return Directive identified earlier.<sup>124</sup> While its rules should lead to swift clarification procedures concerning the status of a third-country national (and potentially the issue of a return decision), third-country nationals who cannot be removed are left in a legal limbo unless national rules provide for regularisation procedures. In a 'Communication to the Council and the European Parliament on Return Policy', published in March 2014, the European Commission expressed its intention to '(...) collect best practice, (...), to avoid protracted situations and to ensure that people who cannot be removed are not left indefinitely without basic rights and don't risk being unlawfully re-detained' (European Commission, 2012, p. 8). However, at the time of writing, no document to this effect had been published.

#### ***b) The legitimacy of criminal sanctions in relation to the Return Directive***

Criminal sanctions for the breach of laws regulating the entry or stay on the territory of the Member States are outside the scope of the Return Directive. Nevertheless, the ECJ was also called to clarify, in a number of cases, the relationship between the Return Directive and national criminal laws, which could contravene – in the view of the referring courts – the aim and purpose of the Directive. Indirectly, the Return Directive thus affected national criminal provisions in two ways. On the one hand, a number of Member States introduced new criminal sanctions for irregular entry or stay in an attempt to circumvent the application of the Return Directive<sup>125</sup> and, on the other hand, the ECJ ruled that most of the criminal sanctions (newly or already previously established by Member States) were incompatible with the aim of the Directive, at least if they entailed a prison sentence.

In the case of *El Dridi* (2011), for example, the ECJ ruled that national provisions criminalising non-compliance with a return decision and sanctioning it with a prison sentence were not in compliance with the purpose of the Directive. While Member States were in principle free to impose criminal sanctions aimed at dissuading (further) irregular stay on the territory, they may not apply rules, which could jeopardise the achievement of the Directive's objectives. As the execution of a prison sentence for irregular stay would, however, prolong the irregular stay, such a criminal sanction runs counter to the Directive's main aim, namely to ensure an effective (and swift) return policy. Instead, Member States

<sup>123</sup> Referring to recitals 2, 6 and 11 of the preamble.

<sup>124</sup> Cf. above the difficulty of this question raised in connection of the *Kadzoev* case.

<sup>125</sup> Cf. e.g. the case of Italy (state concerned in *El Dridi*): Favilli (2009, pp. 1117-1118).

must pursue their efforts to enforce their original return decision (*Hassen El Dridi, alias Karim Soufi – reference for a preliminary ruling*, 2011, paras. 52-58).

While the *El Dridi* case concerns criminal provisions relating to non-compliance with a return decision, in the case *Achughbabian* (2011) the ECJ had to examine the compatibility of the Directive with provisions criminalising any form of irregular entry or stay. Article 2(2)(b) of the Directive allows Member States to exclude third-country nationals ‘who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law (...)’ from the scope of application of the Directive. A number of Member States (including France in the case at issue) had criminalised irregular entry or stay and – once an expulsion decision was imposed as criminal sanction – argued that the Return Directive was not applicable. In its judgment, the ECJ clearly stated, however, that this exception may only be applied to third-country nationals who had committed crimes unrelated to their immigration status; otherwise, the Directive would be deprived of its purpose and binding effect (*Alexandre Achughbabian v Préfet du Val-de-Marne*, 2011, para. 41).

As in *Kadzoev*, the ECJ opted for a formal reasoning in its *Achughbabian* and *El Dridi* judgements, based on the Directive’s primary aim of ensuring effective return policy, without taking into account its secondary aim, the protection of the fundamental rights of persons subject to return procedures. Again, the Advocate General highlighted a different approach in *Achughbabian*: irregularly staying third country nationals have the right to a return procedure conducted in the way prescribed by the Directive, which implies that their liberty can only be limited under particular conditions (*Alexandre Achughbabian v Préfet du Val-de-Marne*, 2011, para. 28).

After *El Dridi* and *Achughbabian* had clarified that a provision criminalising irregular stay may be neither applied during nor before a return procedure, the case *Filev and Osmani* (2013) raised, among others, the question under which circumstances a criminal sanction for irregular stay was permissible once the return procedure is complete. In the two cases at issue, the applicants had been subject to removal orders whose effects were not limited in time, but had, at a later stage, re-entered Germany and were indicted for unlawful entry and illegal stay. The ECJ ruled that, in accordance with Article 11 (2) of the Directive, an entry ban should not exceed five years (except for serious public policy or security reasons). Once five years have elapsed, Article 11 (2) precluded the application of criminal sanctions for breach of an entry ban (*Staatsanwaltschaft Traunstein v Filev and Osmani*, 2013, paras. 29-41). The ECJ has thus considerably limited the application of criminal sanctions in connection with return procedures; in the ECJ’s view, criminal sanctions are only permissible once a return procedure is concluded and even then with limitations (e.g. not, if the re-entry ban is no longer valid).

This brief analysis of exemplary cases reveals the complex effects that common legislation in the area of ‘migration control’ have had on the human rights of the individuals subject to it. The Return Directive has set basic procedural rules, which outlawed practices previously common in some Member States and sanctioned by national law, in particular long periods of detention (and thus deprivation of liberty) or a lack of effective remedies against detention or expulsion orders or re-entry bans. Consequently, the ECJ’s jurisprudence further remedied some of the human rights violations related to the mal- or non-application of the Directive (in particular deprivation of liberty, right to private and family life,

procedural guarantees), by clarifying the meaning and scope of the Directive's key provisions. However, in some Member States the implementation of the Directive into national law has led to more restrictive rules, as well as to attempts to circumvent its application. Furthermore, both the Directive itself and the ECJ's jurisprudence fail to answer a number of human rights concerns related to the common return regime. In particular, the Directive leaves a considerable margin of appreciation to the Member States in determining when detention is justified and for how long. This indeterminacy could lead to cases of unjustified deprivation of liberty, especially if persons are held in detention over longer periods. Furthermore, the Directive's strong focus on the enforcement of the return decision ignores the situation of persons who are irregularly staying in a Member State but who cannot be removed and might find themselves deprived of any social or economic rights, such as access to the labour market, housing or healthcare.

### **C. Economic, social and cultural rights – gaps, tensions and contradictions in the European human rights system**

Another area of interactions, tensions and gaps identified in this report is the field of economic, social and cultural rights (ESCR). Two perspectives are taken to analyse tensions and gaps here: the internal dimension of the EU – ESCR as implemented by the Member States and the EU institutions internally; and the external dimension – the EU's interaction with the CoE human rights protection mechanisms, in particular the European Social Charter (ESC).

As amply described in the Legal Literature Review (chapter II), the imbalance between civil and political and economic, social and cultural rights in Europe and globally has several explanations. First, the historic divide between the two sets of rights dates back to the era of the Cold War and has not been surmounted to this day. Secondly, different levels of implementation between the two sets of rights persist. While civil and political rights are in principle seen as 'fully-fledged' judiciable rights, the misconception of ESCR being only (partly) programmatic in nature persists, and is also reflected in the EU Charter of Fundamental Rights.<sup>126</sup> Finally, the economic integration activities of the EU have not been matched by similar efforts in the social sphere – with the notable exception of (gender) equality and anti-discrimination law.<sup>127</sup> The EU Member States still largely retain the competency for ESCR within the EU.

#### **1. The internal dimension: EU internal issues regarding ESCR**

##### **a) The EU and social rights**

Before the entry into force of the EU Charter of Fundamental Rights,<sup>128</sup> only policy documents without legally binding effect were referred to in the Maastricht Treaty (Protocol No. 14 on Social Policy, Community Charter on the Fundamental Social Rights of Workers of 1989). The adoption of the CFREU

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<sup>126</sup> In the EU Charter some rights are seen as 'principles', these are Articles 23, 25, 26, 34 (1), 36 and 37. For details see Lukas (2015).

<sup>127</sup> There is extensive analysis in this field, which can, for reasons of space, not be included in this chapter.

<sup>128</sup> The Community Charter on the Fundamental Social Rights of Workers has nevertheless been a source of inspiration for the development of the EU Fundamental Rights Charter and can serve as a reference point when it comes to the implementation of the Charter via judgments of the European Court of Justice.

enhanced *de lege* the protection of fundamental social rights within the European Union. According to its own provisions, the CFREU addresses the institutions and bodies of the European Union with due regard for the principle of subsidiarity, and the Member States only when they are implementing European Union law. The CFREU does not establish any new powers or tasks for the Community or the Union, or modify powers and tasks defined by the treaties (Article 51 of the CFREU).<sup>129</sup> With the exception of the aforementioned equality and anti-discrimination law, the European Union has a limited mandate in the area of ESCR.

The CFREU does not speak of ESCR but categorises all rights (civil and political, economic and social, and solidarity rights) under the headings ‘Dignity’, ‘Freedoms’, ‘Equality’, ‘Solidarity’, ‘Citizens’ Rights’ and ‘Justice’.<sup>130</sup> ESCR are spread across these categories, with the chapter ‘Solidarity’ containing most ESCR. The CFREU distinguishes between ‘principles’ and ‘rights’/‘freedoms’. The reasons for the distinction originate in the discussions in the Fundamental Rights Convention that developed the Charter text. Particularly in relation to ESCR, a number of Convention members insisted on a differentiation between ‘rights’, that would have a binding and directly enforceable character, and ‘principles’, which could be interpreted as guidelines rather than enforceable entitlements (Borowsky, 2011, pp. 646-647).

Thus, ‘principles’ in the CFREU are not directly enforceable as individual rights, but ‘may be implemented through legislative or executive acts (...); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not give, however, rise to direct claims for positive action by the Union’s institutions or Member States authorities’ (Convention of the Charter of Fundamental Rights of the European Union, 2007, pp. 17-35).

In addition, a number of solidarity rights refer to ‘national laws and practices’, which reflect the different levels of national implementation of ESCR.<sup>131</sup> This uneven implementation of ESCR can therefore be explained by the fact that the EU Member States have largely retained the competence for the realisation of ESCR, and the EU’s mandate remains quite limited. This is also visible in the construction of the EU Charter of Fundamental Rights. In this respect, the European Agency for Fundamental Rights notes: ‘The way (...) in which social rights are integrated in the EU Charter of Fundamental Rights reflects the existing diversity with regard to the status of social rights at national level. Consequently, their implementation will not always offer the same degree of protection as other rights’ (FRA, 2013, p. 10).

The weak position of ESCR within the EU has become particularly apparent during the economic crisis. The EU Member States took specific budgetary measures to tackle the crisis, some with severe implications for ESCR. In the following section, these actions will be examined more closely, with a specific look at the situation in Greece.

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<sup>129</sup> See also Legal Literature Review (chapter II).

<sup>130</sup> The last category ‘General Provisions’ refers to the scope, level of protection, and prohibition of abuse of the other rights and freedoms.

<sup>131</sup> This is true, for example, for Article 30 (unfair dismissal) and Article 34 (social security and social assistance).

### b) *The economic crisis*

The realisation of ESCR within the EU has been put to the test during the economic crisis, and its effects are still being felt.<sup>132</sup> One of the consequences of the crisis was increasing long-term unemployment and a deterioration of the situation of groups at risk of poverty, such as children and young adults (European Commission, DG Employment, 2012, p. 3). Evidence also suggests that labour market conditions severely deteriorated, hitting migrant families particularly hard and ‘threatening progress accomplished in recent years’ (OECD, 2009, p. 3).

In response to the crisis, the Member States undertook budget cuts and reallocations (so-called austerity measures) with serious implications for ESCR. The ECJ had to decide, on a number of occasions, on the compliance of national austerity measures with the CFREU. In the case *Polier v. Najar*, the Court was asked whether a French law violated the CFREU, ILO Convention No 150, and the ESC. The law allowed the dismissal of employees during the first year of employment, without justification in certain circumstances (*Polier v. Najar*, 2008). The ECJ held that where a legislative basis had not yet been used by the EU legislator, the situation would not fall within the scope of EU law. Although there are a number of directives on dismissal, the specific situation at hand was not covered by Union law. The ECJ concluded that it had no jurisdiction in this case. A similar position was taken in the case *Corpul Național al Polițiștilor* (2011). When asked whether the state was obliged to compensate employees for a cut in remuneration due to the economic crisis (in particular whether articles 17 and 20 of the CFREU could be applied and whether the reference to ‘public interest’ could be interpreted to include the aforementioned wage cuts), the Court said that it lacked jurisdiction to answer the question because the laws at stake did not implement EU law.

Consequently, Charter-related case law seems to show that the Charter is not an effective judicial instrument to guarantee that austerity measures are taken in compliance with social rights. Therefore, Barnard proposes a stakeholder consultation process where Member States engage ‘in appropriate discussion with interested parties prior to deciding the reforms necessary’ (Barnard, 2015, p. 276).<sup>133</sup>

The implications of this ‘governance gap’, in view of ESCR, have been particularly stark in Greece during the economic crisis and after-crisis. In a recent analysis of the situation, the International Federation for Human Rights (FIDH) and the Hellenic League of Human Rights note severe negative consequences of the crisis on ESCR in Greece: unprecedented levels of unemployment; reduction in workers’ protection, safe and healthy working conditions and collective bargaining; severe cuts in public services, social security and social protections; regressive tax reforms that contribute to deepening poverty and exclusion; a deterioration of living standards, often falling below what is considered adequate under international law; increasing homelessness; restrictions to the right to education following reductions in education budgets and teaching staff; and cuts in health-related spending (FIDH & HLHR, 2014, p. 5; see also Matsaganis, 2013, p. 34).

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<sup>132</sup> For further economic data see, for example, Saano (2014, p. 58).

<sup>133</sup> A similar suggestion has been made by the European Committee of Social Rights in Collective Complaint No. 76 against Greece. See also section III.C.2.b.

Two bailout payments were agreed between the Greek Government and the Troika (European Commission, European Central Bank and International Monetary Fund) in exchange for economic adjustment measures. In implementing these measures, decision-makers largely underestimated their impact on employment, as highlighted in the resolution of the European Parliament in March 2014 (EP, 2014, pp. 6 and 15). This seems to be partly due to a calculation error but also the result of a failure by the authorities to consider employment an essential target of the recovery activities. Not only have the Greek authorities taken measures that have seriously exacerbated the unemployment situation, but they have also failed to offer the social support needed to cope with the sharp rise in unemployment. Together with families and informal social structures, it is mostly the municipalities that have had to deal with the situation on the ground. However, as their resources have also been severely reduced, both the civil servants working in the municipalities and the local authorities do not have the capacity to cope with the situation (FIDH & HLHR, 2014, p. 21). Another severe social implication of the crisis was the reinforcement of social polarisation (Koutsogeorgopoulou et al, 2014, p. 16).

Among the EU institutions, the assessment of the human rights conformity of the austerity measures in Greece is mixed. Whereas the European Parliament and the EU Fundamental Rights Agency are (partly) critical of the impacts of austerity on ESCR, other EU institutions seem to view the measures to be in accordance with EU standards, including the EU Charter of Fundamental Rights, or simply do not apply rights-based considerations.<sup>134</sup> In the recent Commission communication on the economic crisis, social rights are mentioned only once in vague and general terms (European Commission, 2014b).

The perception of the impacts of the Greek crisis on ESCR has been quite different at the level of the CoE. Critical assessments were made by the European Committee of Social Rights in its 2013 conclusions and in a number of collective complaints regarding Greece. The next section will present an overview of this case law and will put the interaction of the EU and CoE in the field of social rights into a broader perspective.

## **2. The external dimension: the EU and the Council of Europe in interaction on ESCR**

The divergent set-up and levels of protection of the EU and the CoE systems in the area of ESCR lead to both positive interactions and tensions between the two systems.

Within the Council of Europe, the implementation of ESCR runs on two different tracks. The ECtHR's mandate for ESCR is very limited, as the ECHR contains few explicit socio-economic references. Besides the right to education and the freedom of assembly, the interpretation of the right to property to include social security benefits, and the interpretation of the right to private life to include environmental pollution and the right to the protection of health of the persons exposed to such pollution, for example, has extended the Court's mandate for ESCR to a certain degree.<sup>135</sup> Regarding all

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<sup>134</sup> For example the European Commission speaks of 'social challenges' and impacts on 'vulnerable groups' without a link to human rights considerations, see European Commission (2014a, p. 9). For an overview of anti-crisis measures throughout the EU see [http://ec.europa.eu/economy\\_finance/crisis/index\\_en.htm](http://ec.europa.eu/economy_finance/crisis/index_en.htm) accessed 20 July 2015.

<sup>135</sup> See for example *López Ostra v. Spain* (1994), *Guerra and Others v. Italy* (1998), and *Ledyayeva and others v. Russia* (2006).

other ESCR, the ESC and its monitoring body, the ECSR, are the pertinent mechanisms. Consequently, this section will focus on the ECSR.

On a number of occasions, the ECSR has dealt with the EU legal framework in its collective complaints process. This interaction has gone in two quite distinct directions. On the one hand, the Committee has referred to EU legislation, ECJ judgments and other actions of EU institutions (such as infringement proceedings initiated by the European Commission), which were relevant to its decisions on the merits, as these sources indicated violations of EU law, which were potential indicators for violations of the respective standards of the ESC. Here, the EU framework has had a positive and informative character, as regards decisions on collective complaints. On the other hand, certain legislative and policy activities by EU institutions have been found to be incompatible with the standards of the ESC and have led to violations of the Charter by state parties. Here, the EC framework collides with ESC standards and has a negative influence on compliance with the ESC.

#### *a) Positive interactions between the two systems*

In the case *European Roma and Travellers Forum v. France* (ESC, Collective Complaint No. 64/2011) on forced evictions against Roma without the provision of suitable alternative accommodation, the parties referred in particular to the French national code governing the entry and residence of foreign nationals and the right of asylum (CESEDA). The Government argued that the European Commission considered this code governing the expulsion of European Union nationals to be compatible with European Union law, in particular Directive 2004/38/EC of the European Parliament and of the Council on freedom of movement of citizens of the Union. However, the ECSR found that the administrative decisions whereby Roma of Romanian and Bulgarian origin were ordered to leave French territory where they were residents, were incompatible with the ESC because they were not founded on an examination of the personal circumstances of the individuals, did not respect the proportionality principle and were discriminatory in nature as they exclusively targeted the Roma community.

The European Commission initiated infringement proceedings<sup>136</sup> whilst demanding more proof to support France's claim that it was not deliberately targeting Roma (European Commission, 2013).<sup>137</sup> The proceedings were discontinued after an extensive exchange between the French Government and the Commission.

In *International Federation of Human Rights v. Greece* (ESC, Collective Complaint No. 72/2011), the Committee examined the effects of massive environmental pollution on the health of persons living near the Asopos River. By making explicit reference to the respective judgments of the European Court of Justice on environmental pollution in the Asopos area, the ECSR considered that 'the Government has

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<sup>136</sup> According to Article 258 TFEU, if the European Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

<sup>137</sup> See European Commission (2010). This case has also been brought before the European Court of Human Rights, and the Court found a violation of Article 8 (right to privacy) of the European Convention on Human Rights. See ECtHR, *Winterstein and others v. France* (2013).

not demonstrated that the relevant environmental rules have been fully respected in the areas concerned' (para. 142). It also referred to the ECJ case law on precautionary measures, to further substantiate the state obligation to take action 'when a preliminary scientific evaluation indicates that there are reasonable grounds for concern regarding potentially dangerous effects on human health' (para. 150). Based on the evidence before it, including the ECJ judgments, the Committee concluded that Greece was in violation of Article 11 (right to protection of health) of the ESC.

### *b) Tensions between the two systems*

#### *(1) The Economic Crisis in Greece as assessed by the European Committee of Social Rights*

The ECSR has already been confronted with the effects of the economic crisis for several monitoring cycles. In 2009 it stated that 'the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need protection the most' (ECSR, 2009). The Committee considered that even when reasons pertaining to the economic situation of a state party make it impossible for a state to maintain their social security system at the level that it had previously attained, Article 12§3 (the right to social security) requires the state party to maintain the social security system at a satisfactory level, taking into account the legitimate expectations of beneficiaries of the system and the right of all persons to effective enjoyment of the right to social security (ECSR, 1996, General observation on Article 12§3, p. 143).

In a number of collective complaints, the ECSR has considered the effects of austerity measures taken by the Greek authorities on ESCR, in particular on the right to social security (ESC, Collective Complaint No. 76/2012, No. 77/2012, No. 78/2012, No. 79/2012 and No. 80/2012). The ECSR has considered both substantial and process-related aspects of ESCR compliance.

Regarding the compatibility of any restrictions on the rights relating to social security, as a result of economic and demographic factors, with the Charter, the ECSR took into account the following criteria:

- the nature of the changes (field of application, conditions for granting allowances, amounts and lengths of allowance, etc.);
- the reasons given for the changes and the framework of social and economic policy in which they arise; the extent of the changes introduced (categories and number of people concerned, levels of allowances before and after alteration);
- the necessity of the reform, and its adequacy in the situation which gave rise to these changes (the aims pursued);
- the existence of social assistance measures for those who find themselves in a situation of need as a result of the changes made; and
- the results obtained by such changes (ECSR, General Introduction to Conclusions XIV-1, p. 11).

Taking into account the above criteria, the ECSR considered that certain reductions introduced by the Government did not amount to a violation of the ESC; particularly in relation to the restrictions

introduced in respect of holiday bonuses, and the reductions of pensions in cases where the level of pension benefits was sufficiently high. Despite this, they decided that the cumulative effect of the restrictions led to a significant degradation of the standard of living of certain groups of persons, in particular the pensioners with pensions close to or below the poverty line. The ECSR concluded that the restrictive measures at stake, which appear to have the effect of depriving one segment of the population of a very substantial portion of their means of subsistence, have been introduced in a manner that does not respect the legitimate expectation of the pensioners that adjustments to their social security entitlements will take account of their vulnerability, settled financial expectations and ultimately their right to enjoy effective access to social protection and social security (ESC, Collective Complaint No. 76/2012, paras. 73-74).

Even taking into account the particular context in Greece created by the economic crisis and the fact that the Government was required to take urgent decisions, the ECSR considered that the Government had not conducted the minimum level of research and analysis into the effects of such far-reaching measures and their impact on vulnerable groups in society. Neither had the Government discussed the available studies with the organisations concerned, which represent the interests of many of the groups most affected by the austerity measures (ESC, Collective Complaint No. 76/2012, para. 79). And even though the Troika imposed severe legal restrictions on Greece, Greece still retained its legal obligations under the Charter.<sup>138</sup>

Thus, a number of austerity measures taken by Greece have been found to violate ESCR. It is striking, however, that the existing EU instruments, in particular the EU Charter of Fundamental Rights, could not be used to protect ESCR in this regard. The ECJ cases reviewed seem to indicate that austerity measures with impacts on ESCR do not fall within the scrutiny of the ECJ due to the limited scope of application of the EU Charter. Protection mechanisms outside the EU and within the CoE, in particular the ESC, have to be referred to instead.

Another area of tension between the EU and the CoE is that between ESCR and economic freedoms.

## (2) ESCR and economic freedoms

This tension has become apparent, particularly, regarding the freedom of services and the protection of certain workers rights which have been highlighted in a number of cases before the ECJ. In these judgments, the European Court of Justice has not looked favourably upon certain aspects of labour rights protection, in particular the right to strike. This view can be observed in the *Viking*, the *Laval* and the *Rüffert* cases.<sup>139</sup>

In *Viking*, the ECJ held that the industrial action in question did constitute a restriction on Article 43 (freedom of establishment, now Article 49 TFEU). While this restriction might in principle be justified by public interest, such as the protection of workers, the ECJ held that such restrictions must be suitable for

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<sup>138</sup> The legal obligations of other actors (other EU Member States, the European Central Bank, the IMF, etc.) cannot be discussed here. For an analysis of this issue see FIDH & HLHR (2014, pp. 60f).

<sup>139</sup> Extensive literature can be found on this issue. See for example Blanpain and Swiatkowski (2009). See also Frenz (2009, p. 122).

ensuring the attainment of the legitimate objective pursued and should not go further than what is necessary to achieve that objective. The ‘least restrictive alternative’ rule applies (see also Davies, 2008, p. 135). The Court thus made clear that a union would not be able to justify a boycott, which was so effective as to prevent a firm from reflagging a ship (*Viking Line ABP and OÜ Viking Line Eestia*, 2007, para. 143).

The combined reading of the rulings in *Viking*, *Laval* and *Rüffert* seems to impose stringent limitations on any measures, including collective action,<sup>140</sup> which could limit the rights under Articles 49 (right of establishment) and 56 (freedom of services) TFEU. In assessing the proportionality of the impact of the unions’ right to strike on the company’s right to provide services in *Laval*, the ECJ stated: ‘[i]t should be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an ‘internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital’, but also ‘a policy in the social sphere’. Article 2 EC states that the Community is mandated, inter alia, to promote ‘a harmonious, balanced and sustainable development of economic activities’ and ‘a high level of employment and of social protection. Since the EU has not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, inter alia, improved living and working conditions’ (*Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, 2007, paras. 104-105). Although, the Court distinguishes between negotiations for core labour rights, such as the minimum wage and other demands which go beyond these minimum requirements – a collective bargaining agreement as such, it does not differentiate in its conclusions. According to the Court, the negotiations for a collective bargaining agreement do not justify a blockade by the trade union, whereas a struggle for other minimum labour rights such as minimum wage would. But, while finding the blockage disproportionate as a response to unsuccessful collective bargaining negotiations, the Court simultaneously eliminates the action for a minimum wage agreement.

According to *O’Gorman*, the ECJ only refers to the standards explicitly set out in the Treaty and does not mention the ESC in either *Viking* or *Laval*. This means that such a link is not established in the balancing process of social rights and economic freedoms, leaving social rights inadequately protected (*O’Gorman*, 2011, p. 1843).

In 2012, the ECSR had to deal again with the ‘Laval issue’. In Collective Complaint No. 85/2012, *Swedish Trade Union Confederation and Swedish Confederation of Professional Employees v. Sweden*, the complaining trade unions alleged that following the ECJ judgment in the Laval case (C-341/05), subsequent amendments to Swedish legislation had restricted the rights to freedom of association and collective bargaining, in violation of Articles 4 (the right to a fair remuneration), 6 (the right to bargain collectively) and 19§4 (equality regarding employment, right to organise and accommodation) of the ESC. In this decision, the Committee considered that its task was not to judge the conformity to the

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<sup>140</sup> For further information on the position of European trade unions see for example European Federation of Building and Woodworkers (2014).

Charter of the ECJ's preliminary ruling in the Laval case, but rather to assess whether the legislative amendments adopted by the Swedish Parliament in April 2010 (in the aftermath and as a consequence of the above-mentioned ruling) and in December 2009 (in order to implement the provisions of Directive 2006/123/EC) constituted a violation of the Charter.

In particular, it held that national legislation, which prevents *a priori* the exercise of the right to collective action or permits the exercise of this right only in so far as it is necessary to obtain given minimum working standards, would not be in conformity with Article 6 (4) of the Charter. In the ESC's view, this would infringe upon the fundamental right of workers and trade unions to engage in collective action for the protection of the economic and social interests of the workers. In particular, national and EU rules regulating the enjoyment of such freedoms should be interpreted and applied in a manner that recognises the fundamental importance of the right of trade unions and their members to strive for the protection and the improvement of the living and working conditions of workers, and to seek equal treatment of workers regardless of nationality or any other ground (ESC, Collective Complaint No. 85, paras. 120-121).

This issue aptly shows the different priorities that a collective redress mechanism of a human rights treaty and a supranational system of states based on social rights and economic freedoms assign respectively. Whereas in the European Union system fundamental rights and economic freedoms sometimes tend to interact in a conflictive and even irreconcilable way, the ESC assigns a clear priority to fundamental social rights, such as the right to collective action, which economic freedoms must not interfere with to such an extent as to make them ineffective.

Further tensions between the two systems have become apparent regarding the right to social benefits, in particular for third-country nationals.

### (3) The right to social benefits for third-country nationals

The right to work and the right to social security and social assistance are those rights where EU national systems differ widely, and where political motives seek to restrict access. The terms 'social tourism' or 'benefits tourism' and efforts towards their prevention are an expression of this approach.<sup>141</sup>

In the case *Kamberaj v. Autonomous Province of Bolzano*, the ECJ concluded that third-country nationals, holding long-term residence status in the EU, are entitled to social benefits. The interpretation of the requirements of long-term residency, however, can be restrictive and diverse in several national legislations.

Both the ECtHR and the ECSR grant higher levels of protection to non-EU citizens in this regard. Concerning contributory cash benefits, the Court held that third country nationals are to be treated

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<sup>141</sup> A recent study mandated by the European Commission falsifies this myth: according to the study, non-active (i.e. non-working) EU migrants represent a very small share of the total population in each Member State. They account for between 0.7% and 1.0% of the overall EU population. A few notable exceptions are Belgium (3%), Cyprus (4.1%), Ireland (3%) and Luxembourg (13.9%). The vast majority of non-active intra-EU migrants reside in EU-15 countries (approx. 98%) (Juravle et al, 2013, Executive Summary).

equally to EU citizens in accordance with Article 1 of Protocol No. 1 (right to property) (ECtHR, *Gaygusuz v. Austria*, 1996). In terms of non-contributory cash benefits, the jurisprudence is mixed. Whereas the Court has been restrictive in acknowledging benefits regarding schooling and study periods, it accepted other non-contributory cash benefits under the (only) condition that they legally exist (ECtHR, *Koua Poirrez v. France*, 2003).

The ECSR found a number of violations of the right to social security and social assistance by the EU Member States in its conclusions of 2013. These were mostly violations regarding the access to social security and social assistance benefits of non-EU citizens. The Charter provides that citizens of states parties to the Charter who legally reside or regularly work in the state concerned must be treated equally to citizens of that state. In very specific and narrow circumstances (such as emergency assistance), the conditions of legal stay or regular work do not apply (ECSR, 2014).

In view of this situation of inadequate social rights protection within the EU, the question arises whether these rights should consequently be interpreted in the light of Article 53 of the EU Charter: 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.'

This interpretation would take into due account the requirements of Article 53, whilst providing the opportunity to narrow the protection gaps through a protection system that all EU Member States have accepted. It seems apparent that, in some areas, the EU system lacks a certain level of protection that the CoE protection mechanisms can provide. The effects of the economic crisis further exacerbate these gaps, which could be narrowed by giving full effect to the ESC in all countries of the European Union.

## D. Conclusions

The analysis of the case law in the previous sections uncovers a number of differences and legal gaps in the human rights protection systems of the CoE, the EU and the Member States. It also highlights, however, mutual (judicial) influence and (possible) avenues of cooperation.

First, the case law analysis shows that economic, social and cultural rights are second-rate rights in the EU internal human rights system, for several reasons. First, EU Member States largely retain competency over ESCR in key areas as far as they do not fall under EC anti-discrimination legislation. Thus, social policy competences remain shared between the EU and its Member States, with the Council and Parliament only able to adopt directives on minimum requirements (Art 153 TFEU). Hence, the economic integration activities of the EU are not accompanied by similar efforts in the social sphere. A deeper integration such as in the field of anti-discrimination could be a considerable step forward toward a better implementation of ESCR.

In addition, the historic divide between the two sets of rights and their implementation, which date back to the era of the Cold War have not been overcome. While civil and political rights are in principle seen

as ‘fully-fledged’ justiciable rights, the misconception of ESCR being programmatic in nature persists, and is perpetuated in the EU Charter of Fundamental Rights.

The analysis of cases relating to access to services of migrants and asylum-seekers exemplifies certain legal deficits concerning the protection of ESCR. The CFREU does not include all social rights protected by the ESC, in particular only a limited right to housing assistance (cf. Article 34 (3) CFREU), while ESCR are in principle only applicable to citizens of the Contracting Parties. This might leave migrants that are not nationals of ESC countries without legal protection of certain economic, social and cultural rights.

Second, the increasing harmonisation of asylum and migration rules has entailed strong interactions between the EU law and the Member States’ systems governing these areas. In some cases, the harmonised rules have profoundly changed national laws. The analysis of the first cases brought before the ECJ shows that this influence was two-fold: leading to a more restrictive/repressive approach in some cases and to a more human rights-sensitive in others. From a human rights angle, it is disconcerting to see, however, that the ECJ has only very cautiously considered the fundamental rights at stake in the cases analysed. As the ECtHR and ECSR cannot decide on the human rights compatibility of EU legislation as such, but are limited to an assessment of its application by a Contracting Party in a concrete case, this could lead to a ‘fundamental rights gap’ when challenging EU migration and asylum law.

The analysis of the case law also demonstrates that the common European migration and asylum law was drafted in a strong ‘migration control’-spirit, while the fundamental rights of those directly affected were/are not always equally taken into account. This conclusion applies in particular to the Return Directive, with long potential detention periods and the complete legal vacuum in which persons are left when attempts to return them to their countries of origin or a safe third country have failed. In addition, the current ‘Dublin system’ poses many human rights challenges. The principle of ‘first entry’ puts a disproportionate burden on the Member States with external borders to the south and east, even though case law shows that these states have often proved unable to guarantee adequate reception conditions for asylum-seekers. In addition, the system seems to be handled in a relatively inflexible way by most Member States, which leaves little room for the consideration of the individual situation of asylum-seekers.

Furthermore, case law highlights that it is very difficult for migrant children – especially those unaccompanied or irregularly staying with their families – to access basic services. Here, the Member States’ interest in migration control, in particular discouraging irregular migration, seems to have eclipsed the basic needs of children, which states have recognised in international treaties. It would thus not only be necessary to review legislation to allow migrant children to attend schools or access necessary health care, for example, but also to review practices which hamper effective access (e.g. requiring a number of documents for the enrolment).

Third, the response of the EU and some of its Member States to the economic crisis is seen by some as a threat to the European human rights project. According to FIDH, recent European elections have illustrated widespread discontent with crisis governance. Serious human rights violations such as those

in Greece should not be seen as ‘inevitable collateral damage in pursuing financial stability’ (FIDH & HLHR, 2014, p. 69).

Where austerity measures result in retrogressive steps affecting the realisation or implementation of human rights, the burden of proof shifts to the implementing state to provide justification for such retrogressive measures. In ensuring compliance with their human rights obligations when adopting austerity measures, states should demonstrate the existence of a compelling state interest; the necessity, reasonableness, temporariness and proportionality of the austerity measures; the exhaustion of alternative and less restrictive measures; the non-discriminatory nature of the proposed measures; the protection of a minimum core content of the rights; and genuine participation of affected groups and individuals in decision-making processes (Office of the High Commissioner for Human Rights, 2013, p.12).

So far, both EU Member States and the Troika have not adhered to these principles in their measures against the economic crisis, which had, as analysed above, serious implications for ESCR. The governance gap in the field of ESCR calls for swift and comprehensive counter-measures. The realisation of Article 53 of the EU Charter of Fundamental Rights, which would enable the CoE human rights instruments to be applicable in order to provide higher levels of protection, could be a decisive step in this endeavour. This would also lead to a better harmonisation of the two systems.

Other proposals have been made by the ECSR. For example, the EU could encourage its Member States to step up their commitments, in particular by ratifying the Revised ESC and accepting all the provisions in the Charter, which are most directly related in terms of substance to the provisions of EU law and the competences of the EU. A commitment of all EU Member States concerning the collective complaints procedure would also help to ensure greater balance between EU members in terms of ESCR protection. In addition, if the Charter were taken into account by EU lawmakers (European Commission, Council and Parliament), this would ensure that any new EU legislation increased the convergence between the two legal orders.

Lastly, a possible accession by the EU to the ESC, similar to the process regarding the ECHR, would enable a more profound inclusion of the Charter in the development and implementation of EU law. The justification of EU accession to the ECHR applies *mutatis mutandis* to a possible accession of the EU to the ESC. Proposed by the European Parliament, this solution should be looked at closely to assess its potential practical effects, depending on the arrangements adopted. However, there does not yet seem to be a political consensus concerning this proposal and it therefore appears to be a longer-term endeavour.

## Bibliography

### 1. Legal and policy instruments

Asylum Procedures Directive (2013), *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.*

*Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (2003), 2003/9/EC.*

*Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158/77.*

Council of the European Union (2015), *European Council meeting (25 and 26 June 2015), Council conclusions, Brussels, 26 June 2015, EUCO 22/15, available at <http://www.consilium.europa.eu/en/meetings/european-council/2015/06/euco-conclusions-pdf/> accessed 14 July 2015.*

Council of the European Union (2014), *Council conclusions on 'Taking action to better manage migratory flows', Justice and Home Affairs Council meeting Luxembourg, 10 October 2014, available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/145053.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/145053.pdf) accessed 8 January 2015.*

Commission of the European Communities (2008), *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast), COM(2008) 820 final, 3 December 2008.*

Commission of the European Communities (2001), *Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration, COM (2001) 672 final, 15 November 2001.*

Commission of the European Communities (1994), *Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, COM (94) 23 final, 23 February 1994.*

Dublin Regulation ('Dublin II') (2003), *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.*

Dublin Regulation (recast) ('Dublin III') (2013), *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.*

European Commission (2015), *Communication from the Commission to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions, A European Agenda on Migration, COM(2015) 240 final, 13 May 2015.*

European Commission (2014a), *Assessment of the 2014 national reform programme for Greece, Commission Staff Working Document, available at [http://ec.europa.eu/europe2020/pdf/csr2014/swd2014\\_greece\\_en.pdf](http://ec.europa.eu/europe2020/pdf/csr2014/swd2014_greece_en.pdf) accessed 26 February 2015.*

European Commission (2014b), *Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, 2014 European Semester: Country-specific recommendations, 15, COM(2014) 400 final, Brussels, 2.6. 2014, available at [http://ec.europa.eu/europe2020/pdf/csr2014/eccom2014\\_en.pdf](http://ec.europa.eu/europe2020/pdf/csr2014/eccom2014_en.pdf) accessed 27 February 2015.

European Commission (2012), *Communication from the Commission to the Council and the European Parliament on Return Policy* (COM(2014) 199 final), available at [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/com/com\\_com%282014%290199\\_/com\\_com%282014%290199\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com%282014%290199_/com_com%282014%290199_en.pdf) accessed 4 December 2014.

European Committee of Social Rights (2014), *The relationship between European Union law and the European Social Charter*, Working Document, available at <http://www.coe.int/T/DGHL/Monitoring/SocialCharter/TurinConference/Working%20document%20Relationship%20EU%20law%20%20Charter%20Final.pdf> accessed 3 March 2015.

ECSR (2012), *Conclusions 2011*, available at [http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/ConclusionsYear\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/ConclusionsYear_en.asp) accessed 27 February 2015.

ECSR (2014), *Conclusions 2013 of the European Committee of Social Rights*, available at [http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/ConclusionsIndex\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/ConclusionsIndex_en.asp) accessed 27 February 2014.

ECSR (2015), *Conclusions 2014*, available at [http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/ConclusionsYear\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/ConclusionsYear_en.asp) accessed 27 February 2014.

ECSR (2009), *European Social Charter. Conclusions XIX-2 (2009)* available online [http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/Year/XIX-2\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/Year/XIX-2_en.pdf) accessed 27 July 2015.

ECSR (1996), *European Social Charter. Conclusions XIII-4 (1996)* available online [http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/Year/XIII4\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/Year/XIII4_en.pdf) accessed 27 July 2015.

Eurodac Regulation (2000), *Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention*.

Eurodac II Regulation (2013), *Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice*.

European Parliament (2014), *Resolution of 13 March 2014 on Employment and social aspects of the role and operations of the Troika (ECB, Commission and IMF) with regard to euro area programme countries (2014/2007(INI))*.

Frontex Regulation (2011), *Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*.

Praesidium of the Convention of the Charter of Fundamental Rights of the European Union (2007), *Explanations relating to the Charter of Fundamental Rights (2007/C 303/02)*, Official Journal of the European Union, C 303, 14 December 2007

Qualification Directive (2011), *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*.

Reception (Conditions) Directive (2013), *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection*.

Return Directive (2008), *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals 2008*.

Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

Services Directive (2006), *Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, 2006/123/EC, OJ L 376, 27.12.2006, pp. 36-68*.

Schengen Borders Code (2006), *Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders*.

Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (1997).

## 2. Case law

European Court of Justice, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* (2007), Case C-438/05 [2007] ECR I-10779.

—, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* (2007), Case C-341/05 [2007] ECR I-11767.

—, *Olivier Polier v. Najar EURL* (2008), Case C-361/07, Order of 16 January 2008 [2008] ECR I-6.

—, *Said Shamilovich Kadzoev (Huchbarov) – reference for a preliminary ruling* (2009) Case C-357/09 PPU [2009] ECR I-11189.

- , *Corpul Național al Polițiștilor v. Ministerul Administrației și Internelor (MAI) and Others*, Case C-434/11, Order of 14 December 2011 [2011] ECR I-00196.
- , *Hassen El Dridi, alias Karim Soufi – reference for a preliminary ruling* (2011) Case C-61/11 PPU [2011] ECR I-03015.
- , *Alexandre Achughbadian v Préfet du Val-de-Marne – reference for a preliminary ruling* (2011) Case C-329/11 [2011] ECR I-12695.
- , *N. S. (Case C-411/10) v Secretary of State for the Home Department and M. E. and Others (Case C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform (joined cases) - references for preliminary rulings* (2011) [2011] ECR I-13905.
- , *Kamberaj v. Autonomous Province of Bolzano* (2012), Case C-571/10 [2012] ECLI:EU:C:2012:233.
- , *Cimade et Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration – reference for a preliminary ruling* (2012) Case C-179/11 [2012] ECLI:EU:C:2012:594.
- , *H. I. D. and B. A. v Refugee Applications Commissioner and Others – reference for a preliminary ruling* (2013) Case C-175/11 [2013] ECLI:EU:C:2013:45.
- , *MA and Others v Secretary of State for the Home Department – reference for a preliminary ruling* (2013) Case C-648/11 [2013] ECLI:EU:C:2013:367.
- , *Staatsanwaltschaft Traunstein v Filev and Osmani – reference for a preliminary ruling* (2013) Case C-297/12 [2013] ECLI:EU:C:2013:569.
- , *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and others – reference for a preliminary ruling* (2014) Case C-79/13 [2014] ECLI:EU:C:2014:103.
- , *Bashir Mohamed Ali Mahdi – reference for a preliminary ruling* (2014) Case C-146/14 PPU [2014] ECLI:EU:C:2014:1320.
- European Committee of Social Rights, *International Federation of Human Rights Leagues (FIDH) v. France* (2004) Collective Complaint No. 14/2003.
- , *Defence for Children International (DCI) v. the Netherlands* (2009) Collective Complaint No. 47/2008.
- , *European Roma and Travellers Forum (ERTF) v. France* (2012), Collective Complaint No. 64/2011.
- , *Médecins du Monde – International v. France* (2012) Collective Complaint No. 67/2011.
- , *Defence for Children International (DCI) v. Belgium* (2012) Collective Complaint No. 69/2011.
- , *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece* (2012), Collective Complaint No. 76/2012.
- , *Panhellenic Federation of Public Service Pensioners v. Greece* (2012), Collective Complaint No. 77/2012.

—, *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece* (2012), Collective Complaint No. 78/2012.

—, *Panhellenic Federation of pensioners of the public electricity corporation (POS-DEI) v. Greece* (2012), Collective Complaint No. 79/2012.

—, *Pensioner's Union of the Agricultural Bank of Greece (ATE) v. Greece* (2012), Collective Complaint No. 80/2012.

—, *Swedish Trade Union Confederation and Swedish Confederation of Professional Employees v. Sweden* (2013), Collective Complaint No. 85/2012.

European Court of Human Rights, *López Ostra v. Spain* (1994) App no 16798/90 (9 December 1994)

—, *Gaygusuz v. Austria* (1996) App no 17371/90 (16 September 1996).

—, *Guerra and Others v. Italy* (1998) App no 14967/89 (19 February 1998)

—, *T.I. v. United Kingdom* (2000) App no 43844/98 (7 March 2000, admissibility decision).

—, *Koua Poirrez v. France* (2003) App no 40892/98 (30 September 2003).

—, *Timishev v. Russia* (2005) App no 55762/00 and 55974/00 (13 December 2005).

—, *Ledyayeva and others v. Russia* (2006) App no 53157/99, 53247/99, 53695/00 and 56850/00 (26 October 2006)

—, *K.R.S. v. the United Kingdom* (2008) App no 32733/08 (2 December 2008, admissibility decision).

—, *Rahimi v. Greece* (2011) App no 8687/08 (5 April 2011).

—, *Ponomaryovi v. Bulgaria* (2011) App no 5335/05 (21 June 2011).

—, *De Souza Ribeiro v. France* (2012) App no 22689/07 (13 December 2012).

—, *Samsam Mohammed Hussein and others v. the Netherlands and Italy* (2013) App no 27725/10 (2 April 2013).

—, *Halimi v. Austria and Italy* (2013) App no 53852/11 (18 June 2013, admissibility decision).

—, *Abubeker v. Austria and Italy* (2013) App no 73874/11 (18 June 2013, admissibility decision).

—, *M.A. v. Cyprus* (2013) App no 41872/10 (23 July 2013).

—, *Aden Ahmed v. Malta* (2013) App no 55352/12 (23 July 2013).

—, *Winterstein and others v. France* (2013) App no 27013/07 (17 October 2013).

—, *AL.K. v. Greece* (2014) App no 63542/11 (11 December 2014).

European Court of Human Rights, Grand Chamber, *M.S.S. v. Belgium and Greece* (2011) App no 30696/09 (21 January 2011).

—, *Tarakhel v. Switzerland* (2014) App no 29217/12 (4 November 2014).

### 3. Literature

#### a) Books

Frenz, W. (2009), *Handbuch Europarecht*, Volume 4: Europäische Grundrechte, Berlin/Heidelberg: Springer Publishers.

Lukas, K. (2013), *Labour Rights and Global Production*, Vienna-Graz: Neuer Wissenschaftlicher Verlag.

Mikkola, M. (2010), *Social Human Rights of Europe*, Helsinki: Karelactio Legisactio Ltd.

Peers, S. (2011), *EU justice and home affairs law*, 3rd edn, Oxford: Oxford University Press.

#### b) Book chapters

Barnard, C. (2015), 'The Charter in time of crisis: a case study of dismissal', in Countouris, N. & Freedland, M. (ed), *Resocialising Europe in a time of crisis*, Cambridge: Cambridge University Press, pp. 250-277.

Borowsky, M. (2011), 'Artikel 51', in Meyer, J. (ed), *Charta der Grundrechte der Europäischen Union*, Baden-Baden: Nomos, pp. 642-667.

Cholewinski, R. (2006), 'Control of Irregular Migration and EU Law and Policy: A Human Rights Deficit', in Peers, S. and Rogers N. (eds) *EU immigration and asylum law: Text and commentary*, Leiden: Martinus Nijhoff Publishers, pp. 889–941.

Lukas, K. (2015), 'The European Charter of Fundamental Rights of the European Union and the European Social Charter of the Council of Europe – Partners or Rivals?', in Palmisano, G. (ed), *Making the EU Charter of Fundamental Rights a Living Instrument*, Leiden/Bosten: Brill Nijhoff, pp. 222-244.

#### c) Journal articles

Baldaccini, A. (2010), 'The EU Directive on Return: Principles and Protests', *Refugee Survey Quarterly*, vol. 28(4), pp. 114-138.

Canetta, E. (2007), 'The EU Policy on Return of Illegally Staying Third-Country Nationals', *European Journal of Migration and Law*, vol. 9 (4), pp. 435-450.

Clayton, G. (2011), 'Asylum Seekers in Europe: M.S.S. v Belgium and Greece', *Human Rights Law Review*, vol. 11 (4), pp. 758-773.

Davies, A. (2008), 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ', *Industrial Law Journal*, vol. 37 (2), pp. 126-147.

De Baere, G. (2012), 'N.S. v. Secretary of State for the Home Department. Joined Cases C-411/10 & C-493/10', *The American Journal of International Law*, vol. 106, no. 3, pp. 616-624.

Favilli, C. (2009), 'I nuovi reati di ingresso e soggiorno illegale dello straniero in Italia', *Rivista di Diritto Internazionale*, vol. 92 (4), pp. 1114-1119.

Mallia, P. (2011), 'Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation', *Refugee Survey Quarterly*, vol. 30 (3), pp. 107-128.

Mincheva, E. (2010), 'Case Report on Kadzoev, 30 November 2009', *European Journal of Migration and Law*, vol. 12 (3), pp. 361-371.

O'Gorman, R. (2011), 'The ECHR, the EU and the Weakness of Social Rights Protection at the European Level', *German Journal of Law*, no. 12, pp. 1833-1861.

Raffaelli, R. (2011), 'Criminalizing Irregular Immigration and the Returns Directive: An Analysis of the El Dridi Case', *European Journal of Migration and Law*, vol. 13 (4), pp. 467-489.

Thüsing, G. & Traut, J. (2012), 'Zur begrenzten Reichweite der Koalitionsfreiheit im Unionsrecht', *Recht der Arbeit*, No. 2, pp. 65-73.

#### d) Policy and other reports

Amnesty International (2012), *The end of the road for refugees, asylum-seekers and migrants*, available at <http://files.amnesty.org/archives/eur250112012eng.pdf> accessed 7 January 2014.

Blanpain, R. and Swiatkowski, A. (eds) (2009), *The Laval and Viking Cases: Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area*, 69 Bulletin of Comparative Labour Relations 2009.

De Schutter, O. (2004/2014), *L'adhésion de l'Union européenne à la Charte sociale européenne*, EUI Working Paper LAW No. 2004/11, version révisée en juin 2014, Université catholique de Louvain.

Crépeau, F. (2013), *Report of the Special Rapporteur on the human rights of migrants, François Crépeau: Regional study: management of the external borders of the European Union and its impact on the human rights of migrants 2013*, United Nations General Assembly, Human Rights Council, A/HRC/23/46, available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.46\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.46_en.pdf) accessed 7 January 2015.

Engström, V. and Heikkilä, M. (2014), *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice*, FRAME research report Work Package No. 11, Deliverable No. 1 <http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf> accessed 10 July 2015.

European Federation of Building and Woodworkers (EFBWW) (2014), *European implications of the Rüffert judgment – preliminary analysis and possible courses of action*, available at <http://www.efbww.org/pdfs/European%20implications%20of%20the%20Laval%20Case%20judgment%20080709.pdf> accessed 7 May 2014.

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2012), *Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 19 to 27 January 2011*, available at <http://www.cpt.coe.int/documents/grc/2012-01-inf-eng.pdf> accessed 7 January 2014.

European Union Agency for Fundamental Rights (2010), *Detention of third-country nationals in return procedures*, available at [http://fra.europa.eu/sites/default/files/fra\\_uploads/1054-detention-third-country-nationals-report-092010\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1054-detention-third-country-nationals-report-092010_en.pdf) accessed 9 December 2014.

European Union Agency for Fundamental Rights (2011a), *Fundamental rights of migrants in an irregular situation in the European Union*, available at [http://fra.europa.eu/sites/default/files/fra\\_uploads/1827-FRA\\_2011\\_Migrants\\_in\\_an\\_irregular\\_situation\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1827-FRA_2011_Migrants_in_an_irregular_situation_EN.pdf) accessed 11 December 2014.

European Union Agency for Fundamental Rights (2011b), *Migrants in an irregular situation: access to healthcare in 10 European Union Member States*, available at [http://fra.europa.eu/sites/default/files/fra\\_uploads/1925-FRA-2011-fundamental-rights-for-irregular-migrants-healthcare\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1925-FRA-2011-fundamental-rights-for-irregular-migrants-healthcare_EN.pdf) accessed 9 December 2014.

European Agency for Fundamental Rights (2013), *The European Union as a Community of values: safeguarding fundamental rights in times of crisis*, FRA Focus Report, Vienna.

European Commission, Directorate-General for Employment, Social Affairs and Inclusion (2012), *Employment and social developments in Europe 2012*, Brussels, Directorate-General for Employment, Social Affairs and Inclusion, available at <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7315> accessed 10 January 2015.

European Commission (2010), *Commission decided to start infringement proceedings against France*, available at <http://ec.europa.eu/social/main.jsp?langId=de&catId=89&newsId=902&furtherNews=yes> accessed 15 May 2013.

FIDH & HLHR (2014) Fédération Internationale des Droits de l'Homme and the Hellenic League of Human Rights, *Downgrading rights: the cost of austerity in Greece*, available at <https://www.fidh.org/IMG/pdf/grece646a2014.pdf> accessed 27 February 2015.

Juravle, C. et al (2013), *A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence*, Final report submitted by ICF GHK in association with Milieu LTD, available at [http://ec.europa.eu/employment\\_social/empl\\_portal/facebook/20131014%20GHK%20study%20web\\_EU%20migration.pdf](http://ec.europa.eu/employment_social/empl_portal/facebook/20131014%20GHK%20study%20web_EU%20migration.pdf) accessed 25 February 2015.

Koutsogeorgopoulou, V. et al (2014), *Fairly Sharing the Social Impact of the Crisis in Greece*, OECD Economics Department Working Papers No. 1106.

Matsaganis, M. (2013), *The Greek Crisis: Social Impact and Policy Responses*, Friedrich Ebert Stiftung, Berlin, available at <http://library.fes.de/pdf-files/id/10314.pdf> accessed 25 February 2015.

Office of the High Commissioner for Human Rights (2013), *Austerity measures and economic, social and cultural rights*, E/2013/82 (7 May 2013), available at [http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82\\_en.pdf](http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf) accessed 26 February 2015.

Office of the High Commissioner on Human Rights (2008), *UN experts express concern about proposed EU Return Directive*, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8440&LangID=E> accessed 20 July 2015.

Organisation for Economic Co-Operation and Development (2009), *International migration and the economic crisis: understanding the links and shaping policy responses*, available at [www.oecd.org/els/mig/46292981.pdf](http://www.oecd.org/els/mig/46292981.pdf) accessed 26 February 2015.

Saano, H.-O. (2014), 'Economic Factors', in Lassen, E. (ed) *Report on factors which enable or hinder the protection of human rights*, pp. 57-86, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/03-Deliverable-2.1.pdf> accessed 27 February 2015.

## IV. ‘Not politically good enough’ – A policy analysis of the EU’s legal and institutional human rights framework<sup>142</sup>

### A. Introduction

The European Union (EU) is a unique political system. There has been a considerable debate on the adequate terms and theories that are able to grasp the EU as a political entity, as it is perceived to be more integrated as an international organisation but less than a traditional modern nation-state (see e.g. McCormick, 2014; Wiener and Diez, 2009). In the context of human rights protection, the quality and set-up of the EU as a political system is particularly relevant as it is states which are usually responsible for respecting, protecting and fulfilling human rights (see also FRAME report [D 2.1](#) (Lassen, 2014)). Thus, raising the question of the quality of the EU as a human rights system also means taking into consideration the specific shape and configuration of the EU as a political system and as an actor. This includes issues such as the institutional set up of the EU and the question of whether the EU is an international or supranational organisation, which might act in some situations as a state. Over the past decades, there have been considerable changes concerning the institutional set-up and legal framework of the EU, due to several Treaty reforms since the beginning of the 1990s. The changes have also provided for increased involvement of the EU in the field of human and fundamental rights. The Treaty of Maastricht, for example, stipulated a commitment to respect fundamental rights, as guaranteed by the ECHR and as resulting from the constitutional traditions of the Member States (Article F(2), TEU). The Treaty of Amsterdam included the so-called Copenhagen Criteria in the ‘Treaty on European Union’ (TEU) and introduced the then Article 13 that conferred on the EU the power to take appropriate action to combat discrimination on several grounds.

Since the entering into force of the Lisbon Treaty, the EU has significantly strengthened its institutional and legal human and fundamental rights framework by, for example, amending or introducing new stipulations on human and fundamental rights in EU primary law, such as Article 21 (human rights in external relations), Article 2 or Article 6 TEU (internal dimension). The latter has particularly far-reaching legal and political consequences as it makes the EU Charter of Fundamental Rights (CFREU) legally binding for EU institutions as well as Member States when implementing EU law, and because it envisages the accession of the EU to the ECHR (which, however, has failed so far). The new EU human rights developments have earned wide political, public and academic praise and have attracted considerable criticism. Catherine Ashton, the former EU High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission, underlined that the ‘promise of the Lisbon Treaty is a more coherent, more consistent and hence more effective EU foreign policy’ (Ashton, 2010, p. 3). The Treaty has also been described as initiating ‘a new era for the European Union’s involvement in fundamental rights matters’ (Muir, 2014a, p. 219) or as one of several ‘landmarks for the development of the European Union fundamental rights policy’ (Leconte and Muir, 2014, p. 13). De Schutter writes of a ‘Changing Understanding of Fundamental Rights in the EU’ (2011, p. 110), which

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includes the emergence of a fundamental rights culture within EU institutions, as well as a shift from a 'court-centred focus' on human rights 'to an approach that sees the protection of fundamental rights as part of a broader effort to improve governance' (De Schutter, 2011, p. 108). As human rights law in the EU was – and still is – 'mainly the achievement of judicial interpretation' (Varju, 2014, p. 1; see also Douglas-Scott, 2011, p. 647) the recent developments have given the EU human rights framework a more pro-active approach that not only sees human rights as a 'substantive limitation to the action both of the institutions of the EU and of the EU member states', but also acknowledges its positive function, that is, to guide and empower political action (De Schutter, 2011, p. 116). Or, as Muir phrases it:

EU institutions are progressively moving from an era in which the protection of fundamental rights in the European Union was primarily 'passive', to a new stage marked by a strong 'pro-active' role of EU institutions in this field. For many years, EU institutions and Member States were merely bound to respect fundamental rights while acting within the scope of EU law. [...] In recent years however, the mandate of EU actors in matters of fundamental rights protection has been considerably consolidated to the extent that EU political institutions are in increasingly positive manner acting to enhance fundamental rights protection [...]. (Muir, 2014b, p. 26)

However, critical voices still remark that the EU 'has used fundamental rights as a means to strengthen the autonomy, supremacy and legitimacy of EU law, rather than for their own sakes' (Douglas-Scott, 2011, p. 649). Others describe the EU fundamental rights policy 'as a Source of Euroscepticism' (Leconte, 2014, p. 83) or claim that fundamental rights are 'An Unsettling EU Competence' (Muir, 2014b, p. 25). There are many points of criticism emphasising gaps, tensions and contradictions concerning the institutional as well as legal EU human rights framework. Many of them are formulated by measuring the political system of the EU against the standards and the model of a modern state. However, the political system of the EU still is considerably different when compared to the systems of the Member States and it appears that it will remain so for the foreseeable future. At the same time, it must be kept in mind that the EU institutional and legal human rights framework is quite complex, rather new and still leaves room for improvement. Besides, the complexity of the system is exacerbated by the fact that the European regional human rights framework was profoundly shaped by another institution, the Council of Europe (CoE), and instrument, the European Convention on Human Rights (ECHR). The growing competences of the EU in the fields of human and fundamental rights are fuelling the debate on the influence, overlaps and tensions between the two systems and their respective instruments and institutions (see e.g. Dzehtsiarou et al, 2014; van der Berghe, 2010; chapter II of this report).

The following chapter aims at contributing to the discussion outlined above by elaborating on important gaps, tensions, challenges and contradictions of the legal as well as the political and institutional human rights framework, focussing exclusively on the EU but taking into consideration both, the internal and external dimension. In doing so, it will abstain from undertaking a legal analysis of the pertinent treaties, human rights laws or case law of the European Court of Justice (ECJ). The approach adopted will rather follow a social science approach and will contain a political analysis of EU human rights instruments as

well as scrutinise the EU as a political system and highlight institutional gaps, tensions and challenges with regard to human and fundamental rights.<sup>143</sup>

## 1. Methodology

The research carried out in the context of this chapter primarily draws on interviews conducted with representatives from the European Commission (EC),<sup>144</sup> the European External Action Service (EEAS), the European Parliament (EP)<sup>145</sup> as well as with an NGO representative. In total, qualitative interviews with 22 interview partners were conducted in September 2014 as well as in January 2015. Issues covered in the interviews included, for example: the role of human rights in the EU in general and within EEAS policies in particular; the evaluation of the effectiveness, impact, implementation and significance of different human rights instruments and gaps and challenges in this regard; the collaboration with other EU bodies, as well as Member States and other stakeholders (such as NGOs); and questions concerning gaps and challenges, as well as potential room for improvement, of human rights policies and instruments of the EU and the EEAS. The interviewees were guaranteed confidentiality, thus, there will be no direct reference to any persons interviewed. As the analysis follows the evaluation procedure designed by Meuser and Nagel (2005, pp. 71-93), a direct reference is in any case unnecessary because the analysis presented below aims at filtering out condensed insights which are observable across several interviews.

Thus, the findings of this chapter are mainly based on an analysis of interviews, but they are also embedded and complemented by an analysis of literature (with a political and social science focus), in order to better systematise and contextualise the results of the interviews.

## 2. Content

The present chapter starts with a discussion of gaps, tensions and contradictions concerning EU human rights instruments. It will, firstly, elaborate on some general aspects and then proceed to analyse tensions with regard to the values laid down in the Treaties and the complex issues of EU human rights competences. Furthermore, the Charter on Fundamental Rights of the European Union, the question of monitoring human rights in EU Member States, infringement procedures and the priority of politics, some aspects regarding the planned but controversial EU accession to the ECHR as well as anti-discrimination legislation and policies will be discussed as important dimensions of the internal dimension. The last two sub-sections will deal with external policies, such as the EU Strategic Framework and Action Plan on Human Rights and Democracy and the Human Rights Guidelines. The next section will focus on gaps, tensions and contradictions concerning the institutional and structural EU human

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<sup>143</sup> As discussed in chapter II and V, the EU very often differentiates between fundamental rights and human rights. The first term is used exclusively with regard to the internal dimension when referring to Treaty obligations of the Union and the second term is primarily used for the external dimension when referring to international treaties or agreements, although sometimes also as an umbrella term to refer to both dimensions when discussing general human rights aspects. This chapter mostly follows this distinction that means, fundamental rights is used only for the internal aspects and human rights mainly for external relations but also as an umbrella term.

<sup>144</sup> Interview partners were officers (Head of Units, (Human Rights) Policy and Legal Officers, Programme Managers) from DG DEVCO, DG JUST, DG HOME, DG ECHO and DG TRADE.

<sup>145</sup> Two MEPs who are also members of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) and the Subcommittee on Human Rights (DROI) respectively.

rights context. The section will first discuss the EU as a political system; it will analyse the relationship between the EU and its Member States and will then elaborate on institutional gaps, tensions and contradictions including the Council of the European Union, the European Parliament (EP) and the EC. Secondly, it will scrutinise the role of the EU as a human rights actor with regard to international relations – with a special focus on the EEAS – and conclude with a few paragraphs on inter- and intra-institutional cooperation. The conclusions will summarise the most important cross-cutting issues raised in the chapter.

## **B. Gaps, tensions and contradictions concerning instruments**

As already mentioned in the introduction and as mapped in D 4.1 ‘Report on the mapping study on relevant actors in human rights protection’, the EU has a multitude of sources of and a complex ‘constitutional framework for human rights’ (de Búrca, 2011, p. 466). The sources include primary law, such as the CFREU and the pertinent stipulations in the TEU and the ‘Treaty on the Functioning of the European Union’ (TFEU), as well as a broad range of secondary law. The importance and scope of secondary law on human rights is sometimes underrated and, as Muir has pointed out, ‘limited attention has been devoted to the growth of EU legislation that has implications for the protection of fundamental rights. Yet, in recent years the importance of such acts of secondary law has grown.’ (Muir, 2014a, p. 220) Muir distinguishes between three main types of EU legislation that have fundamental rights implications: a) ‘the EU legislation designed to “give specific expression” to a fundamental right’, including EU anti-discrimination legislation as a prominent example; b) ‘EU “accessory” power to legislate on fundamental rights’, which refers to legislative acts to implement ‘ordinary’ EU competences that have an impact on fundamental rights standards as a by-product; and c) ‘EU legislation defining the scope of the EU courts’ fundamental rights jurisdiction’ (Muir, 2014a, pp. 223-229). In addition, there are a vast number of other instruments, such as actions plans, policy programmes and strategies, funding programs and other documents and initiatives, used in the context of the EU’s internal as well as external relations policies. In general, it has to be emphasised ‘that protection of fundamental rights in the EU has evolved in an *ad hoc*, confusing, incremental way and there exists no clear, conceptual underpinning to the rights protected under EU law’ (Douglas-Scott, 2011, p. 649). The CFREU has raised some hope in addressing this shortcoming (ibid), yet, at the same time it also raises many additional questions concerning implementation, the balance of rights enshrined in the Charter and its relation to the ECHR. As these questions have already been addressed to some extent in chapters II and III of this report, the analysis below only summarises the points raised by the interview partners.

Before looking into the most important issues raised by the interviewees in depth, the following briefly points out some general aspects regarding EU human rights instruments, which were reported to be important (some of them will be picked up again later on or in the conclusions of this chapter). Firstly, the lack of knowledge about the legal and institutional framework of the EU in general and the human rights framework in particular seems to be a serious problem. This is not only an issue which concerns EU citizens but also many other stakeholders. There is a lack of knowledge about how the EU works and in what way and under what circumstances citizens are protected by EU human rights instruments. Secondly, and closely connected to the first point, the complexity of the human rights legal framework is perceived to be a major challenge which makes it difficult to understand the framework as well as to

promote fundamental rights in the EU. Thirdly, interview partners also complained about a lack of communication on human rights issues and obligations to the citizens, on the one hand, and to all EU officers on the other hand, especially those not working in the human rights field. For this reason, the EU is often attributed responsibilities and competences in the human rights field, which it legally does not have. Fourthly, there is doubt whether EU policy makers and officers are ready and willing to give human rights the priority they are given by the Treaties. It is questionable whether human rights are accepted by EU officials as being at the core of the EU's values. Thus, there is not only a lack of education and awareness concerning the human rights system and principles of the EU among EU citizens and other stakeholders (e.g. civil society) but also a lack of political willingness when it comes to EU officials. There is reportedly a lack of a 'fundamental rights culture'. Fifthly, problems of human rights instruments are not first and foremost seen as shortcomings in terms of a lack of adequate EU human rights standards, but they are to a large extent defined as issues of inadequate implementation of these standards. The achievement of the obligations and values laid down in the Treaties and other instruments is perceived as a challenge, requiring a broad range of actions and considerable effort to put into practice. Lastly, the EU system of human rights instruments is rather new. Thus, it is not easy to seriously evaluate the long-term impacts of the instruments. More time is required to thoroughly implement some of the instruments and to evaluate their eventual impact.

Apart from these general comments, the topics which were considered to be the most crucial issues by the interview partners (which will be elaborated on in more detail below) are the values laid down in the Treaties and the complex issue of EU human rights competences, the CFREU, the question of monitoring EU member states, the accession of the EU to the ECHR and EU anti-discrimination legislation and policies. Concerning external action, the focus was on the EU Strategic Framework and Action Plan as well as the so-called 'Human Rights Guidelines'.

### **1. The values in the Treaties and the complex issue of EU human rights competences**

The values laid down in the Treaties – including those referring to or having implications for human rights – are quite ambitious and far-reaching. For example, Article 2 of the TEU says that the 'Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' These ambitious values, however, are contrasted by limited competences of the EU in the field of fundamental and human rights. There is a gap between these demanding and promising values and the way they are translated into concrete EU rights and competences, which are difficult to understand not only for most of EU citizens but also for many other stakeholders. This gap was defined as a relevant problem in the daily work of the officers, because it creates misunderstandings about the scope of EU competences and the possibilities that EU officers have in the field of fundamental and human rights. It is important to note that the mismatch between values laid down in the treaties and the restricted competences of EU bodies in the area of fundamental and human rights are not necessarily perceived as a problem which can be grasped exclusively by legal terms, they are predominantly classified as a political problem that has

consequences not only for the best possible guarantee of fundamental and human rights, but also implications on issues such as the EU's credibility and accountability. The legal human rights system of the EU was characterised as being 'not good enough' not only because of its legal complexity; it was also assessed as being 'not politically good enough', as it obscures political responsibilities for EU fundamental and human rights issues.

## 2. The Charter on Fundamental Rights of the European Union

The CFREU is commonly seen as a major step forward when it comes to the EU fundamental rights framework. The President of the European Court of Human Rights (ECtHR), Dean Spielmann, has for example emphasised that at 'the symbolic level, but more importantly at the political and practical levels, the Charter is a solemn commitment "to respect, protect, promote and fulfil" fundamental rights' (Spielmann, 2014, p. xii). The Charter, which was drafted by a Convention consisting of representatives of the EU, the Member States and civil society, was ceremoniously proclaimed in Nice by the EP, the Council and the EC on 7 December 2000 and became legally binding with the adoption of the Treaty of Lisbon (see e.g. Bojarski, Schindlauer & Wladasch, 2014, pp. 14-15; Piris, 2010, pp. 146-151; Zetterquist, 2011). As already mentioned above, the CFREU raised many hopes and was welcomed quite enthusiastically, but has also been criticised in many respects (see e.g. Kerikmäe, 2014). In general, the CFREU is evaluated quite positively by the officers, as unique and as one of the most modern and advanced human rights instruments in the world. It is described as one of the 'most far reaching' bills of rights and it is perceived as an achievement that Member States were able to agree on such a document. It is seen as a positive development that it makes the EU and its Member States accountable for respecting fundamental rights when implementing EU laws and policies. Before the entry into force of the Treaty of Lisbon, this could be considered a gap in EU fundamental/human rights protection, not least due to the fact that EU actions, laws and policies have a deep impact on the lives of European citizens, as a significant part of Member States' legislation has its origin at the EU level. Therefore, one of the advantages of the CFREU is that it has closed this gap of 'accountability' as it has introduced a catalogue of enforceable rights which can be directly invoked by citizens. The officers are furthermore aware that the CFREU is increasingly used and referred to by the ECJ, which seems to give the Charter particular weight and authority, not least because ECJ rulings show that not respecting the Charter has serious consequences. But EU policy makers and officers did not only stress this 'restricting' dimension of the CFREU in terms of it 'binding' EU institutions and Member States when implementing EU acts. They also refer to a more positive and pro-active dimension of the Charter. They are increasingly aware that the CFREU can be used as a 'tool'. The adoption and implementation of the CFREU therefore reflects the pro-active, 'positive' shift of the EU human rights framework and approach, as emphasised by the academic literature (see e.g. de Schutter, 2011; Muir, 2014).

The CFREU is not only applicable to the internal dimension of EU action, 'it also applies to its external action' (European Commission, 2010, p. 4). In addition, the Charter also seems to be of political symbolic value for the external dimension of EU human rights policies as it can be used to argue that human rights are not only used as a strategy towards third countries, but that EU institutions are also subjected to the rights compliance that they are demanding from other countries. It is reported to have an effect on strengthening internal-external coherence of EU fundamental-human rights policies and strategies.

Yet, on the downside, the CFREU is also regarded as an ambitious document requiring serious effort and political will in order to be adequately implemented and applied. Particular challenges in this regard are ensuring that the action of all EU institutions complies with the obligations laid down in the Charter and guaranteeing that any EU act is in line with and respects the rights enshrined in the CFREU. The ‘mainstreaming’ of the CFREU in all EU institutions and throughout the legislative process is evaluated to be a specifically demanding task, especially in those fields where the human rights dimension is not obviously apparent. There seems to be undertaken a considerable effort to advance the CFREU and mainstream all EU legislation to be in compliance with the Charter. One example in this context is the Communication from the European Commission on the ‘Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union’ (European Commission, 2010). The Strategy offers practical support by, for example, providing a fundamental rights ‘check-list’ that is used to routinely check whether the Commission’s legislative proposals comply with the Charter. As has been mentioned above, the Charter not only binds EU institutions, but also Member States. The latter, however, was identified as being a neglected area so far. It was seen as a particular challenge to ensure and effectively monitor that Member States respect the fundamental rights of the Charter when implementing EU law.

In addition to ensuring that all EU institutions and EU member states respect the CFREU, promoting the Charter was mentioned as particularly important in order to strengthen the EU fundamental rights system and culture. Interviewees highlighted a lack of knowledge about the Charter not only among European citizens, but also among other relevant stakeholders in Member States as well as at the EU level. The need for better communication about and awareness raising of the rights and scope of the CFREU was also confirmed by the European Commission in the Strategy for the effective implementation of the CFREU (European Commission, 2010, pp. 10-12).

It is striking that EU representatives did not mention any gaps and challenges concerning the content of the Charter. They exclusively referred to procedural challenges and problems (see above), although academics have repeatedly discussed some problematic substantial issues of the CFREU, such as an imbalance between political and civil and social and economic rights (e.g. see chapter III.C of this report). Thus, the focus of the discussion is not on the standards and values set by the Charter and possible challenges content-wise, but rather on the procedural aspects of how to ensure optimal and effective implementation.

### **3. Monitoring human rights in EU Member States, infringement procedures and the priority of politics**

De Búrca has emphasised that the ‘existing constitutional framework significantly limits and seeks to restrain the possibility of EU monitoring or review of human rights within Member States’ (de Búrca, 2011, p. 466). The question of whether the EU should have human rights monitoring powers with regard to Member States, beyond the current competences laid down in the Treaties, and/or even have a comprehensive authority to address and sanction human rights violations in its Member States is a

controversial issue. As the legal aspects of Article 7 of the TEU,<sup>146</sup> which ‘confers new powers on the Commission in its monitoring of fundamental rights in the Union and in the identification of potential risks’ (European Commission, 2003, p. 3), as well as the competences of the European Union Agency for Fundamental Rights (FRA) in this respect are already discussed comprehensively in chapter II.C, the present sections only add a few aspects mentioned by the interviewees which are crucial for assessing the issue. In general, the interviewees evaluated the monitoring competences and infringement procedures of the EU as quite weak and insufficient. The most important shortcomings in this regard were seen, on the one hand, as the limited scope of the CFREU, which only obliges Member States to implement EU law in compliance with the rights of the Charter. On the other hand, Article 7 of the TEU is not only limited by its conceptual and legal vagueness; the Article can be also interpreted to be a reflection of the political system of the EU, where inter-governmental relationships are still influential, as Member States want to have a say in sensitive issues, which human rights very often are. Article 7 was considered by the interviewees as being unenforceable due to the lack of a political will and the reluctance of the Member States to be accountable to the EU for human rights issues outside the EU legal framework. It was described as a mechanism that does not work because the process laid down in the article will never be activated due to political reasons. The discussions surrounding Article 7 reveal the tensions between a legal and a political system of the EU, which are inherent in the vague formulation of the said Article, as well as the political process that is required to trigger it. Thus, Article 7 demonstrates that human rights treaties and clauses are not only ‘always a political outcome, a compromise, or a diplomatic resolution of competing interests’ (Langlois, 2009, p. 23), they are not only ‘made by a political process’ (Freeman, 2002, p. 132) but are also subject to a political process, which seems to be the decisive starting point when it comes to discussing the issue of an effective EU human rights monitoring system.

The crucial questions, therefore, do not only refer to whether EU monitoring of the human rights situation in Member States, outside the scope of EU law, is necessary – as there are other international and regional human rights systems in place which have a monitoring function – but also whether it is politically desired. In case such a monitoring or an effective sanction competence is politically desired, the next crucial challenge is to ascertain in what way such a competence/mechanism should be designed in order to be effective in such a specific political setting as the EU. Although some interviewees expressed their doubt as to whether there is the necessity for the EU to take over such responsibilities – as Member States are already subjected to other regional and international instruments and mechanism, such as the ECHR or the human rights treaties of the United Nations – most of them advocated for such a system as it was expected to not only enhance the credibility and legitimacy of the EU, but also the internal-external coherence of human rights policies. With regard to the specific legal and institutional design of such a system or competence, it is questionable if a hard law approach and mechanism is adequate for the specific political setting of the EU. It might be better to use

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<sup>146</sup> Article 7 of the TEU provides for a political mechanism to address and sanction situations where ‘there is a clear risk of a serious breach by a Member State of the values’ laid down in the TEU (such as respect for human dignity, freedom, democracy, equality, the role of law or respect for human rights).

‘softer’ mechanisms, such as deliberative processes, or make use of the open method of coordination or enhance the mandate of the FRA (as discussed in chapter II.C).

The 2003 ‘Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union’ already introduces means of securing respect for and promotion of common values, based on Article 7 of the TEU, including the ‘regular monitoring of respect for common values and developing independent expertise’ (European Commission, 2003, p. 9). It further mentions the EP’s annual report on the fundamental rights situation in the EU as a ‘major contribution to the elaboration of an exact diagnosis on the state of protection in the Member States and the Union’. However, it has to be emphasised that the monitoring quality of the reports has serious problems, as it is also a taboo to name member states with a problematic human rights record in these reports. Thus, the reports only analyse problems and make recommendations on a very general level. The Communication further recommends ‘establishing a network of authoritative fundamental rights experts to provide a high degree of expertise regarding each of the Union Member States’ (ibid). The latter, however, had already been established before, following a recommendation by the EP in 2000 (ibid), and ceased operation in 2006 (De Schutter, 2011, p. 113).

#### 4. EU accession to the ECHR

The EU accession to the ECHR was provided for in Article 6(2) of the TEU by stipulating that the ‘Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.’ The EU accession is a controversial topic among academics (see chapter II of this report; see also Callewaert, 2014; Craig, 2013; Douglas-Scott, 2011, pp. 658-669; Eckes, 2013). Whereas some scholars emphasise the ‘added value’ of an external human rights control of the EU (Eckes, 2013, p. 255; Callewaert, 2014, pp. 14-18), others warn against the increased complexity or the threat to the autonomy of the EU legal order (Douglas-Scott, 2011, pp. 662 and 682). This section will not contribute to the legal discussion on the details and the prospective challenges, as well as advantages and disadvantages, of EU accession to the ECHR. However, it will shortly summarise the most important points raised by interviewees when asked about the potential benefits and challenges that they associate with the accession, as this will reveal some of the perceived gaps in the current EU human and fundamental rights framework, and some of the problems that might arise as a consequence of the accession.

The three most important gaps concerning the current framework were voiced as follows: Firstly, the need for external human rights supervision and monitoring of the performance of EU bodies was emphasised. It was seen as a problem that the European institutions are taking far-reaching decisions, which significantly affect the lives of EU citizens, yet these decisions are not subject to the same external monitoring as those of the Member States. The accession to the ECHR is seen as one way to address this gap. Secondly, and closely connected with the first point, the accession to the ECHR is expected to tackle the lack of accountability of EU institutions. Thirdly, the limited access of individuals to the ECJ was

defined as a gap.<sup>147</sup> The accession to the ECHR would fill this gap – its standards would be applicable to decisions and actions of EU institutions, including direct access to the ECtHR.

As potential problems, the interviewees pointed out an even increased level of complexity which might it make harder for EU citizens, as well as policy makers and other stakeholders, to understand the system and the rights that they have, potentially further exacerbating the problem of limited access to justice for individuals. Thus, there would be an enhanced necessity for communication and public awareness-raising, as well as setting up a strong and transparent coordination mechanism between the two systems.

## 5. Anti-discrimination legislation and policies

EU anti-discrimination and equality law can be considered one of the EU's human rights success stories. It is also described as being 'the most important and expansive area of human rights activity [...] which has been developed substantially since the adoption of Article 13 EC (now Article 19 TFEU) by the Amsterdam Treaty' (de Búrca, 2011, p. 492; see also de Búrca, 2010 and Tobler, 2014). Article 19 of the TFEU confers on the EU the power to take appropriate action to combat discrimination on grounds of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation. In addition, there are other references in the Treaties aiming, for example, at addressing discrimination and enhancing equality between men and women (e.g. Article 8 and Article 157 of the TFEU). Based on this legal foundation provided by EU primary law, a broad range of secondary law has been adopted over the years (see also chapter VI of FRAME report [D 2.1](#) and chapter II of FRAME report D 2.2 (forthcoming)). However, EU anti-discrimination law and policies are operating through many different instruments and are characterised by a diversity of sources, which mirror different stages in the development of the law. Besides, case law has played a key role in the evolution of an EU anti-discrimination system and 'litigation under the suite of directives on equality and non-discrimination (...) is exploding' (Stone Sweet & Stranz, 2012, p. 105). In general, the shift from a passive towards a more pro-active role in the EU human and fundamental rights system can also be observed with regard to EU anti-discrimination law and policies. The EU anti-discrimination regime can be characterised by moving 'from a focused negative obligation to a broad set of positive requirements including the general requirement of "mainstreaming" (i.e. the systematic incorporation of equality goals into all public policies), as well as more specific requirements which trigger broader positive obligations' (De Búrca, 2010, p. 225).

The most important shortcoming concerning EU anti-discrimination law is the material scope of specific anti-discrimination provisions in EU law, which is 'often quite limited and uneven' (Tobler, 2014, p. 532). Most of the grounds mentioned in the TFEU are only protected in the field of employment and occupation. An exception in this regard is, for example, discrimination on grounds of racial or ethnic origin which is also protected in other fields, such as employment-related social security, access to and supply of goods and services, education and social advantages. The gap of uneven and limited scope of protection was also identified as a crucial problem by some of the representatives of the EC and the EP. To remedy this gap, the adoption of the 'Proposal for a Council Directive on implementing the principle

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<sup>147</sup> This is, of course, a problem which not only relates to fundamental rights issues, but it was considered to be a specifically problematic aspect in the context of fundamental rights.

of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation’, which was proposed by the EC on 2 July 2008, is recommended. The proposed directive envisages the prohibition of discrimination on grounds of religion or belief, disability age or sexual orientation also outside the workplace. The EP supported the proposal on 2 April 2009 (see EP, 2009). Up to now, the Council has refused the adoption of the directive and, thus, prevented the adoption and implementation of a more comprehensive non-discrimination law.

## **6. EU Strategic Framework and Action Plan on Human Rights and Democracy**

The ‘EU Strategic Framework and Action Plan on Human Rights and Democracy’ was adopted by the Council of the EU on 25 June 2012. The reasons for introducing the Framework and Action Plan are, on the one hand, a result of the Treaty of Lisbon, which assigned human rights a central role in EU external action (Article 3 and Article 21 of the TEU). On the other hand, criticism was raised concerning the adequate integration or lack of human rights standards in various areas of the EU, such as development or trade, or that ‘there was sometimes a lack of political will to make full use of the different instruments in the tool box of the EU human rights policy’ (Theuermann, 2013, pp. 32-33). The Strategic Framework aims at addressing these shortcomings by stating that respect for human rights, democracy and the rule of law are principles that ‘underpin all aspects of the internal and external policies of the European Union’ (Council of the European Union, 2012, p. 1) and by reaffirming the EU’s commitment to the promotion and protection of all human rights, to the pursuit of coherent objectives and to the enhancement of human rights in all areas of its external action. In addition, the document defines human rights priorities to be implemented when working with both bilateral and multilateral institutions. The Action Plan’s objective is to implement the Strategic Framework by listing a wide range of actions to be carried out until the end of 2014. The Action Plan has been evaluated and revised. On 28 April 2015, the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy published a Joint Communication to the European Parliament and the Council to propose a new Action Plan for the years 2015 to 2019.<sup>148</sup>

The Strategic Framework and Action Plan are considered an important step towards ensuring the implementation of human rights in external action by the interviewees. They were considered to be a ‘substantial improvement’ and a big achievement in terms of cooperation between the Commission, the EEAS, the Member States and the EP, which was reported to have had an important role by constantly pushing the EC and the EEAS to be more accountable when it comes to human rights and democracy. The Framework and the Action Plan are said to be concrete commitments supported at the highest political level, setting out priorities and guiding political engagement with external partners and other countries and organisations. They have contributed to the enhancing of the communication and the exchange of information among the officers involved. Thus, the instruments have not only had a positive impact substantively, but also in institutional terms. They are said to have fostered, for the first time, a ‘real dialogue’ between different EU institutions, as well as civil society organisations. A challenge

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<sup>148</sup> See European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy (2015). Although the proposal was adopted on 28 April 2015, the analysis in this chapter will refer to the Action Plan adopted in 2012.

regarding commitment was identified with regard to the Member States. They were said to have actively supported the drafting of the Strategic Framework as well as the Action Plan, but were reluctant to actively engage in the implementation of the Action Plan.

The Action Plan was also reported to be an improvement as it was a commitment to systematically integrate human rights considerations in fields that have previously been neglected in this regard, for example in trade policies. However, the actual implementation of human rights principles laid down by the Strategic Framework into such fields of external action proved also to be a challenge. Thus, 'translating' the commitment into real action that could have an impact seems to be difficult, and efficient procedures to monitor and evaluate the implementation process in order to improve results in the long run are missing. The assessment procedures in place were considered to be inadequate in this regard by the interviewees.<sup>149</sup>

Other problematic issues of the Strategic Framework and Action plan were reported to be the lack of a conceptual basis that should bring different items of the Action plan together in a strategic and coherent way. The former Action Plan was said to be a collection of different tasks and elements raised and suggested by different representatives of various EU institutions such as the DG DEVCO (Directorate General for International Cooperation and Development), the EEAS and others. The gap was therefore the lack of a 'big picture', which refers to the necessity of determining main strategic objectives in a first step and defining appropriate and adequate action in order to achieve these objectives in a second step.

Some points of criticism were formulated with regard to the drafting process, including the need for better coordination of stakeholders during the process, a better and more extensive discussion on the substance of the actions included in the plan, and more transparency concerning the prioritisation of certain actions and measures. It was also suggested that the Action Plan should be simplified, for the sake of being able to include more in-depth action; and that it should have a clearer focus containing more consistent and compact action that would have really had an added value; and, thus, should leave out the 'easy gains', which refers to actions that would have been completed anyway and which do not require an Action Plan.

## 7. Human Rights Guidelines

Another tool, which became increasingly important for the work of the EEAS over the past years, is human rights guidelines. The guidelines aim at addressing specific human rights issues and 'provide EU representatives in the field with operational goals and tools to intensify initiatives in multilateral fora and in bilateral contacts, resulting in some intensive lobbying campaigns to promote specific human rights goals' (Keukeleire & Delreux, 2014, p. 136). According to the EEAS, the guidelines play a significant role concerning the implementation of human rights policies in external action:

The eight so-called "Guidelines" form the backbone of EU human rights policy. Though they are not legally binding, they are adopted unanimously by the Council of the EU, and therefore represent a strong political expression of the EU's priorities. They also provide practical tools to

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<sup>149</sup> For recommendations see [FRAME policy brief](#) (2014).

help EU representatives around the world advance our human rights policy. Thus the Guidelines reinforce the coherence and consistency of EU human rights policy. (EEAS, 2012, p. 15)

So far, eleven guidelines were adopted in or with the following areas or titles: Death penalty; Torture and other cruel, inhuman or degrading treatment or punishment; EU Guidelines on the promotion and protection of freedom of religion or belief; Guidelines to promote and protect the enjoyment of all Human Rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons; Human Rights dialogues with third countries; Children and armed conflict; Human Rights defenders; Promotion and Protection of the Rights of the Child; Violence against women and girls and combating all forms of discrimination against them; International Humanitarian Law; and EU Human Rights Guidelines on Freedom of Expression Online and Offline.

The guidelines are developed, drafted and implemented in a deliberative manner. They are developed together with civil society organisations and in cooperation and communication with the Member States as well as the EP. In general, one of the most important challenges with regard to the guidelines is their implementation. They are sent with instructions for implementation to EEAS delegations as well as Member States embassies, and information on and experiences with implementation are discussed in the Human Rights Working Group (COHOM) and included in the annual reports. Especially, the implementation of the guidelines by Member States' embassies is said to be particularly challenging, as they are frequently regarded as being 'EU-business'.

Similar to the 'EU Strategic Framework and Action Plan on Human Rights and Democracy', the guidelines are an 'agreed language', a commitment at the highest political level. They are said to have a very positive impact on integrating human rights principles into external action (see also chapter II of [D 2.2](#)). They imply an institutionalisation of human rights policies and facilitate the implementation of human rights issues, which are specifically contentious (e.g. rights of LGBTI, gender issues) and sensitive. They contain clear instructions on how to proceed, which actions to take and which arguments and approaches to use. According to the interviews, the guidelines make a huge difference when dealing with a specific issue. For example, the LGBTI Guidelines had the effect that an issue nobody wanted to speak of and deal with became a topic everyone talks about and which is considered one of the priorities of EEAS action. Although the guidelines are not legally binding, they were described as being 'politically-morally binding'. The guidelines were evaluated as making common EU-standards available to all EEAS units and ensuring a consistent and uniform approach to third countries as well as other international and regional bodies and, thus, ensuring coherence and preventing double standards.

However, as already thoroughly analysed in chapter II of D 2.2 the picture is less favourable when it comes to the content of the guidelines. An analysis of their substance, concerning their anti-discrimination dimension, revealed that the concepts used are flawed and inadequate. They do not provide clear-cut definitions and their focus is rather on providing the officers in charge of implementation with detailed information on procedural aspects of implementation than with information substance-wise. The concepts and definitions used in this context are quite problematic and may – implicitly – even reinforce sexist, heteronormative, racist and islamophobic stereotypes. Important concepts such as the concept of (anti-)discrimination are not or are not adequately defined,

which leaves it to the individual officer to have appropriate expertise and knowledge in the respective area (for a detailed analysis please see chapter II of FRAME report D 2.2 (Lassen, 2015 forthcoming, pp. 4-31)).

## **C. Gaps, tensions and contradictions concerning the institutional and structural context**

### **1. The EU as a political system**

‘EU political institutions are increasingly (directly or indirectly, explicitly or implicitly [...]) setting fundamental rights standards in the process of exercising the competences entrusted to them, or marking the presence of Union law and thereby allowing the European Court of Justice to do so.’ (Muir, 2014a, p. 210) As already mentioned above, the quality and configuration of a political system, including the design and performance of its institutions, is crucial when it comes to the question of effectively protecting, respecting and fulfilling human rights. The following subsections are dedicated to elaborating on the role of different EU institutions as well as institutional gaps, tensions and challenges. The section will start out with discussing the role of the Member States in the political system of the EU and its human rights dimension. A second part will discuss selected EU institutions starting with the Council of the European Union, the EP and EC. Although the Court of Justice of the European Union is also a crucial institution in this context, it will be left out as its role and case law is to some extent discussed in chapter II and III of this report. Furthermore, a special emphasis will be placed on the work of the EEAS.

#### **a) The EU and Member States**

A key issue regarding the EU as a political system concerns the position of the Member States within the structural configuration and power relation of the EU. EU integration theories (i.e. theories which aim at grasping the dynamics and structures of European integration) provide different answers to the question of what kind of political structure and entity we are dealing with when it comes to the EU. Some assume that the Member States are still the most important players in this context (liberal intergovernmentalism) (see e.g. Moravcsik and Schimmelfennig, 2009) while others – such as advocates of multilevel governance theories – argue that states have to share decision making powers with other levels/actors (such as EU institutions, NGOs, etc.) (see e.g. Hooghe & Marks, 2001; Peters & Pierre, 2009, Wiener & Diez, 2009). In reference to human rights protection, Member States remain a decisive force in the EU framework and ‘despite the regular invocation of human rights in official discourse and documents, there is a great reluctance to specify any clear role for the EU in relation to the action of Member States as far as human rights compliance is concerned’ (de Búrca, 2011, p. 484). Nevertheless, the EU has made significant efforts to strengthen its human rights dimension (Treaty of Lisbon). Not least because of its non-discrimination law, the EU ‘has developed into the regional authority on social rights, overtaking some of the earlier work on the Council of Europe in importance as the Community’s rights are enforceable’ (Smith, 2012, p. 116). The adoption of CFREU, and the envisaged accession of the EU to the ECHR, are further favourable developments in regard to enhancing a comprehensive European human rights protection system, although the limited scope of application of CFREU has to be stressed in this context. Gráinne de Búrca argues that although the formal constitutional framework is limited, and any legal and constitutional discussion of human rights issues is ‘accompanied by assertions on the

part of the Council and the Member States of the limited competences of the EU, and a narrow view is taken of the legitimate scope of human right law and policy within the EU' (de Búrca, 2011, p. 491), this is often inconsistent with the evolving human rights practices of European governance, such as the EU anti-discrimination regime and the activities of the EC or the FRA (de Búrca, 2011, p. 496).

The tensions between the Member States and the EU that result from the complex political and legal EU system are a problematic and disconcerting force in the fields of fundamental and human rights. As already mentioned in the beginning of this chapter, for a long time the EU fundamental rights framework has evolved primarily through the case law of the ECJ. This process was also labelled as 'integration through law' (Scharpf, 2012, p. 127). Some authors argue that this process will even intensify and a 'new era of rights-based legal integration' (Stone Sweet & Stranz, 2012, p. 92) is dawning on the EU horizon. In addition, there is a new pro-active turn of EU human and fundamental rights policies discernible 'that sees the protection of fundamental rights as part of a broader effort to improve governance' (de Schutter, 2011, p. 108). On the one hand, this shift was praised as giving 'way to regulatory approaches that are more flexible, participatory, and subject to permanent evaluation – in other terms, that have a capacity to learn' (ibid). On the other hand, this expansion of fundamental rights competences, as well as the integrative effect of human rights law, also have an 'unsettling' dimension (Muir, 2014, pp. 25-37). Scharpf warns that 'ECJ case law [...] is consistently extending the domain of constitutionally protected individual rights – and hence the range of issues that are placed beyond the reach of democratic self-determination' (Scharpf, 2012, p. 134). On the basis of EU fundamental rights law, the EU is capable 'of calling into question, to an unprecedented extent, sensitive domestic policy areas' (Muir, 2014, p. 25). This may lead to the undermining of the legitimacy of the multilevel European governance system itself (Scharpf, 2012, p. 134). Also, the more recent developments that go beyond the hard law dimension have far-reaching consequences for domestic politics and policies. Leconte, for example, emphasises two dimensions of the so-called 'soft europeanisation of fundamental rights' in this context: the first dimension refers to an increasing cross-country comparison of national fundamental rights policies by civil society actors, the media, NGOs, and others, which are very often supported in one way or the other by the EU, and which have an impact on national public spheres and domestic agendas. The second dimension refers to the fact that Member States' governments operate under the increasing surveillance of peers, members of the EP and the EC, who may position themselves on contested aspects of national public policy related to human rights and may subject them to a political (not legal) assessment in terms of compatibility with informal norms of legitimacy [...]' (Leconte, 2014, p. 91).

The paragraphs above reveal that the political and legal human rights framework of the EU has conflicting empowering and, at the same time constraining effects regarding the EU as well as the Member States. On the one hand, the EU is considerably legally empowered by its fundamental rights competences, because they lend far-reaching authority to the EU institutions, which have a considerable impact at the domestic level. In addition, the legal powers conferred to the EU level are dynamically used by the ECJ as a means of further legal integration (see e.g. Scharpf, 2012). On the other hand, though having far-reaching competences, EU institutions are, at the same time, paradoxically politically constrained by their limited competences, which do not correspond with the values attributed to the EU

or the competences in other fields, e.g. in the economic area. This area, however, has a serious human rights impact that does not match the EU competences in the field of human and fundamental rights. EU Member States and, more precisely, their governments, in contrast, still have considerable power in the political system of the EU because of their membership in the European Council<sup>150</sup> as well as the Council of Ministers, although they have also given up substantial competences in the field of fundamental rights. They are, therefore, also constrained in various fundamental rights areas by EU law, which simultaneously represents a challenge for the authority of the Member States as ‘systems for the protection of fundamental rights inevitably constitute a challenge to the authority of decision-makers; it is the function of such a system to ensure that decisions made on behalf of the general interest do not neglect or deny core individual rights. It is thus often perceived as a constraint’ (Muir, 2014, p. 29). The political system of the EU enables the Member States to play a double game as it allows the ‘blaming’ of the EU for exerting significant influence on fundamental rights issues that concern sensitive domestic matters, such as minority issues or other fields that are closely related to the concept of national identity (see e.g. Leconte, 2014, pp. 89-91), although they have voluntarily given up these competences in the first place. Besides, the realisation of the fundamental rights related values laid down in the Treaties are in fact dependent on a political process that leaves considerable room for Member States to safeguard their political interests, which, however, at times even undermine these values. The problematic issue is that Member States are very often reluctant to take responsibility for decisions concerning human and fundamental rights issues at the EU level, even when they have been involved in these decisions. In practice, this mismatch often leads to citizens and other stakeholders holding very high expectations concerning the fundamental and human rights performance and possibilities of EU bodies and their actual legal competences and responsibilities, which often leaves EU officers in an awkward position. To address this aspect of a seemingly ‘obscure’ human rights framework of the EU, interviewees referred to what academics call the ‘politicisation of fundamental rights’ (Muir, 2014, p. 29), the approach which suggests that the political aspects, processes and responsibilities of human and fundamental rights should not only be clearly communicated, but also that the public discussion and disagreement on human rights issues should be seen as an important and vital part of an animated fundamental rights culture. However, there seems to be a lack of political will to clearly communicate this decisive and crucial political dimension of fundamental rights to the population.

On the part of the EU, the question of legitimacy, with regard to their human rights competences, is still a crucial one. The contentious issue is whether expanding EU competences and action in human and fundamental rights matters contributes to or undermines the legitimacy of the EU. Some academics argue that these competences might ‘undermine’ the legitimacy of the ‘multilevel European polity itself’ (Scharpf, 2012, p. 134; see also Leconte, 2014; Muir, 2014), while others emphasise the potential of these rights to solve ‘the no-demos element of the democratic deficit and the associated EU legitimacy crises’ (Hilson, 2007, p. 527). However, it is questionable whether the issue of legitimacy is purely an

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<sup>150</sup> The European Council is a paradigmatic example of the double and at the same time conflicting ‘identity’ of being Community versus an inter-governmental body because since the entry into force of the Lisbon Treaty the European Council is an institution of the EU, but when adopting treaty changes, the members of the European Council meet as an intergovernmental conference (see TEU, Articles 14 and 48(4); see also de Schoutheete, 2012, p. 44).

issue of more or less human and fundamental rights competences of the EU; it is surely also an issue of the mismatch between the legal and political factors mentioned above.

### *b) Institutional gaps, tensions and contradictions*

#### *(1) The Council of the European Union*

The Council of the European Union (also known as the Council of Ministers or the Council) has always had a crucial position in the political system of the EU. It is, first and foremost, the voice of the Member States, where 'national interests are articulated, defended, and aggregated by representatives of the member governments' (Hayes-Renshaw, 2012, p. 68). The Council has four main functions: In its legislative function, it passes EU laws, mostly together with the EP under the ordinary legislative procedure; in its budgetary role it agrees the budget of the EU, also jointly with the EP; it is responsible for policy-making, as it determines the mandate for the High Representative to carry out the EU's common foreign and security policy; and it assumes a coordinating function as it 'coordinates the broad economic policies of the member states' (ibid, p. 76). All of these functions have decisive implications for the EU's fundamental and human rights policies.

In general, the Council is used to voice and secure national interests in human and fundamental rights matters. The Council can be characterised by a sort of reciprocal preventive and protective working mode, especially when it comes to the issue of fundamental rights. That means that the Council is a 'group of peers of the Member States', who try not to interfere in each other's business and are rather cautious when it comes to discussing each other's misconduct or inadequate performance in the field of fundamental rights, as anyone could be the next one to be singled out. Therefore, the decision process in fundamental rights matter is said to be very slow and intransparent, and influenced by the different human rights traditions of the Member States. The specific human rights interest or culture of the Member State holding the presidency of the Council impedes or facilitates the political process. Whereas the EP is seen as the institution that makes progressive and far-reaching decisions in the field of fundamental rights, the Council is said to be more reluctant, sometimes blocking important initiatives in the fundamental rights area, such as the proposal for enhanced protection against discrimination (COM(2008) 426 final).

The fact that national interests play a critical role in Council decision-making is not only valid for fundamental rights issues (i.e. referring to the internal dimension), it is also important for decisions concerning human rights policies towards third countries. Generally speaking, there seems to be a division, or even incoherence, concerning the working mode when it comes to internal fundamental rights versus external human rights issues in the Council. The decision-mode with regard to the latter is reported to be more open, dynamic, purposeful and progressive than with internal matters. The particular interests of different Member States in different regions, however, is also linked to their national historic context, which was also viewed positively by the interviewees as this deeper knowledge, engagement and interest in certain regions is said to play a positive role in highlighting human rights-related issues in the respective regions. More negatively, this could also be seen as the application of different standards to different regions, depending on the vested interests of the respective Member State.

The internal-external division is also apparent in the two most important working groups assisting the Council on human and fundamental rights: COHOM and the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP). COHOM was established by the Council of the European Union in 1987 and its main task is ‘to promote the development, and to oversee the worldwide implementation, of the EU’s policy in the field of human rights and democracy, including EU human rights guidelines and human rights dialogues and consultations with third countries. In particular, COHOM assists in identifying the EU’s strategic priorities and co-ordinating the positions of the EU and its Member States with regard to specific thematic or geographic issues in multilateral human rights fora’ (Council of the European Union, 2014). COHOM holds meetings on a monthly basis which assemble Directors for Human Rights and delegates from EU Member States, the Commission and the EEAS. A Brussels-based formation of COHOM, to complement the monthly meetings, has been established, which brings together experts mainly based in Brussels (Theuermann, 2012, pp. 186-187). With the entering into force of the Treaty of Lisbon, ‘COHOM is among the working groups of the Council with a “permanent” chair who is part of the EEAS and under the authority of the HR/VP (High Representative of the Union for Foreign Affairs & Security Policy/Vice-President of the European Commission)’ (Ibid, p. 187). COHOM is said to provide strong guidance on human rights. It has a very open approach to civil society organisations, not only providing them with information, but also being willing to receive information from them. COHOM’s workload has increased considerably over the last years; the coordination of human rights activities in multilateral fora is said to require a considerable amount of working time. COHOM seems to mirror the inter-governmental versus community dilemma of the EU in the human rights field. On one hand, COHOM has been described as a ‘club’, where the EU and Member States’ representatives most committed to human rights, come together to try to actively push human rights forward. On the other hand, Member States are reported to disengage when it comes to the implementation of the adopted strategies or documents. They were described as acting like ‘clients’ who choose what to implement and what to leave to the EU from a human rights menu.

FREMP was established by the Committee of Permanent Representative (COREPER) in 2005 and became a permanent working party in 2009. The mandate of FREMP covers ‘all matters relating to fundamental rights and citizens rights including free movement of persons, negotiations on accession of the Union to the ECHR [and] the follow-up of reports from the EU Agency for Fundamental Rights. The Working Party [meets] in different formations whenever necessary, depending on the subject of the agenda’ (Council of the European Union, 2009, p. 5). Although FREMP has a very broad mandate, the main focus of its work over the past few years was the EU’s accession to the ECHR. As FREMP has not a permanent but a rotating chair, which changes every six months, its working mode is very much shaped by the priorities of the respective chair. The rotation of the chair between the Member States – reflecting the respective presidency of the Council – gives the working group an inter-governmental dynamic with a strong focus on strictly staying within the limited EU fundamental rights competences of the CFREU. Joint meetings are taking place between COHOM and FREMP, where COHOM has lobbied for the issue of internal-external coherence to be taken more seriously into consideration in the work of FREMP. However, according to some interviewees it appears that FREMP has only recently become more receptive to such issues.

## (2) The European Parliament

Starting out as a relatively weak institution, the power and influence of the EP has seen remarkable growth. The Treaty of Lisbon marks the last step of this success story as it saw, extending ‘ordinary legislative procedure’ (the former co-decision procedure) – which gives the EP an important role in the political decision-making process – to cover a vast majority of EU legislation, significantly expanding the competences of the EP (see e.g. Shackleton, 2012, pp. 124-147). Concerning EU policy in general, and human and fundamental rights policy in particular, the EP plays an important role. It has stated that ‘[h]uman rights are among the main priorities of the EP. The Parliament is a key actor in the fight for democracy, freedom of speech, fair elections and the rights of the oppressed’ (EP, undated). An expression of this commitment, as well as one of the first exercises of its new powers in the area of individual rights, constitutes the EP’s rejection of the SWIFT agreement in February 2010 due to non-compliance with adequate standards of data protection (EP, 2010; see also Shackleton, 2012, p. 125).

The EP is said to be, first and foremost, very supportive of, but also very vocal on, human and fundamental rights issues. The EP is described as being the ‘voice of the citizens’ in this field. The EP puts new human rights issues on the EU agenda and, thus, paves the way for the discussion and consideration of new issues and eventually also policies and legislation. It makes human rights issues visible and gives public space to human rights organisations and defenders that would otherwise not be heard. The EP organises public hearings and other events and publishes reports and resolutions on controversial topics that would otherwise escape public attention. The EP was described as having the function of a ‘watchdog’ concerning European human rights policies through, for example, parliamentary questions or resolutions, but also by actively communicating with other EU institutions and stakeholders.

On the downside, the EP is also reported to sometimes ‘overshoot the mark’, to demand too much and to be not flexible and pragmatic enough in its approach to human and fundamental rights. In doing so, it also hampers progress and blocks the political process by not being ready to make a political compromise. Although being very vocal on human rights, the EP also lacks the ability to put its demands into practice.

There are two sub-bodies of the EP responsible for fundamental and human rights: the Committee on Civil Liberties, Justice and Home Affairs (LIBE) which is responsible for fundamental rights issues in EU Member States and the Subcommittee on Human Rights (DROI) which is a subcommittee of the Foreign Affairs Committee (AFET) and deals with human rights issues in relation to third countries. The division reflects the separation of internal fundamental rights from external human rights issues. The influence of LIBE is said to be considerable and competition to become a member of LIBE is high. The significance of LIBE is based on the fact that it deals with fundamental rights, which are a core political issue in the EU, and is able to influence the wording and conceptualisation of policy and legal responses in this field. LIBE also has monitoring power to some extent, as it is responsible for drafting the annual reports on the fundamental rights situation in the EU (see section II.C of this chapter). DROI is also considered by interviewees to be an important voice when it comes to human rights policies concerning third countries. However, its possibilities are limited and its influence is diminished because it is not a fully-fledged committee. Although DROI also organises public hearings and tries to draw attention to human

rights issues which would not otherwise be heard, and although the work of DROI is said to have repercussion in other EU bodies such as the Commission, its output is filtered by AFET, which means that its proposals are not always translated into outcomes. In addition, the working mode of DROI is described as rather reactive; it prefers to respond to human rights incidents and violations, as well as to suggestions by AFET, rather than to pro-actively and systematically address specific human rights topics.

Room for improvement was thus summarised by the interviewees as follows: enhancement of the role of DROI by converting it into a fully-fledged committee; promoting better coherence between internal and external human/fundamental rights issues by better coordinating different Parliamentary committees working in this field; and improving the practical progress of the EP in general by adopting a more flexible and practical approach.

### (3) The European Commission

It is difficult to grasp the EC's role, with regard to the EU's fundamental and human rights policies, as it is a very complex and multi-layered body. Peterson (2012, p. 97) calls the Commission 'the strangest administration ever created' and describes it as 'a distinct hybrid: the European Union's largest administration and main policy manager, as well as a source of political and policy direction' (ibid, p. 96). Although being legally a single institution, a differentiation can be made between the College of Commissioners, the 'political arm' of the commission, the members of which are appointed via a political process; and 'a permanent, formally apolitical administration, or what are known as the Commission's services or Directorates-General (DGs)' (ibid; see also Nugent, 2001). This subsection will primarily focus on the latter as they are an important factor in the political process of the EU. The powers and functions of the EC range from being a policy initiator and legislative facilitator, taking over executive roles, being a legal guardian, mediator and broker, as well as an external representative and negotiator (Hooghe & Kassim, 2012, p. 179). However, as the Commission is a very complex body with multitudinous instruments and policies that have a human rights impact, the following remarks are only cursory observations and a rough and abstract assessment of the Commission's work in the field of human and fundamental rights (a more detailed analysis of policies and instruments of different DGs is provided in chapter V).

The main unit responsible for fundamental rights in the EC is the Directorate-General for Justice and Consumers (DG JUST), which covers civil justice, criminal justice, fundamental rights and union citizenship, equality and consumers. With regard to external relations, the main bodies are the Directorate-General for International Cooperation and Development (DG DEVCO), which works closely with the EEAS, and the Directorate-General for Trade (DG TRADE).<sup>151</sup> There are, however, a multitude of other DGs which also have, to some extent, a fundamental and human rights dimension, for example, the Directorate-General for Employment, Social Affairs and Inclusion (DG EMPL), the Directorate-General for Migration and Home Affairs (DG HOME), the Directorate-General for Climate Action (DG CLIMA), and others. The division between internal (DG JUST) and external (DG DEVCO) dimension of human rights is also reflected in their differing approaches to their functions – which is not only a

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<sup>151</sup> Following the requirements laid down in the project proposal, the analysis in this chapter will focus on DG DEVCO.

characteristic of the Commission, but is also apparent in other EU institutions. Although dedicated to bringing the realisation of fundamental rights forward, the units dealing with the internal dimension adopt a rather defensive, cautious approach and are eager not to overstep their legal boundaries. They are more reactive than pro-active in their approach and reluctant to use all of their power. The mismatch between the legal and political factors of the EU human and fundamental rights framework – discussed at the beginning of this section - seems to leave the officers working on the internal dimension in a rather vulnerable position, as they are confronted with high expectations which do not match their legal competences. In addition, the issues they are dealing with are often highly sensitive and concern delicate issues regarding the domestic matters of Member States. However, it is questionable if the defensive and cautious approach is an adequate way to address this mismatch or, on the contrary, if it rather exacerbates these tensions. Therefore, a more pro-active approach was suggested by the interviewees as a better way to proceed, which would in turn ensure that the Commission is able to fully achieve its potential in the field of fundamental rights. In comparison, DG DEVCO is reported to adopt a more pro-active and dynamic approach, more willing to deliberately advocate for human rights and not so afraid of pushing boundaries. Their more progressive approach is facilitated by the fact that they are mostly dealing with human rights issues in third countries and, thus, not touching on sensitive, internal issues of EU Member States. Nevertheless, the Commission is seen as being a very strong institution in the field of fundamental and human rights, which is able to exert a considerable influence on human and fundamental rights policies, as well as being pragmatic and willing to compromise. It has therefore been able to initiate and adopt quite progressive and innovative tools.<sup>152</sup>

In March 2001, the EC decided that '[a]ny proposal for legislation and any draft instrument to be adopted by the Commission will, as part of the normal decision-making procedures, first be scrutinised for compatibility with the Charter' (European Commission, 2001, p. 4). Subsequently, the Commission published a Communication outlining a 'Methodology for systematic and rigorous monitoring' concerning the 'Charter of Fundamental Rights in Commission legislative proposals' (Commission of the European Communities, 2005). The Methodology should enable Commission services 'to check all Commission legislative proposals systematically and rigorously to ensure they respect all the fundamental rights concerned in the course of normal decision-making procedures' (ibid, p. 3). The 'Strategy for the effective Implementation of the Charter of Fundamental Rights by the European Union' (European Commission, 2010) refined the approach by introducing a fundamental rights 'check-list' as well as proposing to examine the impact of legislative proposals on fundamental rights in order to be able to systematically screen the compatibility of legislative proposals of the Commission with the CFREU. Although these initiatives by the interviewees to have had a positive effect, it was also repeatedly confirmed that the systematic mainstreaming of CFREU is still a challenge, especially in those policy fields which are not obviously linked to fundamental rights and those which are core activities of the EU, namely trade and other economic activities. In addition, although the instruments introduced by

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<sup>152</sup> According to interviewees from various DGs and the EP the picture looks less favourable with regard to DG Trade, although there has been made considerable efforts to integrate human rights in trade policies over the last year. For a further elaboration please see [FRAME report D 9.1](#) (Beke et al, 2014).

the EC have the potential to enhance compliance with CFREU, the instruments themselves were evaluated to be quite vague and leave scope for interpretation. As Butler concludes:

[...] the introduction of fundamental rights considerations into the impact assessment, including the fundamental rights check-list, does have the potential to improve compliance with the [CFREU]. However, the substance of the guidance offered is relatively brief and superficial in nature – in particular in relation to the actual content of rights, how rights fit in to the existing economic-social-environmental headings and the actual application of the proportionality test. [...] much more work on improving expertise on fundamental rights within the Commission is necessary if the check-list is to become anything more than glorified box-ticking exercise. (Butler, 2012, p. 409)

Further problems regarding the mainstreaming of human and fundamental rights throughout the EC were considered, firstly, to be the provision of limited human resources. Mainstreaming is a very demanding task, which requires profound knowledge as well as willingness, if it is to be thoroughly applied. The workload of Commission officers was described as being already very demanding. Making human rights the business of all staff members adds to this workload, as such analysis requires additional time. Furthermore, the EC is said to be reducing staff in this field (e.g. in DG DEVCO), which further adds to the workload of the remaining officers. Secondly, mainstreaming human rights requires the acquisition of additional knowledge and the training of the officers involved, which is also a challenge in terms of resources.

Another problem identified with regard to mainstreaming human rights, is its tendency to become a bureaucratic, 'box-ticking exercise' (ibid), which is focused on the process rather than on the content or the actual impact or benefit for the people affected. In order to address this issue, DG DEVCO has introduced the mainstreaming of the rights-based approach into all development cooperation programmes. Although the rights-based approach was already used before, it must now be consistently implemented in all programmes and projects. The rights-based approach 'considers human rights principles and standards both as a means and a goal of development cooperation. It changes the analytical approach and integrates the achievement and fulfilment of human rights into the design, implementation, monitoring and evaluation of all development policies and programmes.' (EC, 2014, p. 5) Thus, the rights-based approach aims at shifting the attention from the process, towards the benefit felt by the potential rights-holders, and also aims to bring together human rights and development in a more coherent way. As the toolbox is a rather new instrument, it is not possible to seriously evaluate whether it has really had the effect of shifting the focus from the process to the substantive impacts on the ground.

Generally, it was reported that the implementation of fundamental and human rights issues, throughout the EC, requires a considerable amount of personal commitment. Again, the 'human factor' is an important starting point when addressing gaps and challenges in this context.

## 2. The EU as a human rights actor concerning external relations

The EU has undertaken considerable effort to integrate human rights principles into its external policies and instruments. The most important institutions in this regard are DG DEVCO and the EEAS, which was created by the Treaty of Lisbon (adopted 2007, entering into force in 2009). On 25 March 2010, the HR/VP submitted a proposal for a Council decision on the establishment of the organisation and functioning of the EEAS to the Council of the European Union. The proposal was approved by the Council Decision of 26 July 2010, establishing the organisation and functioning of the EEAS. The EEAS was officially established on 1 January 2011. Concerning the EEAS, the following dimensions were reported as important by the interviewees:<sup>153</sup>

Firstly, the working mode of the EEAS was described – especially when taking into consideration a more historical perspective which includes the working mode of the EEAS's predecessor DG RELEX, the former Directorate-General for External Relations – as being rather reactive. That means that the EEAS responds to external events – human rights-related events that occur in third countries or with an international dimension – and pressure exerted by other institutions, such as the EP, rather than taking the initiative itself. The EU Strategic Framework and Action Plan seem to have given the EEAS a more forward-looking and more pro-active agenda, and have led to the development of new guidelines, which have reinforced the pro-active impetus of the EEAS. The Strategic Framework and Action Plan make up a rather top-down approach to defining human rights priorities with regard to external relations. This approach is complemented by a bottom-up approach – the priorities that are decided on in collaboration with the delegations and on the basis of the human rights country strategies.

Secondly, the 'human factor' is a very decisive point in implementing human rights policies in the EEAS. The implementation of such policies is reported to require a high degree of personal commitment from the officers in charge. Particularly in the past, it was to a large extent the responsibility of the officers, in particular the respective Head of Missions working in the EU delegations as well as the so-called geographical desks, to implement human rights policies. As indicated above, the EU Strategic Framework and Action Plan, and the guidelines, have enhanced the institutionalisation and de-personalisation of human rights policies. The adoption of these instruments has seen an increasing institutionalisation of human rights policies, including, for example, trainings provided for all officers and the appointment of human rights focal points in all EU delegations. They have also disburdened individual officers, because human rights issues, and especially controversial ones such as LGBTI rights, have increasingly been institutionalised, and are thus accompanied by clear instructions on where and how they should be pushed forward. There is the clear imperative that everyone must engage and that human rights are a 'normal' part of the agenda. However, there still seems to be a huge focus on personal and individual commitment and responsibility, not only when it comes to the implementation of human rights in the EEAS, but also with regard to inter-institutional cooperation, for example, between EU institutions but also between the EEAS and NGOs. Therefore, there is room for

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<sup>153</sup> Most of the dimensions presented in this section are also elaborated on extensively in the Report D 2.2 chapter II with the example of EEAS' anti-discrimination policies.

improvement concerning the right balance between a well-founded institutionalisation of human rights issues, and personal commitment.

Thirdly, however, there seems to also be a lack of political will to systematically implement human rights at all levels and in all policies of the EEAS. Although documents such as the Strategic Framework and Action Plan, as well as the human rights guidelines, have been adopted and endorsed at the highest political level, officers reported the lack of a clear political message to the senior management and to the head of delegations in third countries to seriously take human rights into consideration. As, especially in the context of external relations, human rights are perceived to be political issues, geographical desks<sup>154</sup> as well as delegations very often adopt a cautious approach to human rights issues and human rights violations in a specific country. They would need a clear political message to adequately react to human rights situations in third countries.

Fourthly, there are tensions between EU delegations and Member States' delegations with regard to human rights. This could also be described as a lack of coherence when it comes to the collaboration of delegations of Member States with EU delegations in the area of human rights. There is reportedly a lack of full involvement of Member States and an unwillingness regarding the sharing of burden in the fields of human rights, as would be provided for in the Treaty of Lisbon. Interviewees reported that some Member States repeatedly disengage from implementing human rights, as laid down by EU documents such as the Action Plan or the Guidelines, and some Member States focus on those issues which are of most significance to them and 'outsource' topics which they consider of minor importance. Thus, there is a tendency to leave these latter topics to the EU delegation, as the policies and principles stipulated in the Action Plan and Guidelines are classified as falling into the responsibility of the EU.

Fifthly, the working conditions of EEAS officers are reported to have an adverse effect on the implementation of human rights principles. A lack of staff is accompanied by an increasing workload, which is a result of an increasing number of human rights tools and instruments, among other causes. In addition, the principle of job rotation prevents the constant, sustainable and in-depth building-up of human rights expertise by individual officers. This was, on the one hand, evaluated to adversely affect the quality and coherence of the respective policies but, on the other hand, the expertise gained in the human rights division is said to continue having an effect when officers rotate to other roles. The rotation, thus, may contribute to the distribution of human rights expertise throughout the EEAS.

Sixthly, the emphasis placed on the procedures and processes which implement human rights policies into the work of the EEAS, was raised repeatedly in the interviews. Procedurally, the EU is said to be very successful in raising human rights issues at regional and international levels, organising human rights dialogues, etc. However, officers also reported too strong a focus on, or an overloaded of, bureaucratic work. Human rights are described as having become a technical, bureaucratic exercise with too little space available for the consideration of conceptual and strategic issues. There is no, or only little, room for critical reflection, especially with regard to the officers' own attitudes and the use of concepts. This is

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<sup>154</sup> The so-called 'geographical desks' refer to specific departments of the EEAS each of which deals with a specific geographical area.

a result of the controversial nature of the issues at stake, and thus the results are often the lowest common denominator and/or focus on procedures because they are less controversial.

Seventhly, although there has been a huge effort to mainstream human rights issues in all EEAS procedures, the human rights unit is still reported, by some officers, to be rather isolated. The setting-up of the EEAS saw human rights shift from the former Human Rights Directorate in the Commission, to the 'normal business' of any geographic desk. Although this human rights expertise is still concentrated in the Human Rights Directorate of the EEAS, it has increasingly become the responsibility of all officers to take human rights principles into consideration. The mainstreaming of human rights policies has paradoxically led to a 'de-professionalisation of the human rights field. Although more and more EEAS officers are using human rights language, there is a lack of more detailed and in-depth expertise, which would be necessary to fill the policies and strategies with more substance. Thus, the question of human rights training for EEAS officers is an important issue when trying to ensure the quality of EEAS human rights work. It further remains unclear if trainings on human rights are reaching the officers who need training or only those who are already sensitive to the subject.

Finally, the work of the EEAS is undermined by the fact that human rights are not acknowledged as 'universal' by all stakeholders. Human rights are still perceived by some third countries to be a 'Western concept' imposed on other countries. There are different perspectives on human rights standards, as well as different approaches to the universality of human rights. Implementing human rights principles in external action is hampered by the accusation of cultural imperialism; human rights are frequently seen as an imperialist instrument aiming at 'missionising' others. The criticism and rejection of human rights is reportedly fuelled by an arrogant attitude adopted by representatives of the EU and Member States towards third countries, EU double standards concerning human rights in different countries and a lack of credibility due to a lack of internal-external coherence in this field.

### **3. Inter- and intra-institutional cooperation**

There are a number of platforms for inter- and intra-institutional cooperation and interaction on fundamental and human rights in the EU. As already outlined above, the two Council working-groups COHOM and FREMP are important bodies where inter-institutional exchange takes place. For example, the EC is represented in both institutions and makes initiatives and deliberates with Member States. The EC itself has a considerable number of inter-service groups which bring together officers of different departments with the objective to cooperate, exchange information, learn from each other and ensure coherence. There are further several EC inter-service groups dealing with human rights issues, such as the Inter-Service Group on the implementation of the Charter. There are also inter-service groups on gender equality, disability, Roma, children's rights and data protection.

Furthermore, the cooperation of the EP with other bodies on human and fundamental rights matters appears to be beneficial for the advancement of human rights in the EU. The EP has an important awareness-raising role in this field, for example, through its committees, which are regularly attended by officers of the EC. Especially since the entry into force of the Treaty of Lisbon, the EP is said to be an institution that has gained political weight in the field of fundamental and human rights.

Intensive cooperation on human rights is taking place between the EEAS and DG DEVCO. This cooperation was described as ‘strong but not without sparks’ by one interviewee (concisely summing up what was frequently expressed in different ways also by other interviewees). Although there is no formalised institutional bridge between the two bodies, they are linked by a close net of informal cooperation. Both bodies are powerful in their own way; DG DEVCO is more involved in working on the procedural-operational level by financing projects, such as those under the EIDHR, while the EEAS is its political counterpart.

In general, informal cooperation on fundamental and human rights matters are said to be of huge importance. Such cooperation requires a high level of personal commitment from those involved as it means that the implementation of human and fundamental rights is dependent on personal engagement. In addition, there seems to be the need to establish an institutional link between the external and internal human rights dimension. This division is apparent in all institutions, reportedly exacerbating the problem of internal-external incoherence.

## D. Conclusions

Evaluating the gaps, tensions and contradictions of the EU’s human rights framework involves analysing a complex and unique political system that on the one hand has far-reaching competences in this area, but that, as pointed out above, is also considerably constrained at the same time. In light of the above, the following crucial gaps, tensions and contradictions can be summarised as followed:

### 1. Coherence<sup>155</sup>

A lack of coherence was declared to be one of the most considerable challenges facing the EU’s human and fundamental rights policies by EU representatives during the interviews. First of all, the lack of vertical and horizontal coherence is a serious and systematic issue. Vertical coherence refers to potential differences between the actions and policies of the EU and Member States, covering ‘the articulation between different levels of administration, here between the EU and its member states’ (Marangoni & Raube, 2014, p. 475; see also Portela & Raube, 2012). It includes ‘differences between the EU level and the member states as well as between the Community and the intergovernmental level’ (Portela & Raube, 2012, p. 4). Both aspects are crucial in the context of fundamental and human rights policies and the legislation of the EU. For example, the implementation of CFREU in the Member States was mentioned as a specific challenge, as were the tensions between the EU and Member States’ delegations in third countries, and the alleged dissociation of the latter from EU external human rights policies and strategies that they are supposed to support and implement.

Horizontal coherence defines the need for well-functioning coordination between different policy fields, due to incongruences between different policies and action. The issue of uneven implementation of human and fundamental rights policies and principles in different EU policy fields constitutes a recurring and challenging topic. This aspect was not only mentioned with regard to considering and respecting the rights laid down in the CFREU in all policy fields, it was also described as being a problem of specific

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<sup>155</sup> For a detailed analysis of the issue of coherence with regard to EU fundamental and human rights law and policies please see [FRAME report D 8.1](#) (Lewis et al, 2014).

policy fields which are said to be more reluctant and resistant when it comes to implementing human and fundamental rights principles – such as trade, investment, migration or climate change (see also below).

A third dimension of coherence refers to differences and tensions between internal and external policies, instruments and action, or internal-external coherence. Ensuring coherence between internal and external human rights policies was defined as one of the most pressing issues in the EU human rights field by the interviewees. The causes of incoherence in this area also lie in the specific institutional and legal design of the EU:

The major emphasis of the EU's constitutional regime of human rights protection today, however, is externally focused, setting up a distinct difference between external and internal policies. This is evident not just in the reluctance on the part of Member States to submit themselves to human rights monitoring by the EU, [...] but more specifically in the contrast between the active assertion of human rights protection as a goal of EU foreign policy and the unwillingness to declare human rights protection to be a general goal or a cross-cutting objective of internal EU policies. (de Búrca, 2011, p. 491)

Internal-external incoherence refers to many aspects, including differing internal and external standards (see also chapter V). For example, the 'Guidelines to promote and protect the enjoyment of all Human Rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons' contain demands that would not be accepted by some Member States. A further issue is the problematic human rights record of Member States towards, for example, minorities or migrants, which undermines the credibility of the EU when voicing criticism against an alleged poor human rights record of third countries. Therefore, the problem of internal-external coherence does not only refer to human rights double-standards concerning human rights violation in EU-Member States, but also very much to the legal and policy fields, which lays out differing standards, processes, mandates and levels of protection dependent on whether a human rights issue falls under the internal or external dimension.

Marangoni and Raube also mention another dimension of coherence, institutional coherence, a term which covers two challenges: 'Inter-institutional conflicts arise when a single policy area is served by two sets of actors and their different procedures, for instance the Council and the Commission. Intra-institutional incoherence arises when different actors within the same organisation – for instance two Directorates-General of the Commission – have different approaches to a dossier' (Marangoni & Raube, 2014, p. 475). As human and fundamental rights is a policy area where many institutions are involved with different approaches and objectives, the question of institutional coherence is particularly challenging. For example, within the EC, different DGs are entrusted with different aspects of human and fundamental rights and within the EP there are two sub-bodies dealing specifically with human and fundamental rights issues. In addition to these, human rights in external relations is served mainly by the EEAS and DG DEVCO. Although collaboration is reported to run smoothly between different bodies and units, there is a still room for improvement, especially when it comes to establishing an institutional link, for example between the external and internal dimension. In addition, intra-institutional coherence,

defined as different approaches of different actors within one institution, was also mentioned as a relevant issue.

## **2. Structure versus personal commitment – the ‘human factor’**

Closely connected with the last point is the importance of personal commitment of officers, the so-called ‘human factor’, which was rated to be decisive with regard to an effective enhancement and implementation of human rights principles and obligations in the EU. The challenge lies in achieving the right balance between providing an adequate structure (i.e. instruments, strategies, procedural requirements) and enhancing the commitment of officers towards human rights issues. Too much structure might result in an increasing emphasis on procedural aspects of human rights – reportedly already a problem – and thus reducing human and fundamental rights to a bureaucratic exercise. Putting too little emphasis on structure may, in contrast, lead to ‘personalisation’ of human rights concerns, making the realisation of human rights dependent on the personal commitment of the officers involved, which very often leads to an overburdening of individuals. There is therefore a need to find the right balance between adopting adequate instruments, such as the Human Rights Guidelines that have contributed to an institutionalisation of human rights in the EEAS, and the enhancement of personal commitment as well as expertise of officers. The latter refers to the need for adequate training of officers and the dissemination of knowledge on the significance of human rights issues. It is further important to consider the importance of institutional learning for building up a human rights culture. One approach could be to refine the instrument of human rights mainstreaming. Such an improved instrument could make human rights ‘everybody’s business’, however, at the same time it is necessary to ensure that mainstreaming does neither lead to a bureaucratisation and a dilution of human rights nor to an overburdening of individual officers.

## **3. Process beats content**

Putting too much emphasis on procedures and processes to implement human rights principles, as mentioned in the previous paragraph, has another problematic consequence: the negligence of content-related issues. There is a tendency to focus on procedural aspects, not only with regard to the internal but also with regard to the external dimension. The Guidelines, for example, list a broad variety of operational tools describing which procedures to follow in different international and regional fora. Another example would be the mainstreaming of human rights, which reportedly has the potential to focus too much on process. Concentrating on procedures, however, bears the risk of reducing human rights to a technical, bureaucratic exercise, and leaves too little space for the consideration of conceptual and strategic issues.

Thus, when it comes to the question of the effectiveness of EU human and fundamental rights politics, there is a tendency to concentrate on ‘effectiveness in representation’, which means ‘that those speaking on behalf of the EU are able to aggregate the different demands into a unified position. The emphasis here is on avoiding a multitude of views being signalled externally and abstaining from acting in an uncoordinated fashion’ (Elsig, 2014, p. 328). ‘[E]ffectiveness in impact’, which refers to the achievement of goals – and which would require the question of whether EU human rights strategies and policies are actually good for the people on the ground to be dealt with – is neglected.

#### **4. Communication and the lack of a European public**

The lack of awareness, as well as knowledge, on EU human rights issues and competences was reported as a serious gap, closely related to the question of the legitimacy and credibility of the EU, as well as to the expectations that citizens have towards the EU. This challenge arises not only due to the complexity of the EU as a political system, but also as a result of a lack of a genuine European public, which hampers direct communication between EU bodies and citizens. However, there is not only a need to bring EU human and fundamental rights issues closer to the citizens, there is also a need to enhance communication towards EU policy makers and other stakeholders.

#### **5. Politicisation of human rights**

The lack of political will to bring forward human rights policies, to ensure the adequate protection and fulfilment of human rights, was defined as a core problem rooted in the EU's complex political and legal system. Thus, there is not only a need to stress the deficits of the EU's legal human and fundamental rights system, but also to reveal and address political aspects, processes and responsibilities. A so-called politicisation of human rights would further require these political aspects to be actively taken into account and for the importance of public discussion and disagreement on human rights issues, as part of an animated fundamental and human rights culture, to be acknowledged.

#### **6. Trade-offs between human rights and other interests in EU external and internal action**

A severe challenge to compliance with human rights objectives and principles is their often weak position in relation to other issues. The problem of trade-offs between human rights and other interests was frequently mentioned as a barrier to integrating human rights principles into external action. Economic and trade interests, especially, seem to repeatedly trump human rights.<sup>156</sup> Although some effort has been made to integrate human rights principles into trade policies, there is serious doubt about whether this has been done in a coherent, sustainable and serious way or if it is rather an example of effective 'window-dressing'. Two issues seem to be important starting points for addressing this challenge: Firstly, how to methodologically evaluate whether policy proposals in the area of trade are in line with human rights obligations and, secondly, how and against which standards the impact of these policies on human rights should be measured.

The issue of competing interests was not only raised in relation to the external dimension, it was also mentioned with regard to internal issues. The two outstanding issues frequently mentioned were the tension between the question of security and the guarantee of individual rights, especially in terms of data protection and the respect of other individual rights, and the question of migration (i.e. the treatment of migrants coming from third countries and the guaranteeing of their rights).

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<sup>156</sup> See also [Frame report D 9.1](#) (Beke et al, 2014).

## Bibliography

### 1. Legal and policy instruments

*Charter of Fundamental Rights of the European Union* (2000/2010), 2010/C 83/02, available at: [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf) accessed 11 May 2015.

Commission of the European Communities (2005), *Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposals*, COM(2005) 172 final, Brussels, 27.4.2005.

Commission of the European Communities (2008), *Proposal for a COUNCIL DIRECTIVE on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM(2008) 426 final, 2008/0140 (CNS), Brussels, 2.7.2008.

*Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union*, Brussels, 12 November 2012, 6655/7/08, REV 7, available at: <http://register.consilium.europa.eu/pdf/en/08/st06/st06655-re07.en08.pdf> accessed 12 May 2015.

Council of the European Union (2014), *Mandate of the Working Party on Human Rights*, available at [http://eeas.europa.eu/human\\_rights/workgroup/docs/cohom\\_mandate\\_en.pdf](http://eeas.europa.eu/human_rights/workgroup/docs/cohom_mandate_en.pdf) accessed 20 May 2015.

Council of the European Union (2012), *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12.

Council of the European Union (2009), *Implications of the Treaty of Lisbon provisions for the JHA working structures*, 17653/09, Brussels, 16 December 2009, available at <http://register.consilium.europa.eu/doc/srv?!=EN&f=ST%2017653%202009%20INIT> accessed 25 May 2015.

European External Action Service (2012), *Human Rights and Democracy in the World: Report on EU Action 2011*.

European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy (2015), *Joint Communication to the European Parliament and the Council, Action Plan on Human Rights and Democracy (2015-2019), 'Keeping human rights at the heart of the EU agenda'*, JOIN(2015) 16 final, Brussels, 28.4.2015, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=JOIN:2015:16:FIN&qid=1394708797280&from=EN> accessed 20 May 2015.

European Commission (2014), *Commission Staff Working Document. Tool-Box, A Rights-Based Approach Encompassing All Human Rights For EU Development Cooperation*, SWD(2014) 152 final, Brussels, 30.04.2014, available at [http://www.eidhr.eu/files/dmfile/SWD\\_2014\\_152\\_F1\\_STAFF\\_WORKING\\_PAPER\\_EN\\_V5\\_P1\\_768467.pdf](http://www.eidhr.eu/files/dmfile/SWD_2014_152_F1_STAFF_WORKING_PAPER_EN_V5_P1_768467.pdf) accessed 20 May 2015.

European Commission (2010), *Communication from the Commission, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, COM(2010) 573 final, Brussels, 19.10.2010, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:en:PDF> accessed 12 May 2015.

European Commission (2003), *Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based*, Brussels, 15.10.2003, COM(2003) 606 final.

European Commission (2001), *Memorandum from the President and Mr Vitorino, Application of the Charter of Fundamental Rights of the European Union*, Brussels, 13 March 2001, SEC(2001)380/3.

European Parliament (2009), *European Parliament legislative resolution of 2 April 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008)0426 – C6-0291/2008 – 2008/0140(CNS))*, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0211+0+DOC+XML+V0//EN> accessed 15 May 2015.

## 2. Literature

### a) Books

Callewaert, J. (2014), *The accession of the European Union to the European Convention on Human Rights*, Strasbourg: Council of the European Union.

Donnelly, J. (2003), *Universal Human Rights in Theory & Practice*, Second Edition, Ithaca and London: Cornell University Press.

Dzehtsiarou, K., Konstadinides, T., Lock, T. & O'Meara, N. (eds) (2014), *Human Rights Law in Europe. The Influence, Overlaps and Contradictions of the EU and the ECHR*, London/ New York: Routledge.

Freeman, M. (2002), *Human Rights. An interdisciplinary Approach*, Cambridge and Malden: Polity press.

Hooghe, L. & Marks, G. (2001), *Multi-Level Governance and European Integration*, Lanham et al: Rowman & Littlefield Publishers.

Kerikmäe, T. (ed) (2014), *Protecting Human Rights in the EU, Controversies and Challenges of the Charter of Fundamental Rights*, Heidelberg et al: Springer.

Keukeleire, S. & Delreux, T. (2014), *The Foreign Policy of the European Union*. New York: palgrave macmillan.

McCormick, J. (2014), *Understanding the European Union, A Concise Introduction*, London et al: palgrave macmillan.

Nugent, N. (ed) (2001), *The European Commission*, Basingstoke and New York: palgrave.

Piris, J.-C. (2010), *The Lisbon Treaty, A Legal and Political Analysis*, Cambridge: University Press.

Smith, R. K. M. (2012), *International Human Rights, Textbook*, 5<sup>th</sup> edition, Oxford: University Press.

Varju, M. (2014), *European Union Human Rights Law, The Dynamics of interpretation and Context*, Cheltenham and Northampton: Edward Elgar.

Wiener, A. & Diez, T. (eds) (2009), *European integration Theory*, Second Edition, Oxford: University Press.

### **b) Book chapters**

De Búrca, G. (2011), 'The Evolution of EU Human Rights Law, in Craig, P. & de Búrca, G. (eds) *The Evolution of EU Law*, Oxford: Oxford University Press, pp. 465-497.

De Búrca, G. (2010), 'Stumbling into Experimentalism: The EU Anti-Discrimination Regime', in Sabel, C. F. & Zeitlin, J. (eds) *Experimentalist Governance in the European Union, Towards a New Architecture*, Oxford: Oxford University Press, pp. 215-236.

De Schoutheete, P. (2012), 'The European Council', in Peterson, J. & Shackleton, M. (eds) *The Institutions of the European Union*, 3rd edition, Oxford: Oxford University Press, pp. 43-67.

De Schutter, O. (2011), 'The New Architecture of Fundamental Rights Policy in the EU', in Benedek, W., Benoît-Rohmer, F., Karl, W. & Nowak, M. (eds) *European Yearbook on Human Rights*, Antwerp: European Academic Press, pp. 107-141.

Hayes-Renshaw, F. (2012), 'The Council of Ministers', in Peterson, J. & Shackleton, M. (eds) *The Institutions of the European Union*, 3rd edition, Oxford: Oxford University Press, pp. 68-95.

Hooghe, L. & Kassim, H. (2012), 'The Commission's Services', in Peterson, J. & Shackleton, M. (eds) *The Institutions of the European Union*, 3rd edition, Oxford: Oxford University Press, pp. 173-198.

Langlois, A. J. (2009), 'Normative and Thoretical Foundations of Human Rights', in Goodhart, M. (ed) *Human Rights. Politics & Practice*, Oxford: Oxford University Press, pp. 11-25.

Meuser, M. & Nagel, U. (2005), 'ExpertInneninterviews – vielfach erprobt, wenig bedacht, Ein Beitrag zur qualitativen Methodendiskussion', in Bogner, A., Littig, B. & Menz W. (eds). *Das Experteninterview, Theorie, Methode, Anwendung*. Wiesbaden: VS Verlag für Sozialwissenschaften, pp. 71-93.

Moravcsik, A. & Schimmelfennig, F. (2009), 'Liberal intergovernmentalism', in Wiener, A. & Diez, T. (eds) *European Integration Theory*, Oxford: Oxford University Press, pp. 91-104.

Oikarinen, J. (2014), 'Reform of the EU Human Rights Policy and the Challenge of Implementation', in Benedek, W., Benoît-Rohmer, F., Karl, W., Kettemann, M. C. & Nowak, M. (eds) *European Yearbook on Human Rights 2014*, Antwerp: intersentia, pp. 115-124.

Peters, B. G. & Pierre, J. (2009), 'Governance Approaches', in Wiener, A. & Diez, T. (eds) *European Integration Theory*, Oxford: Oxford University Press, pp. 91-104.

Peterson, J. (2012), 'The College of Commissioners', in Peterson, J. & Shackleton, M. (eds) *The Institutions of the European Union*, 3rd edition, Oxford: Oxford University Press, pp. 96-123.

Shackleton, M. (2012), 'The European Parliament', in Peterson, J. & Shackleton, M. (eds) *The Institutions of the European Union*, 3rd edition, Oxford: Oxford University Press, pp. 124-147.

Smith, K. E. (2014), 'The EU as a diplomatic actor in the field of human rights', in Koops, J. & Macaj, G., (eds) *The European Union as a Diplomatic Actor. The European Union in International affairs*, London: Palgrave Macmillan, pp. 155-177.

Spielmann, D. (2014), 'Foreword', in Dzehtsiarou, K., Konstadinides, T., Lock, T. & O'Meara, N. (eds) *Human Rights Law in Europe. The Influence, Overlaps and Contradictions of the EU and the ECHR*, London/ New York: Routledge, pp. xii-xxi.

Theuermann, E. (2013), 'The Review of the EU Human Rights Policy: A Commitment to Strengthened EU Action on Human Rights', in Benedek, W., Benoît-Rohmer, F., Karl, W., Kettemann, M. C. & Nowak, M. (eds) *European Yearbook on Human Rights 2013*, Antwerp: intersentia, pp. 31-41.

Theuermann, B. (2012), 'The Role and Functioning of COHOM and the External Relations of the EU', in Nowak, M., Januszewski, K. M. & Hofstätter, T. (eds) *All Human Rights for All. Vienna Manual on Human Rights*, Wien: NWV Verlag, pp. 185-189.

Tretter, H. (2012), 'An overview of the EU Human Rights Mechanisms', in Nowak, M., Januszewski, K. M. & Hofstätter, T. (eds) *All Human Rights for All. Vienna Manual on Human Rights*, Wien: NWV Verlag, pp. 165-175.

Zetterquist, O. (2011), 'The Charter of Fundamental Rights and the European *Res Publica*', in Di Federico, G. (ed) *The EU Charter of Fundamental Rights*, Dordrecht: Springer, pp. 3-14.

### c) *Journal articles*

Butler, I. d. J. (2012), 'Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission', *European Law Review*, vol. 37 (4), pp. 397-418.

Craig, P. P. (2013), 'EU Accession to the ECHR: Competence, Procedure and Substance', *Fordham International Law Journal*, vol. 36 (115), pp. 1114-1150.

Douglas-Scott, S. (2011), 'The European Union and Human Rights after the Treaty of Lisbon', *Human Rights Law Review*, vol. 11 (4), pp. 645-682.

Eckes, C. (2013), 'EU Accession to the ECHR: Between Autonomy and Adaptation', *The Modern Law Review*, vol. 76 (2), pp. 254-285.

Hilson, C. (2007), 'Legitimacy and rights in the EU: questions of identity', *Journal of European Public Policy*, vol. 14 (4), pp. 527-543.

Leconte, C. (2014), 'The EU Fundamental Rights Policy as a Source of Euroscepticism', *Human Rights Review*, vol. 15 (1), pp. 83-96.

Leconte, C. & Muir, E. (2014), 'Understanding Resistance to the EU Fundamental Rights Policy', *Human Rights Review*, vol. 15 (1), pp. 13-24.

Marangoni, A.-C. & Raube, K. (2014), 'Virtue or Vice? The Coherence of the EU's External Policies', *Journal of European Integration*, vol. 36 (5), pp. 473-489.

Muir, E. (2014a), 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges', *Common Market Law Review*, vol. 51 (1), pp. 219-246.

Muir, E. (2014b), 'Fundamental Rights: An Unsettling EU Competence', *Human Rights Review*, vol. 15 (1), pp. 25-37.

Portela, C. & Raube, K. (2012), 'The EU Polity and Foreign Policy Coherence', *Journal of Contemporary European Research*, vol. 8 (1), pp. 3-20.

Scharpf, F. W. (2012), 'Perpetual momentum: directed and unconstrained?', *Journal of European Public Policy*, vol. 19 (1), pp. 127-139.

Stone Sweet, A. & Stranz, K. (2012), 'Rights adjudication and constitutional pluralism in Germany and Europe', *Journal of European Public Policy*, vol. 19 (1), pp. 92-108.

Tobler, C. (2014), 'Equality and Non-Discrimination under ECHR and EU Law. A Comparison Focusing on Discrimination against LGBTI Persons', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 74 (3), pp. 521-561.

Van der Berghe, F. (2010), 'The EU and Issues of Human Rights Protection. Same Solutions to More Acute Problems?', *European Law Journal*, vol. 16 (2), pp. 112-157.

#### **d) Policy and other reports**

Ashton, C. (2010), *Speech to the European Parliament on human rights*, Strasbourg, 16 Jun 2010, SPEECH/10/317), available at [http://europa.eu/rapid/press-release\\_SPEECH-10-317\\_en.pdf](http://europa.eu/rapid/press-release_SPEECH-10-317_en.pdf) accessed 11 May 2015.

Beke, L. et al (2014), *Report on the integration of human rights in EU development and trade policies*, FRAME Workpackage No. 9, Deliverable No. 1, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/07-Deliverable-9.1.pdf> accessed 22 July 2015.

Bojarski, Ł., Schindlauer, D. & Wladasch, K. (2014), *The European Charter of Fundamental Rights as a Living Instrument*, available at [http://bim.lbg.ac.at/sites/files/bim/attachments/cfreu\\_manual\\_0.pdf](http://bim.lbg.ac.at/sites/files/bim/attachments/cfreu_manual_0.pdf) accessed 11 May 2015.

De Schutter, O. (2004), *The Implementation of the EU Charter of Fundamental Rights through the Open Methode of Coordination*, Jean Monet Working paper 07/04, NYU School of Law, new York, available at <http://www.jeanmonnetprogram.org/archive/papers/04/040701.rtf> accessed 12 May 2015.

European Parliament (undated), *Human rights and democracy*, available at <http://www.europarl.europa.eu/aboutparliament/en/0039c6d1f9/Human-rights.html> accessed 15 May 2015.

European Parliament (2010), *SWIFT: European Parliament votes down agreement with the US*, Press release, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20100209IPR68674+0+DOC+XML+V0//EN> accessed 15 May 2015.

FRAME Policy Brief (2014), *The Post-2014 EU Action Plan on Human Rights and Democracy. A Policy Brief*, available at [http://www.fp7-frame.eu/wp-content/materiale/policy\\_brief/02-FRAME%20Policy%20Brief%20No%202%20--Post%202014%20SFAP%20Policy%20Brief.pdf](http://www.fp7-frame.eu/wp-content/materiale/policy_brief/02-FRAME%20Policy%20Brief%20No%202%20--Post%202014%20SFAP%20Policy%20Brief.pdf) accessed 9 July 2015.

Lewis, T. et al (2014), *Report on coherence of human rights policymaking in Eu institutions and other EU agencies and bodies*, FRAME Work Package No. 8, Deliverable No. 1, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf> accessed 22 July 2015.

## V. Document analysis of policy and legal documents<sup>157</sup>

### A. Introduction

The following chapter consists of an analysis of human rights related policy and legal documents employed by the European Union (EU) in both internal and external policies. It has the objective of determining human rights standards of EU policy-making and acquiring an insight into the content, priorities and motivation of EU human rights policies. It will further identify gaps, tensions and contradictions thereof, in line with the general parameters of the report as outlined in chapter I.

The policies of the EU cover several topics and are framed in various contexts, often with one theme engaging several institutions and policies at once. As a result, the EU engages to some extent in virtually every major human rights area, both in the realm of civil and political rights as well as economic, social and cultural rights (ESCR).

This wide thematic scope must be considered within the context of the organisational structure of the EU and its relationship with the Member States. Despite a long process of structural reorganisation and attempts at streamlining, the EU remains a complex entity, with various aspects of its policies and actions distributed among its principal bodies and institutions (the European Council, the Council of the European Union, the European Commission and the European Parliament) and several other agencies and inter-institutional bodies, most of which have their own specialised structures for handling specific thematic and geographic areas of concern. The complicated structure of the EU makes an analysis of human rights policies all the more difficult, given the fact that different policies are the responsibility of many different bodies and institutions, and in some cases the same area of policy falls within the purview of more than one actor.

The above parameters mean that an analysis of the entire scope of human rights-related policies of the EU is well beyond the scope of this chapter. Therefore, a selection of topics to be covered was carried out with a view towards providing an insight into a wide variety of EU policies, internal and external, as well as providing focus on current and emerging themes, which pose particular challenges to the EU. As a result, the choice was made to focus the analysis on policies formulated or employed by the European External Action Service (EEAS) and several Directorate-Generals (DGs) of the European Commission. The reasoning behind this selection is that both the EEAS and the Commission play a primary role in the execution and implementation of the EU's internal and external policies, including areas of human rights concern. Furthermore, within the Commission, several DGs were selected on the grounds of the scope of their involvement with human rights-related topics, including recently emerging themes and challenges. This is important because the Commission does not feature a specific DG tasked primarily with human rights concerns; instead, relevant policies are split among several DGs.

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The analysis carried out in this chapter will refer to the general standards and principles of human rights within the EU system, as established by primary law and in the 'Charter of Fundamental Rights of the European Union' (CFREU), and as applied in the jurisprudence of the Court of Justice of the European Union (CJEU) (see chapters II and III).

In order to provide a sound insight into gaps, tensions and contradictions within the EU human rights protection system, the choice was made to focus on selected areas of EU policy. These areas were chosen with a view towards fulfilling the following criteria:

- a) The selected areas are being implemented by the following EU institutions:
  - i. EEAS
  - ii. The Commission's DG for International Cooperation and Development (DG DEVCO)
  - iii. The Commission's DG for Migration and Home Affairs (DG HOME)
  - iv. The Commission's DG for Justice and Consumers (DG JUST)
  - v. The Commission's DG for Communications, Networks, Content and Technology (DG CONNECT)
- b) The areas represent a mixture of external, internal and mixed (internal with external elements and vice versa) policies, providing an insight into how the issue of division between internal and external policies of the EU informs the human rights protection system.
- c) The policies in the given area are in various stages of their policy cycle, allowing a look at how EU policies are developed, implemented, and evaluated and into how they transition into the next policy stage.

Within each selected area, relevant documents have been screened and selected according to their relevance to a given area, their weight and their relation to human rights topics. Given the number of various types of documents produced by the EU, prioritisation has been applied with a view towards selecting the most vital and relevant legal and policy instruments. Following collection and screening, an analysis has been carried out towards identifying examples of gaps, tensions and contradictions.

## **B. Selected policy areas and documents**

### **1. Human rights in EU external action**

The overarching commitment to the promotion and protection of human rights throughout the external policy of the EU, as provided for in primary law (Article 2, Article 3, Article 6 and Article 21, Treaty on European Union (TEU), Articles 208-211 and Article 218, Treaty on the Functioning of the European Union (TFEU)) finds its conceptualisation and operationalisation within several policies. The 'European Security Strategy' (European Council, 2003) remains the sole general strategic foreign policy document for the EU. In 2012, the Council of the EU adopted the EU Strategic Framework on Human Rights and Democracy (SF) and a corresponding Action Plan (AP) (Council of the European Union, 2012b). The SF and AP address the entirety of EU external policy, making them the first major policy documents which operationalise EU human rights standards across major areas of EU activities. The SF and AP are envisioned to function as an organic pair. The SF acts as a permanent overarching document, which elaborates the aspirations of the EU as a promoter and protector of human rights worldwide. The AP is

laid out as a tactical operationalisation and implementation tool, highlighting specific areas of concern and actions to be taken, including an indication of responsible actors and projected timeframes. Unlike the permanent SF, the AP is assumed to cover a set period of time, with the first one concluding in 2014. The actors empowered to implement the AP include, for the most part, the Member States, the Commission and the EEAS. With the first set of outcomes and actions on the AP concluded in 2014, the AP is currently undergoing a transitory phase towards the next array of parameters.<sup>158</sup> A joint Communication by the Commission and the HR/VP on a new proposed AP for the years 2015-2019 was issued in April 2015, and the new AP is expected to be adopted by the Foreign Affairs Council shortly (European Commission & High Representative of the European Union for Foreign Affairs and Security Policy, 2015).<sup>159</sup>

Parallel to the SF and the AP, the EU continues to employ a variety of specific documents which outline the parameters for external action within selected topics and themes, towards particular actors and venues, on a multilateral, bilateral and unilateral level. The majority of these documents touch upon human rights concerns and issues to some degree. Examples of these documents include: EU medium-term priorities at the United Nations (UN) (2012-2015) (Political and Security Committee, 2012), various EU Human Rights Guidelines (Council of the European Union), the EU priorities for cooperation with the Council of Europe (CoE) in 2014-2015 (Council of the European Union, 2013) and various EU human rights guidelines. These policies are implemented primarily by the EEAS (including EU delegations throughout the globe), in cooperation with other EU bodies and institutions (chiefly the Commission and the Council) and the Member States (including their embassies and missions).

## **2. Development cooperation and human rights**

Although the Treaty of Lisbon introduced the EEAS as an institution intended to carry out the majority of the EU's external action, other EU bodies and the Member States share responsibility with the EEAS over several foreign policy areas. One such area is development cooperation and related fields, such as international dialogue on development and research for development, which DG DEVCO administers with the involvement of the EEAS. Towards implementing the EU development policy, DG DEVCO operates under a specific set of strategic documents, most importantly the 2012 'EU Agenda for Change' (Council of the European Union, 2012a), which outlines the basic parameters for the various forms through which the EU provides external partners with aid and assistance. Other documents, which encapsulate specific aspects of development policy related to human rights, include the 'Council conclusions on a rights-based approach to development cooperation, encompassing all human rights' (Council of the European Union, 2014) and the 'Tool-Box: A Rights-Based Approach, Encompassing All Human Rights For EU Development Cooperation' (European Commission, 2014a).

## **3. Human rights in the Area of Freedom, Security and Justice**

The EU's Area of Freedom, Security and Justice (AFSJ) consists of the following policy areas: (1) Border checks, asylum and immigration; (2) judicial cooperation in criminal law matters and police cooperation;

<sup>158</sup> For an analysis of possible adjustments to the second instalment of the Action Plan see [FRAME Policy Brief](#) (2014).

<sup>159</sup> The new Action Plan on Human Rights and Democracy (2015-2019) was adopted by the Council on 20 July 2015, shortly before the submission of this report.

and (3) judicial cooperation in civil law matters (Engström and Heikkilä, 2014, p. 4). The relevant European Commission departments for AFSJ are DG JUSTICE and DG HOME. They deal chiefly with the following matters: EU citizenship, discrimination, organised crime and drug dealing, counter-terrorism, human trafficking, free movement of people, asylum and immigration, judicial cooperation and police and customs cooperation. Additionally, several specialised EU agencies such as FRONTEX, EUROJUST, EASO and EUROPOL are involved in AFSJ matters.

The principal strategic policy priorities and themes of the AFSJ have been outlined in a series of strategic programmes, namely the Tampere Programme (1999-2004), the Hague Programme (2004-2009) and recently the Stockholm Programme (2010-2014) (Council of the European Union, 2010). With the Stockholm Programme having expired at the end of 2014, the EU is currently in the midst of a prolonged internal discourse on the future of overarching AFSJ policies. As a new set of policies are being developed, this analysis will thus cover the on-going process. The following major, strategic documents, envisioned as foundations for the new AFSJ programme, have been analysed: the European Council Conclusions of 26-27 June 2014 which contain 'Strategic Guidelines' for the next AFSJ cycle (European Council 2014); Commission documents – DG HOME: Commission Communication, 'An Open and Secure Europe: Making it Happen' (European Commission 2014b), DG JUSTICE: Commission communication, 'The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union' (European Commission 2014c), Commission communication 'A New EU Framework to Strengthen Rule of Law' (European Commission 2014d); and the European Parliament's 'Report on the Mid-Term Review of the Stockholm Programme' (European Parliament 2014).

#### **4. Human rights and EU information and communication technology policies**

Since the 1990s, the EU has developed several policies related to Internet access and use, online commerce, privacy and security, with legal and policy documents adopted with a view towards fostering a common digital market within the EU. In 2010 these policies were upgraded as part of the Europe 2020 Strategy, taking new shape as the 'Digital Agenda for Europe' (2010a). This document presents a strategic array of policies intended to provide a comprehensive approach to all issues related to information and communication technology (ICT). The Agenda should '[...] chart a course to maximise the social and economic potential of ICT, most notably the Internet, a vital medium of economic and societal activity: for doing business, working, playing, communicating and expressing ourselves freely'. Towards this goal, the Agenda is elaborated into specific priorities, goals and sub-policies, primarily operated by the newly established DG CONNECT.

#### **C. Notes on methodology**

In general, access to legal and policy documents of the EU in areas covered in this analysis is good. The majority of legal acts, policy and strategy documents, programmes, plans and strategies, working documents and plans, official statements, directives and other information are readily accessible via the EU's websites.

One concern, regarding the accessibility of documentation, warrants attention, given that it affects the entire FP7-FRAME project. Despite the general principle of transparency and the public nature of the

majority of EU publications, several types of documents remain confidential and inaccessible to the public, short of employing legal means pursuant to EU laws regarding public access to documents. These documents include selected types of policy documents (e.g. external action country strategies), minutes, agendas and participant lists of Council Working Group meetings and internal evaluations and assessments. Despite the fact that some of the information in these documents eventually informs various official concluding documents, the issue of document confidentiality continues to impair research on EU policies.

## **D. Gaps, tensions and contradictions**

### **1. Fundamental rights vs. human rights**

Throughout both EU legal acts and policy documents, rights and freedoms are referred to as both ‘fundamental rights’ and ‘human rights’. The former term has its roots in historical developments of framing human rights within the jurisprudence of EU courts. As a result of these developments, a tradition of referring to rights and freedoms of EU citizens within the EU legal and policy language as ‘fundamental rights’ has emerged. Despite differences in semantics, a virtually unanimous consensus within the academia persists as to treating the terms ‘human rights’ and ‘fundamental rights’ interchangeably while referring to the EU standard of human rights protection (Nyman-Metcalf, 2014, p.14). This consensus is grounded, inter alia, in the explicit links between the EU fundamental rights regime and the standards of the ‘European Convention for Human Rights and Fundamental Freedoms’ (ECHR), which have been elaborated on by the CJEU in its jurisprudence. Within both normative acts and policy documents, there is no evidence that the EU considers fundamental rights to be a category of norms functioning under different overarching principles and characteristics to the international human rights regime. Looking at the CFREU itself, the fundamental rights language within it matches the human rights language presented in the UN treaties and within other regional human rights systems. However, at the same time, the EU itself continues to refer to ‘fundamental rights’ as to a category in its internal policies, and to ‘human rights’ as a category in its external policies.

### **2. References to other human rights systems**

As mentioned briefly above, the EU human rights system, both in its internal and external dimensions, refers extensively to standards and achievements of the CoE, as can be seen in the ECHR and the jurisprudence of the European Court of Human Rights. The links between these two human rights protection systems appear on various levels: in the primary law (e.g. Article 6.2. of the TEU which states that ‘The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.’); in the CFREU (preamble, para. 5); in various secondary legislation of the EU; and in policy documents (e.g. in the EU Strategic Framework on Human Rights and Democracy, p. 2). An analysis on the nature, scope and consequences of the relationship between the EU and CoE human rights protection systems lies beyond the scope of this report, but has been extensively discussed within academia and will be the focus of further research within the FRAME project.<sup>160</sup>

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<sup>160</sup> See chapter II.B.1. of this report: ‘The legal relationship between the Charter, the ECHR and national constitutions after the Treaty of Lisbon’; See also FP7-FRAME Deliverable D5.2 ‘Report EU engagement with other European regional organizations’,

References to the UN human rights protection system are markedly different between EU legal and policy documents. While the EU refers extensively to the global human rights framework of the UN in its external policy documents (e.g. the EU Strategic Framework and Action Plan on Human Rights and Democracy recall UN standards in various areas, starting with a general statement that ‘The EU calls on all States to implement the provisions of the Universal Declaration of Human Rights and to ratify and implement the key international human rights treaties, including core labour rights conventions, as well as regional human rights instruments’), similar references within the internal legal and policy documents are sparse. Neither the Treaties, nor the CFREU contain any mention of the ‘International Bill of Rights’ or core UN human rights treaties. Incidental references to the UN human rights system can be found within lower-tier legal and policy documents, for example ‘Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin’ (commonly known as the Racial Equality Directive) refers to several elements of the UN Bill of Rights in its preamble (European Commission, 2000). This state of affairs mirrors the situation within the CJEU jurisprudence, which has taken a distanced stance towards the UN human rights system on several occasions (*Grant v South West Trains Ltd*, Case C-249/96, para. 46) and is seen as reluctant to refer to it (UN Office of the High Commissioner for Human Rights, undated, pp. 11-12). While the EU itself is legally bound only by the ‘UN Convention on the Rights of Persons with Disabilities’ (CRPD), the UN human rights system has become a universal, global human rights reference point, and the vast majority of its core instruments have been adopted by EU Member States themselves. The low level of recognition of the international human rights system within internal EU laws and policies goes against the spirit, if not the letter, of the universality of human rights (ibid).

### 3. Human rights in general external policy

Human rights feature differently between external EU policies (understood as policies related to EU action towards bilateral and multilateral partners) and internal policies (taken as policies aimed at EU institutions and Member States). The EU formulates its external and internal policies separately in the Council, where the external human rights policies are dealt with by COHOM (Human Rights Working Group), while the internal fundamental rights matters are handled by FREMP (Working Party on Fundamental Rights, Citizens’ Rights and Free Movement of Persons), with both groups interacting to a limited degree. External action in the field of human rights is largely divided between the EEAS and selected Commission DGs (chiefly DEVCO and TRADE) working with external policies, while other DGs (including CONNECT, HOME and JUST) focus on internal matters. Furthermore, neither the Council nor the Commission feature dedicated overarching (external and internal) human rights policy bodies. The internal-external divide has several consequences. The separation of developing, operationalising and implementing internal and external human rights policies, combined with the lack of an overarching human rights policy aimed at both dimensions, results in a quite remarkably different set of parameters, priorities and topics within each dimension. In some cases, the resulting gaps are quite easy to justify.

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developed by Adam Mickiewicz University, KU Leuven Centre for Global Governance Studies and University of Nottingham, forthcoming Summer 2016. The report will extensively consider the relationship between the EU and the CoE in the field of human rights, including the consequences of the recent CJEU opinion 2/13 on accession of the EU to the European Convention on Human Rights and Fundamental Freedoms.

For example, the extensive focus on the death penalty in external action, combined with relative lack of internal activity on the topic, is due to the permanent abolition of the death penalty in all EU Member States. However, tensions do arise in other areas, particular when EU external policies tackle a topic that has a markedly lower policy priority within the internal dimension. This leads to situations perceived as double standards, when the EU acts externally on human rights issues which are considered to be inadequately addressed within the EU itself. Several such areas, such as human rights in counterterrorism, the response to the treatment of minorities in Member States and EU refugee and migration policies, have been identified in literature (de Búrca, 2011, p. 687) and continue to persist, damaging the credibility of the EU's external relations.

Furthermore, the external human rights promotion of the EU is markedly uneven, as regards civil and political rights and ESCR. The EU has a very long and successful history of globally promoting civil and political rights, as well as furthering mechanisms and institutions of general importance for human rights protection and promotion. Examples of these initiatives include the abovementioned staunch EU support of UN resolutions regarding abolishing the death penalty worldwide and other policy priorities, such as promoting freedom of religion and belief and working to strengthen and reform the UN human rights system. The Council elaborates an array of human rights guidelines which can be seen as primary EU human rights priorities in external actions. These include, among others: abolishing the death penalty, preventing torture and other cruel or inhuman treatment and punishment, promoting LGBTI rights, protecting human rights defenders and preventing violence against women and girls. However, at the same time, ESCR are addressed with a remarkably lower priority. The 2012 SF includes a general commitment to the protection and promotion of ESCR, but the AP contains only a single outcome entitled 'Respect for economic, social and cultural rights' (Council of the European Union, 2012b, outcome III.9), which contains actions aimed at including ESCR in cooperation with the UN and third countries. However, it does not elaborate on specific ESCR concerns to the same degree that it engages topics related to civil and political rights. The Council has not elaborated any EU human rights guidelines on ESCR and they feature in a very haphazard manner across other general external policy documents. Some elements of prioritising ESCR appear in documents focused on select areas of human rights, such as the rights of children (Guidelines for the Promotion and Protection of the Rights of the Child, Council of the European Union, 2008b). However, on the whole, the EU gives a markedly lower priority to ESCR compared to civil and political rights. This particular gap appears to be remedied in the proposed new AP for the years 2015-2019,<sup>161</sup> which contains the objective 'Fostering a comprehensive agenda to promote Economic, Social and Cultural Rights (ESCR)' under the section 'Addressing Key Human Rights Challenges' (European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy, 2015, objective II.16). Interestingly, while in the previous informal external action burden sharing arrangement the promotion of ESCR was mostly ceded to Member States,<sup>162</sup> the proposed new AP indicates that the stakeholders responsible for furthering ESCR priorities will be the

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<sup>161</sup> The new Action Plan on Human Rights and Democracy (2015-2019) was adopted by the Council on 20 July 2015, shortly before the submission of this report.

<sup>162</sup> Information obtained during interviews with stakeholders taken under the Chatham House Rule, Brussels, October 2014.

EEAS, the Commission and the Council. This signals an interesting shift towards a more centralised approach to ESCR promotion.

The proposed new 2015-2019 AP includes other solutions which contrast with the previous array of external human rights policies. One general observation can be made, namely that the proposed AP has shifted towards an approach based on prioritisation of key items and areas. This likely heralds a change from the previous external human rights strategy, where the EU sought to address virtually all major human rights concerns (and as evidenced in the case of ESCR, was not quite able to succeed in that) into an assumption that the EU selects particular areas where it will focus the attention of its institution and cooperation with Member States. This prioritisation is demonstrated by the fact that some items present in the 2012 AP, such as the outcome 'Freedom of Religion and Belief' (Council of the European Union, 2012b, outcome V.23) have no counterparts in the 2015 AP. While, on the one hand, this raises concerns as to whether the EU will continue to maintain its policies in areas not covered in the 2015 AP, interviews with stakeholders from the Council, EEAS and MS diplomacy indicate that the new prioritisation is supposed to allow the EU to use its resources in a more efficient manner, averting the problem of overextending the EU diplomacy in the field of human rights.

On the other hand, the 2015 AP includes several items which have not featured prominently in the EU external human rights policy up to date. One example of filling such gaps in the policy is the objective 'Cultivating an environment of non-discrimination' (European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy, 2015, objective II.12), which contains actions of both general anti-discriminatory nature and specific areas such as issues of discrimination against LGBTI persons, indigenous peoples and persons with disabilities.

#### **4. Human rights in development cooperation**

Throughout the history of EU development cooperation, much criticism has been expressed regarding the role and place of human rights concerns within the policies employed by the EU (International Human Rights Network, 2008 p. 6.). Weaknesses identified include the following: substitution of legally precise human rights terminology with vague formulations; misrepresentation of the relationship between policy commitments and the legal obligations of human rights; failures to identify core development challenges (such as poverty as a denial of human rights); and not acknowledging the equal status of ESCR and civil and political rights in practice (Ibid). In particular, criticism has indicated that EU policies have refrained from adopting a human rights-based approach (HRBA) to development. The HRBA, as developed within the UN system, calls for the mainstreaming of human rights across development cooperation, an understanding human rights protection as both a means and a goal of aid, and the strengthening of the capacity of rights-holders to make their claims and of duty-bearers to meet their obligations (Marx, McInerney-Lankford, Wouters & D'Hollander, 2015, pp. 27-29). The current general strategic document for EU development cooperation, the Agenda for Change (Council of the European Union, 2012a), suffers from several of the above-mentioned inadequacies. The Agenda uses confusing language, which indicates an unclear approach to the relationship between human rights,

democracy and good governance,<sup>163</sup> and makes no mention of the HRBA or of the role of the UN human rights framework.

Towards addressing these shortcomings, the SF and AP includes a policy objective entitled 'Working towards a rights-based approach to development cooperation'. The AP envisages three items to be carried out in order to achieve this outcome: the development of a toolbox for working towards a rights based approach (RBA) to development cooperation, the inclusion of human rights assessments as an overarching element in the deployment of EU country aid modalities and the integration of human rights issues in EU advocacy on the global development agenda post-Millennium Development Goals (Council of the European Union, 2012b, outcome IV.10). Following up on the priorities laid out in the AP, the Commission has introduced a working document, 'Tool-Box: A Rights-Based Approach, Encompassing All Human Rights for EU Development Cooperation', mentioned briefly above, which, while operating under the umbrella of the Agenda for Change, outlines a comprehensive RBA (European Commission, 2014a).<sup>164</sup> The working document presents a modality frequently employed by EU institutions, namely the tendency to close gaps and alleviate inadequacies in general policy by introducing new specific documents, without replacing or altering the underlying framework. While this approach ensures covering the gaps in policy, it does generate a disconnect between the Agenda for Change, which features no references to 'rights-based' or 'human-rights based' approaches, and the Tool-Box, which operationalises an RBA. While this does not cause a direct conflict between both documents, it results in an arguably vital concept of RBA missing from the overarching strategy.

Furthermore, the RBA, as elaborated upon in the Tool-Box, is difficult to reconcile with pre-existing concepts in the discourse on human rights in development. The Tool-Box recalls the Development Assistance Committee (DAC)/Organisation for Economic Co-operation and Development (OECD) framing of the HRBA as the starting point for its concept, and goes on to introduce a 'right-based approach, encompassing all human rights', stating that the 'RBA goes beyond the formally recognized Human Rights, to include other types of rights, such as intellectual property rights, basic economic and social delivery rights as well as sexual and reproductive health and rights. An RBA therefore is an approach covering a broader category of rights than those covered by an HRBA' (European Commission, 2014a, p. 7). While there is indeed much confusion related to various uses of the terms 'human rights-based approach', 'human rights approach' and 'rights-based approach' (Cornwall & Nyamu-Musembi, 2004, p. 1431), the latter sees at least two frequent uses. As Prion explains, one of them is nothing more than a shorthand for 'human-rights based approach', while the other signifies an approach distanced from the international human rights system (Piron, 2005, p. 24). The Tool-Box introduces a new conceptualisation of an RBA which is neither fully convergent with an HRBA but, on the other hand, as the Tool-Box itself reiterates, does not imply distancing from human rights. As a result, the conceptualisation of human rights in development, as presented in the Tool-Box, is difficult to reconcile with existing concepts, and

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<sup>163</sup> In Section 1, the Agenda states that 'objectives of development, democracy, human rights, good governance and security are intertwined', while Section 2 is entitled 'Human rights, democracy and other key elements of good governance', implying a hierarchical relationship.

<sup>164</sup> A more extensive analysis of the Tool-Box can be found in Beke, D'Hollander, Hachez & Pérez de las Heras (2014).

indicates a somewhat carefree approach to terminology in an already quite semantically convoluted field.

### 5. The EU and positive duties in human rights protection

One of the general critiques of the EU human rights system concerns the way in which it formulates duties related to rights and freedoms, in comparison to the concept of multi-layered human rights protection (UN Office of the High Commissioner for Human Rights (undated), pp.14-17). Developed within the UN human rights system, the concept of multi-layered protection of human rights assumes that, apart from 'negative duties', which entail respect for rights and freedoms of the right-holder and the obligation of duty-bearers to refrain from infringing upon these rights, positive duties exist as well, entailing the protection and fulfilment of human rights. In this paradigm, the duty-bearer is required to ensure that third parties do not interfere with the enjoyment of freedoms and rights, and that the duty-bearer facilitates the fulfilment and realisation of rights by the right-bearers themselves. To quote the Committee on Economic, Social and Cultural Rights (CESCR): 'All human rights impose [...] three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote' (CESCR, 2000, para. 33).

The concept of multi-layered protection of human rights, originating from the CESCR and the 'Convention on the Elimination of all Forms of Discrimination Against Women', has since expanded into the entire UN human rights framework. While the EU itself is currently a party to only one instrument of the international human rights system (namely the CRPD), the core concepts of human rights, as elaborated by the UN, are not limited to the UN itself, but are widely considered, both in academia and in jurisprudence of international and domestic courts, as universal standards applicable to all human rights systems. Furthermore, while the TEU does not explicitly reference the international human rights system as a source of general principles for fundamental rights within the EU, it does refer to the constitutional traditions common to the Member States, who have ratified a majority of core UN human rights covenants and treaties and who apply international standards in their domestic legislation and jurisprudence.

The concept of positive duties is unevenly reflected in EU policy documents. For example, the Commission's recent documents, on assessing the human rights impact and implementation of the CFREU, stress the necessity of respecting fundamental rights and ensuring that the EU bodies and Member States refrain from infringing on rights and freedoms to the degree to which they are bound by the Charter (European Commission, 2009a; 2009b and 2010c). These documents make no reference to the concepts of protecting the right-holders from interferences by third parties or to the idea of fostering the fulfilment of rights.

The scope of the EU's obligations as a duty-bearer and the explicit limits imposed on the EU's human rights system lead to situations such as the one concerning the European Arrest Warrant (EAW). The EAW is an instrument of judicial cooperation within the EU, which allows for the transfer of a suspect or a sentenced person from one EU Member State to another, subject to several standards and procedures outlined in relevant EU law, and in domestic law which implements the EU legislation (Council Framework Decision 2002/584/JHA). While the Framework Decision on the EAW introduces several

human rights safeguards,<sup>165</sup> it does not enshrine protection of procedural rights. Therefore, the EAW relies strictly upon procedural rules and practices of domestic criminal law, and does not protect the individual from the violation of his or her procedural rights. The relationship between domestic standards and the EAW Framework Decision were subject to several controversial rulings of the CJEU, which initially took a very defensive approach, narrowly interpreting the scope of grounds for refusal of EAW as exhaustive (case *Ciprian Vasile Radu*, 2013) and ruling that Article 53 of the CFREU may not be interpreted as allowing the Member State executing the EAW to introduce conditionality for surrender, which is not provided for in the Framework Decision (case *Stefano Melloni v Ministero Fiscale*, 2013). Only recently, in the case *Jeremy F v Premier ministre* (2013), did the CJEU take a less restrictive position from the perspective of human rights protection, ruling that the Framework Decision, despite a lack of explicit provisions, neither requires nor prevents Member States from providing a possibility to bring an appeal with suspensive effect against a decision to execute an EAW. Recent years have seen several developments aimed at overcoming gaps in criminal procedure standards across the EU, with several policy and legal measures undertaken towards strengthening (and harmonising) these standards. Examples are the 'Directive on the right to interpretation and translation in criminal proceedings' (Council and European Parliament Directive 2010/64/EU), the 'Directive on the right to information in criminal proceedings' (Council and European Parliament Directive 2012/13/EU) and the 'Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings' (Council and European Parliament Directive 2010/64/EU). Despite these new instruments, the overall scope of procedural rights protection remains uneven, with areas such as the presumption of innocence and the right to be present at trial, special safeguards for children suspected and accused in criminal proceedings and safeguards for vulnerable persons still in early proposal stages.

On the other hand, however, several policy areas do outline priorities and actions, which adhere more closely to the concept of multi-layered protection of human rights. One can find such examples in the aforementioned Digital Agenda for Europe. The Digital Agenda for Europe (European Commission, 2010a) frames the key actions of the EU in the field of ICT as part of the general 'Europe 2020' strategy. It is a holistic and comprehensive document, which tackles ICT concerns from many angles and within multiple contexts. As far as civil and political rights are concerned, the Agenda focuses on the issues of online privacy and security; however, it does not consider the importance of the Internet as a medium for freedom of expression and political activity.<sup>166</sup> In its focus on safeguarding the protection of privacy, the Agenda stops short of highlighting problems arising from the use of state surveillance for gathering

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<sup>165</sup> Ibid. Recital (12) 'This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons. This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.'; Recital (13) 'No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.'

<sup>166</sup> This contrasts with the way the EU promotes freedom of expression in its external human rights guidelines on freedom of expression online and offline, see Council of the European Union (2014e).

data in law enforcement or of international data-sharing between state agencies and governments. The Agenda is one of the few EU documents analysed, which strongly accentuates the positive obligations of the EU as a duty-bearer. With regard to economic, social and cultural rights, the Digital Agenda features several items which tackle challenges related to ESCR, such as the use of ICT in providing healthcare and assistance to the elderly, the role of ICT for culture and creativity and the concept of eGovernment as a platform for enhanced, open governance. While the Agenda does not explicitly refer to ESCR, it nevertheless clearly elaborates the policy objectives of the EU regarding ensuring ICT support for several social, economic and cultural spheres of life. Furthermore, the Agenda references the CRPD in the context of ensuring proper ICT accessibility for persons with disabilities.

The Agenda highlights the necessity to protect individuals against cyber-crime and threats to privacy and personal data regardless of the source of such infringements. As far as the obligation to fulfil human rights is concerned, the Agenda takes a progressive stance, including themes such as guaranteeing universal broadband coverage, providing an 'open and neutral' internet, increasing digital literacy and preventing digital exclusion. The Agenda falls short of explicitly elaborating on several themes, such as the general importance of internet access for the full realisation of rights and freedoms<sup>167</sup> or the challenges digital surveillance and law enforcement data-sharing present for the right to privacy. Nevertheless, it serves as an example of a document that is more closely aligned to international standards, as far as multi-layered protection of human rights is concerned.

## 6. AFSJ policy priorities post-Stockholm Programme<sup>168</sup>

With the Stockholm Programme having expired at the end of 2014, the EU is faced with the challenge of elaborating a new overarching strategy in the field of freedom, security and justice. Under the pre-Lisbon division of powers and competences within the EU, the European Council enjoyed exclusive competence for policy-making in the so-called 'third pillar' of the EU, while the role of the Commission was limited and the European Parliament was a non-player in the process (Carrera & Guild, 2014, p. 2). The Treaty of Lisbon altered this structure by making the European Parliament a co-legislator in the field of AFSJ and by strengthening the roles of the Commission and the CJEU, as well as by constitutionalising the CFREU as a binding document. Nevertheless, the Stockholm Programme was adopted by the European Council, operating in a very pre-Lisbon mind-set, with little respect given to the emerging roles of other EU bodies (ibid, p.3). Consequently, intra-institutional rivalry flared as the Commission defied the European Council and opted to pursue its own agenda and vision of AFSJ policies (European Commission, 2010b). As the Stockholm Programme approached its expiration date, the European Council set out to provide a new set of strategic parameters for the next cycle of AFSJ policy; these parameters were eventually adopted in June 2014 (European Council, 2014). However, concurrently, the European Parliament's Civil Liberties, Justice and Home Affairs Committee (LIBE) and the Commission's DG JUST and DG HOME prepared their own takes on the topic of expanding AFSJ policy into the next institutional cycle (European Commission, 2014b; 2014c; 2014d; European Parliament, 2014).

<sup>167</sup> Several aspects of general importance of internet access for various spheres of human rights have been identified within the international human rights system, e.g. in the context of freedom of opinion and expression (UN Human Rights Council, 2011) and access to cultural and scientific life (UN General Assembly, 2012).

<sup>168</sup> For a more comprehensive look at human rights in the area of AFSJ see [FRAME report D 11.1](#) (Engström & Heikkilä, 2014).

A comparative analysis of these documents, carried out by Carrera and Guild, indicates that there are major tensions in operationalising human rights between the European Council, the Commission and the European Parliament. The authors point to a markedly low prioritisation of human rights in the European Council's AFSJ agenda, for example the lack of general references to the CFREU and deficits in indicating an awareness of human rights issues in topics such as immigration and surveillance (Carrera & Guild, 2014, pp. 8-11). While both the Commission and the Parliament have proposed AFSJ strategies which accept the CFREU as a central human rights instrument and allude to specific human rights concerns, the level of recognition of human rights concerns varies between the institutions, with the Parliament's documents being arguably strongest in terms of scope and language.

Taking a closer look at policy documents prepared by the Commission's DG HOME and DG JUSTICE, one cannot fail to notice several tensions and gaps between them. In general terms, the documents produced by both DGs acknowledge the role of the CFREU and respect fundamental rights. However, the communications issued by DG JUSTICE feature a markedly higher level of attention to human rights issues, highlighting specific topics such as the right to fair trial, children's rights and the protection of vulnerable groups (e.g. crime victims, persons with disabilities). Given that both DG HOME and DG JUSTICE deal with the same major area of EU policy, the incoherency resulting from the parallel design of strategic parameters paves the way for the possibility of internal double standards across the same policy area. At the same time, documents formulated by both DGs fail to address several issues related to human rights. Carrera and Guild highlight the lack of attention paid to the topics of mass surveillance and international cooperation with third countries' intelligence agencies in either of DG's working documents (Carrera and Guild, 2014, pp. 9-10). However, other gaps persist as well, such as the lack of any explicit reference to the need to safeguard human rights in counter-terrorism. This omission is all the more questionable given the record of EU Member States in curtailing human rights under the justification of protecting national security against terrorist threats, as well as the participation of several Member States in the US extraordinary rendition programme.

## **E. Conclusions**

Over the course of its history, the EU has developed a number of human rights instruments and policies, including the entry into force of the CFREU as a legally binding document. The EU has also made several positive developments in mainstreaming human rights throughout its policy areas – achieving considerable success in the external field, with the introduction of the 'Strategic Framework and Action Plan for Human Rights and Democracy'. Yet, at the same time, discourse on further developments within internal policies is frequently dodged by inter-institutional rivalry and the conflicting views of the Council, the Commission and the Parliament (Thiel 2005 p. 16). The internal-external divide, and incoherencies arising from it, continue to be major challenges of EU human rights policy. The divide leads to situations such as the EU externally promoting the respect for rights and freedoms, which it itself does not protect, inviting arguments of 'double standards' of EU policy and damaging the position of the EU in multilateral and bilateral relations. This situation is also exacerbated by the low priority given insofar to ESCR in EU external policy, which makes dialogue and cooperation with external actors who are strongly focused on matters related to ESCR much more difficult.

While the EU has established a long tradition of referring to the CoE human rights system, and drawing upon achievements of the Strasbourg court, it displays remarkably less interest in drawing upon the experiences of the UN human rights system. References to critical global human rights instruments found within the UN's Bill of Rights remain scarce among legal and policy documents. The idea of multi-layered duties elaborated within the UN system is only partially reflected in the EU human rights system. At the same time, as outlined in the FP7-FRAME report D5.1 'Report on the analysis and critical assessment of EU engagement in UN bodies, the EU continues to seek to strengthen its position within the UN, upgrading its status within UN bodies and positioning itself as a provider of leadership in selected human rights areas (Baranowska et al., 2015, pp. 218-219). Such political aspirations can fare poorly if strong arguments can be leveraged against the level of inclusion of UN human rights standards within the EU itself.

Looking more closely at internal EU policies in their own context, the first major tension visible is the lack of an overarching internal EU human rights policy. While the EU was able to successfully elaborate a comprehensive SF and AP for human rights in external action, it has not moved to establish a similar document for internal policies. As a result, internal human rights concerns continue to be addressed in a scattered manner by a wide range of legal and policy instruments spread across thematic areas and divided between the competences of various EU bodies and institutions. The few documents which address all EU policies, most notably the Commission's implementation and impact assessment policies for fundamental rights, are overtly general in nature and do not indicate specific areas of engagement or emerging global themes in human rights protection. In fact, the vast majority of EU policy and legal documents refer to human rights on a very general and abstract level, expressing commitment to respecting rights and freedoms but frequently stopping short of addressing specific issues identified by both internal and external stakeholders.

The issue of formulating a post-Stockholm policy strategy for AFSJ is certainly one example of the infamous inter-institutional rivalry within the EU, and of a struggle to establish a working division of competences and powers post-Lisbon. It also reflects how EU policy-making is influenced by the diverse philosophies of EU bodies and institutions. The Council of the European Union, an intergovernmental body, appears to defend pre-Lisbon arrangements and is reluctant to elaborate policy priorities, which would require stronger human rights commitments from the Member States. The Commission, on the other hand, due to its role as an enforcer and scrutiniser of EU policies and their implementation by Member States, appears invested in ensuring that the EU remains 'exemplary' in implementing the CFREU and mainstreaming human rights throughout its policies. However, with the policies split between two DGs, with only a superficial level of coordination, incoherency persists. Despite commitments to ensure respect for the CFREU and, particularly concerning DG JUSTICE, a visible focus on several important human rights areas, gaps the DGs remain. In particular, issues which cast doubts on the human rights record of EU Member States appear to be side-lined. Finally, the European Parliament, with its importance increasing and role broadening, unburdened by intergovernmentalism, elaborates the strongest support for protecting human rights within the AFSJ.

At the same time, the EU human rights protection system has seen positive developments. Examples of the increasing scope of safeguarding procedural rights in criminal justice and of introducing a RBA to

development cooperation show that the EU is capable of reflecting upon its own human rights system and taking steps towards covering gaps and removing tensions and contradictions. The new AP appears to reflect several key issues of external action in the field of human rights. Most notably, the EU seems to move towards engaging major topics such as ESC rights and discrimination which have not been prominently featured in its external policy insofar. At the same time, the EU continues to further external human rights policies in areas where it has seen considerable success over the years, such as with children's rights or opposition to death penalty. On a general note, the EU lately appears able to reflect and re-adjust its approach to human rights in external policy in a more comprehensive manner than it is with internal policy. There are certainly many factors behind this situation and several of them, such as the lack of overarching human rights strategy, intra-institutional issues and the problem of trade-offs (see p. 115) have been highlighted in this report.

## Bibliography

### 1. Legal and policy instruments

*Charter of Fundamental Rights of the European Union (2000/2010), 2010/C 83/02.*

Committee on Economic Social and Cultural Rights (CESCR) (2000), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, E/C.12/2000/4.

*Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2012), 2012/C 326/01.*

*Council and European Parliament Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (2013), 2013/48/EU.*

*Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000), 2000/43/EC.*

*Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.*

Council of the European Union (2014) *Council conclusions on a rights-based approach to development cooperation, encompassing all human rights*, 19 May 2014.

Council of the European Union (2014a) *EU Human Rights Guidelines on Freedom of Expression Online and Offline (2014)*.

Council of the European Union (2013) *EU priorities for cooperation with the Council of Europe in 2014-2015*, 19 November 2013.

Council of the European Union (2013a) *EU Guidelines on the promotion and protection of freedom of religion or belief (2013)*.

Council of the European Union (2013b) *Guidelines to promote and protect the enjoyment of all Human Rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons (2013)*.

Council of the European Union (2013c) *EU Guidelines on Death Penalty (2013)*.

Council of the European Union (2012) *Guidelines to the EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment (updated 2012)*.

Council of the European Union (2012a) *Council conclusions Increasing the Impact of EU Development Policy: an Agenda for Change*, 14 May 2012.

Council of the European Union (2012b) *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 25 June 2012.

Council of the European Union (2010) *The Stockholm Programme: An open and secure Europe serving and protecting citizens*, 3 March 2010.

Council of the European Union (2009) *EU Guidelines on promoting compliance with international humanitarian law* (updated 2009).

Council of the European Union (2009a) *EU Guidelines on Human Rights dialogues with third countries* (updated 2009).

Council of the European Union (2008), *EU Guidelines on violence against women and girls and combating all forms of discrimination against them*.

Council of the European Union (2008a) *Ensuring protection – EU Guidelines on Human Rights Defenders (2008)*.

Council of the European Union (2008b) *EU Guidelines for the Promotion and Protection of the Rights of the Child*.

Council of the European Union (2008d) *EU Guidelines on Children and armed conflict* (updated 2008).

*Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings* (2012), 2012/13/EU.

*Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings* (2010), 2010/64/EU.

European Commission & the High Representative of the European Union for Foreign Affairs and Security Policy (2015), 'Joint Communication to the European Parliament and the Council. Action Plan on Human Rights and Democracy (2015-2019) "Keeping human rights at the heart of the EU agenda"', 28 April 2015.

European Commission (2014a) *Tool-Box: A Rights-Based Approach, Encompassing All Human Rights For EU Development Cooperation*, Commission Staff Working Document, 30 April 2014.

European Commission (2014b) *An Open and Secure Europe: Making it Happen*, 11 March 2014.

European Commission (2014c) *The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union*, 11 March 2014.

European Commission (2014d) *A New EU Framework to Strengthen Rule of Law*, 11 March 2014.

European Commission (2010a) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Agenda for Europe*, COM (2010) 245.

European Commission (2010b) *Delivering an area of freedom, security and justice for Europe's citizens: Action Plan implementing the Stockholm Programme*, 20 April 2010.

European Commission (2010c) *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, 19 October 2010.

European Commission (2009a) *Impact Assessment Guidelines*, 15 January 2009.

European Commission (2009b) *Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights*, 29 April 2009.

European Council (2014), *Conclusions*, 27 June 2014.

European Council (2003) *European Security Strategy: A Secure Europe in a Better World*, Brussels, 12 December 2003.

European Parliament (2014) *Report on the Mid-Term Review of the Stockholm Programme*, 4 March 2014.

Political and Security Committee (2012) *European Union medium-term priorities at the United Nations (2012-2015)*, 10 May 2012.

*Treaty on European Union*, signed at Maastricht on 7 February 1992 (1993) OJ C191/1.

UN Human Rights Council (2011), Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/17/27, 16 May 2011.

UN General Assembly (2012), Report of the Special Rapporteur in the Field of Cultural Rights (2012), *The Right to Enjoy the Benefits of Scientific Progress and its Applications*, A/HRC/20/26, 14 May 2012.

## 2. Case Law

*Ciprian Vasile Radu* (2013), Case C-396/11, [2013] ECR I-0000.

*Grant v South West Trains Ltd* (1998), Case C-249/96, [1998] ECR I-621.

*Jeremy F v Premier ministre* (2013), Case C-168/13, [2013] ECR I-0000.

*Stefano Melloni v Ministerio Fiscal* (2013), Case C-399/11, [2013] ECR I-0000.

## 3. Literature

### a) Book chapters

Marx, A., McInerney-Lankford, S., Wouters, J. & D'Hollander, D. (2015), 'Human Rights and Service Delivery: A Review of Current Policies, Practices and Challenges', in Wouters, J., Ninio, A., Doherty, T. & Cissé, H. (eds) *The World Bank Legal Review, Volume 6. Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability*, Washington: World Bank.

Nyman-Metcalf, K. (2014), 'The Future of Universality of Rights', in Kerikmäe, T. (ed) *Protecting Human Rights in the EU*, Heidelberg: Springer.

### b) Journal articles

Cornwall, A. & Nyamu-Musembi, C. (2004), 'Putting the 'Rights-Based Approach' to Development into Perspective', *Third World Quarterly*, vol. 25 (8), pp. 1415-1437.

De Búrca, G. (2011), 'The Road Not Taken: The European Union as a Global Human Rights Actor', *American International Law Journal*, vol. 105 (4), pp. 649-693.

Piron, L-H. (2005), 'Rights-based Approaches and Bilateral Aid Agencies: More Than a Metaphor?', *IDS Bulletin*, vol. 36 (1), pp. 19-30.

### c) Policy and other reports and documents

Amnesty International (2014), *The future of EU policies in the area of freedom, security and justice: a human rights perspective*, available at <http://www.fightdiscrimination.eu/discrimination-in->

[europe/publications/future-eu-policies-area-freedom-security-and-justice-human-rig](#) accessed 10 May 2015.

Baranowska, G. et al. (2015), *Report on the analysis and critical assessment of EU engagement in UN bodies*, FRAME Project Deliverable 5.1 available at <http://www.fp7-frame.eu/reports/> accessed 10 May 2015.

Beke, L., D'Hollander, D., Hachez, N. & Pérez de las Heras, B. (2014), *Report on the integration of human rights in EU development and trade policies*, FRAME Project Deliverable 9.1 available at <http://www.fp7-frame.eu/reports/> accessed 10 May 2015.

Carrera, S. & Guild, E. (2014), *The European Council's Guidelines for the Area of Freedom, Security and Justice 2020. Subverting the 'Lisbonisation' of Justice and Home Affairs?*, Centre for European Policy Studies Essay No. 13/14, July 2014, available at <http://www.ceps.eu/publications/european-council%E2%80%99s-guidelines-area-freedom-security-and-justice-2020-subverting> accessed 10 May 2015.

Carrera, S., Guild, E. & Hernanz, N. (2013), *Rule of law or rule of thumb? A New Copenhagen Mechanism for the EU*, Centre for European Policy Studies Policy Brief No. 303, November 2013, available at <http://www.ceps.eu/publications/rule-law-or-rule-thumb-new-copenhagen-mechanism-eu> accessed 10 May 2015.

Engström, V. & Heikkilä, M. (2014), *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice*, FRAME Project Deliverable 11.1, available at <http://www.fp7-frame.eu/reports/> accessed 10 May 2015.

FRAME Policy Brief (2014), *The Post-2014 EU Action Plan on Human Rights and Democracy. A Policy Brief*, available at [http://www.fp7-frame.eu/wp-content/materiale/policy\\_brief/02-FRAME%20Policy%20Brief%20No%20%20--Post%202014%20SFAP%20Policy%20Brief.pdf](http://www.fp7-frame.eu/wp-content/materiale/policy_brief/02-FRAME%20Policy%20Brief%20No%20%20--Post%202014%20SFAP%20Policy%20Brief.pdf) accessed 9 July 2015.

International Human Rights Network (2008), *Human Rights-Based Approaches and European Union Development Aid Policies*, available at [http://www.ihrnetwork.org/eu-development-policies\\_215.htm](http://www.ihrnetwork.org/eu-development-policies_215.htm) accessed 10 May 2015.

Thiel, M. (2011), *Good cop, bad cop games? The value of internal rights conceptions in the EU's creation of an external border*, EUSA Conference, Boston, March 2011, available at [http://www.euce.org/eusa/2011/papers/6k\\_thiel.pdf](http://www.euce.org/eusa/2011/papers/6k_thiel.pdf) accessed 10 May 2015.

UN Office of the High Commissioner for Human Rights (undated), *The EU and International Human Rights Law*, available at [http://www.europe.ohchr.org/Documents/Publications/EU\\_and\\_International\\_Law.pdf](http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf) accessed 4 February 2015.

## VI. The EU Member States under the Universal Periodic Review of the Human Rights Council: main gaps and challenges<sup>169</sup>

### A. Introduction

#### 1. Objectives and methodology

This chapter will address the analysis of the outcome of the Universal Periodic Review (UPR) for each European Union (EU) Member State in order to identify the main legal gaps in the implementation and/or violation of international human rights standards attributed to the Member States during this review process. The objective of this chapter is to identify which gaps are highlighted most in the UPR of the EU Member States in order to identify common, general or systematic patterns. It thus follows that individual cases of violations by Member States will not be analysed.

The focus of this section is on the outcome of the UPR, that is, the 'Report of the Working Group' or 'Outcome Report'. All of the Working Group's reports issued during the first and second cycles of the UPR of all the EU Member States have been examined.<sup>170</sup> Human Rights Council (HRC) Resolution 5/1, 'Institution-building of the United Nations Human Rights Council', states the rules that govern the process of the review. Since the main purpose of this section is to identify legal gaps in the human rights performance of the Member States, also with reference to the rules stated by the 'Institution Building Resolution', special consideration should be given to the legal basis of the review, that is, to the legal standards according to which the behaviour of the states will be assessed. According to General Assembly Resolution 60/251, which establishes the HRC, this basis ought to be each state's 'human rights obligations and commitments'. The Institution-building Resolution specifies those instruments on which there was a consensus among the states, that is, the 'Charter of the United Nations', The 'Universal Declaration of Human Rights', human rights instruments to which a state is party, voluntary pledges and commitments made by states (including those undertaken when presenting their candidatures to the HRC) and, finally, international humanitarian law (HRC Resolution 5/1, Annex I.A paras. 1 and 2). Regarding the comprehensiveness of this list, some authors highlight that this normative framework has an 'expansive focus' since it is not limited to the human rights treaties to which each state is party and includes other legal instruments (Abebe, 2009, p. 5). Others regret the exclusion of customary rules of human rights law and identify certain problems if the basis of the UPR relies only on the treaties to which the State under Review (SuR) is party (Bernaz, 2009, pp. 79-82).<sup>171</sup> For the purposes

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<sup>170</sup> The Reports of the Working Group are available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx>, except for the second cycle's Report of Italy which was not available at the time of drafting this section. The EU Member States that have passed the second cycle are Cyprus, the Czech Republic, Finland, France, Germany, Italy, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia and the UK.

<sup>171</sup> This author mentions two problems if the basis of the review is composed only of the treaties ratified by the SuR: first, the review of the states that have ratified less instruments would be less severe since there are less standards to assess their behavior and, consequently, less possibilities of finding violations compared to those states who have ratified more instruments and, second, the risk of duplicating the work of the treaty bodies increases (2009, p. 81).

of this chapter we will mainly focus on the international and regional human rights instruments to which the Member States are party, because these instruments are the main source of binding human rights obligations for the states. The analysis of other sources, such as the voluntary pledges and commitments of the states, would be a huge task that, due to time and space constraints, cannot be addressed here, although they also form part of the legal basis of the review.

Before addressing the main purpose of this chapter – to identify the most recurrent issues noted in the UPR of the EU Member States – the following section I.B will briefly introduce some ideas regarding the role of the EU in the HRC and, in particular, in the creation and development of the UPR, in order to contextualise and facilitate the study of the outcome of the EU Member States’ reviews which will be undertaken in section II.

## 2. Background: the EU and the Human Rights Council

The EU has been a strong advocate and supporter of the HRC since its inception in 2006<sup>172</sup> as the successor of the Commission on Human Rights (1946-2006). As proclaimed in the ‘EU Strategic Framework and Action Plan on Human Rights and Democracy’, the EU ‘will contribute *vigorously* to the effective functioning of the Council’ (Council of the European Union, 2012, emphasis added). Without any doubt, the most innovative element of the HRC was the creation of a new mechanism to examine the situation of human rights in all UN Member States (Márquez Carrasco & Nifosi, 2009, p. 260), namely the UPR. The main aim of the UPR is to overcome the politicisation, selectivity and double standards that plagued the former Human Rights Commission when dealing with human rights violations in specific countries (Nowak, 2006, p. 24). According to the UN General Assembly resolution that set up the HRC, the UPR will be based on ‘objective and reliable information, of the fulfilment by each state of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all states’ (General Assembly, A/Res/60/251, para. 5.e). In spite of this wording, deep disagreements remain as to the scope of the UPR (Alston, 2006, pp. 1-42) and its functioning so far reveals that risks of politicisation will always be inherent to a body of a political nature such as the HRC.

The EU and its Member States have been very active and have tried to turn the UPR into an effective mechanism for the promotion and protection of human rights.<sup>173</sup> After the first cycle of the UPR (April 2008-October 2011),<sup>174</sup> in which the 193 Member States of the UN were scrutinised, and with the second cycle under way, the UPR has gained some credibility as a mechanism that has the potential to make a significant contribution to the promotion and protection of human rights at a domestic level. Although being fully aware of some relevant shortcomings: lack of sufficient time for the consideration of the human rights situation in every country; block dynamics in the operation of the UPR; vagueness, duplication and overlap of some recommendations; freedom of states to reject recommendations; and

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<sup>172</sup> For the role of the EU during the process that led to the establishment of the HRC see Wouters, Sudsehna & Bernaz (2008).

<sup>173</sup> The EU cannot participate as a full member in the HRC, since it can only apply for observer status. See HRC Resolution 5/1, Rule of procedure 7(a).

<sup>174</sup> A thorough analysis of the first cycle can be found in De la Vega & Lewis (2011).

lack of effective follow-up procedures of the recommendations adopted, among others,<sup>175</sup> the UPR can be considered an opportunity for the appropriate promotion and protection of human rights, if adequately used. In this sense, both the EU and its Member States have a strong responsibility to ensure that the UPR functions well if they want to be perceived as a credible and coherent multilateral actor in the field of human rights.

## **B. The outcome of the UPR: gaps in the human rights performance of the EU Member States**

### **1. Introduction**

This chapter will undertake the identification of the main legal gaps, most of which are highlighted in the course of the UPR of the EU Member States. As previously mentioned, the focus of this part of the report is on the outcome of the UPR, that is, the Reports of the Working Group. There are two passages in these Reports that contain relevant information on potential gaps: first, the chapter summarising the comments of the ‘reviewer States’ made during the interactive dialogue and the correlative responses of the states under review, and second, the chapter that includes the recommendations made by the reviewer states. A trend that emerged from the very beginning of the UPR is the participation of ‘friendly states’, which take the role of complimenting and congratulating the SuRs. This trend will be analysed in detail below, but it is worth mentioning here that this chapter will pay most attention to the ‘negative’ comments received by the SuRs, which are, of course, those that will highlight gaps in the performance of the EU Member States.

Before addressing the list of gaps, we would like to point out some limitations of the UPR in order to adequately assess the results arising from the analysis of the Reports of the Working Group.<sup>176</sup> As some authors have noted, due to a combination of time restraints and diplomacy, the UPR cannot be comprehensive enough to analyse all human rights obligations of the SuRs (Smith, 2013, p. 13). In addition to this limitation, there are other factors which also have an influence on the review of the SuRs and, in particular, on the issues that come up regarding the human rights situation of the state concerned. Some of these factors stem from the nature of the UPR procedure, but others, in particular those mentioned in points 3 to 5, stem from the way in which states use this mechanism and the dynamics which unfold during the review process:

1. The intergovernmental nature of the review: the states are the primary actors throughout the review process. In the first stage, the SuR prepares the information, usually in the form of a national report (HRC Resolution 5/1, para. 15(a)), which is the main base for the assessment of the human rights situation in the country concerned. In a second phase, the interactive dialogue is led both by the SuR, which again presents information in an introductory statement, and the reviewer states, which raise questions regarding concrete human rights issues in the SuR, ask for further information, urge the SuR to take specific actions or just welcome the adoption of measures or the implementation of best practices by the SuR. Finally, the Outcome Report,

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<sup>175</sup> A deep analysis of the main limitations of the UPR can be found in Smith (2011).

<sup>176</sup> A deep analysis of the main limitations of the UPR can be found in Smith (2011).

produced by the rapporteurs of the troika with the full involvement of the SuR, summarises the proceedings of the review process and includes the recommendations made by the reviewer state. The consequence of this inter-governmental nature of the UPR is, in Abebe's words, that the states are the 'primary suppliers of information, reviewers and consolidators of the report itself' (2009, p. 8). In the end, the UPR is a 'political undertaking' of the UN Member States (Abebe, 2009, p. 8). Thus, the human rights issues raised in a particular UPR depend on the willingness of the states, both the SuR and the reviewer state, to conduct the process in an 'objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner' (HRC Resolution 5/1, para. 3(g)). Therefore, it could be questioned whether the procedure is in fact based on 'objective and reliable information' (General Assembly, A/RES/60/251, para. 5(e)). In this regard, a main difference between the UPR and other peer-review mechanisms, such as the African Peer Review Mechanism (APRM) or the Development Assistance Committee peer review process of the OECD, is that the information is not produced by a team of experts (McMahon and Ascherio, 2012, p. 234). Lastly, this 'excessively intergovernmental nature of the review' has been mentioned by some authors as an example of the maintenance of the politicisation of the work of the HRC (Viegas e Silva, 2013, p. 109).

2. Limited scope of the review: According to Resolution 60/251, the focus of the review is the 'fulfilment by each State of its human rights obligations and commitments' (General Assembly, A/RES/60/251, para. 5(e)). However, in practice the UPR is not a rigorous technical legal assessment of the implementation of those obligations and commitments by the states. It is more accurate to say that the UPR presents a 'general picture of the human rights situation in a country' (Human Rights Watch, 2010, p. 13), a picture which is primarily built by the states, both the SuR which is interested in presenting the best image of its performance and the reviewer state which in the future will also be subject to the review. This is one of the main differences between the UPR and the work of the treaty bodies, composed of experts who monitor the implementation of the human rights treaties, and the HRC special procedures, which again involve human rights experts in charge of reporting and advising on specific themes or countries. The UPR is not such a technical review and cannot substitute the expert work of the treaty bodies and the special procedures. In this regard, the UPR has to 'complement and not duplicate other human rights mechanisms, thus representing an added value' (HRC Resolution 5/1, para. 3(f)). It should also be noted that during the information gathering phase there are more technical documents which are also submitted to the Working Group, namely a compilation produced by the Office of the High Commissioner for Human Rights (OHCHR), including the 'information contained in the reports of treaty bodies, special procedures and (...) other relevant official United Nations documents' and a summary of the stakeholders' reports. However, these documents are not discussed at any stage of the process, although some states rely on them to make recommendations. Therefore, an oft-heard criticism of the UPR is that the valuable information contained in these other documents is not given enough prominence to focus and inform the dialogue (Human Rights Watch, 2010, p. 15; Amnesty International, 2011, p. 17). Finally, there is a concern among the observers of the UPR that some recommendations issued by certain governments were even inconsistent with international human right standards

and jurisprudence (Viegas e Silva, 2013, p. 106; Human Rights Watch, 2010, p. 15; Amnesty International, 2011, p. 17).

3. The identification of regional patterns in the conduction of the interactive dialogue and in the formulation of recommendations: This issue is mentioned frequently in the literature as the main challenge to the UPR. Although it is said that the fact that states have to make their recommendations on an individual basis favours bilateral relations among the states, many authors have identified a trend towards the development of regional alliances in the UPR that hinder the achievement of the goals of the UPR, notably the improvement of the human rights situation on the ground, and revisits the criticisms of the extinct Commission regarding the excessive politicisation in the process of decision making. 'Friendly states', for example, tend to issue positive comments and avoid sensitive issues regarding the performance of the SuRs belonging to their regional group, as well as making softer recommendations (Viegas e Silva, 2013, p. 106; Abebe, 2009, pp. 19-21; McMahon & Ascherio, 2012, pp. 245-247; Sweeney & Saito, 2009, p. 210; Freedman, 2011, pp. 309-311). In Abebe's words, 'regional alliance is a major force influencing the review process' (2009, p. 19) and some states are even accused of manipulating the list of speakers who participate in the interactive dialogue to favour those who will praise them and avoid those critical of their regime (Cox, 2010, p. 115). In conclusion, the regional dynamics and the lack of real critics among states belonging to the same groups could be another factor that hinders the identification of relevant human rights issues in the SuR's performance.
4. The generality and high number of recommendations: Many of the recommendations formulated by the states are said to be too general, difficult to implement or empty (Viegas e Silva, 2013, p. 106 & Abebe, 2009, pp. 16, 34). Generality in the formulation of recommendations is a common technique used by states. In fact, 39.49% of the total number of recommendations issued so far are considered 'general actions'.<sup>177</sup> McMahon and Ascherio classify the recommendations issued by the reviewer states into five categories, depending on the progressive level of action required to be taken by the SuR as expressed by the verbs used in the recommendation. Recommendations classified in Category 1 require 'least cost and effort' to the SuR (e.g. 'share experiences and best practices', 'seek contributions from the international community'), while Category 5 includes those recommendations where more specific and tangible actions are asked of the SuR. Recommendation of actions can be formulated in a quite specific manner, such as those classified in Category 5 (e.g. 'undertake', 'adopt', 'ratify', 'implement'), or in a more general way, leaving more discretion to the SuR regarding the measures to be adopted. This latter type of recommendations (e.g. 'take measures or steps towards', 'encourage', 'promote', 'enhance', 'engage') are clustered in Category 4. According to the data analysed by the authors, the largest number of recommendations fall into categories 4 and 5. This could suggest in principle that states are using the UPR seriously, as they are asking SuRs to take reform actions. However, a deeper

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<sup>177</sup> The number of recommendations by category can be consulted in <http://www.upr-info.org/database/statistics/> accessed 12 November 2014.

examination of the content of the recommendations, especially the ones included in Category 4, which, as mentioned before, clusters recommendations of actions which contain a general element, shows that the generality in their formulation is what makes it easier for states to accept them (McMahon & Ascherio, 2012, pp. 236-242; McMahon, 2012, pp. 14-19 & McMahon, 2010, pp. 7-27). Another feature of the recommendations that has to be underlined is their abundance. So far, a total number of 35,469 recommendations have been formulated from UPR sessions 1 to 18. Although this high number could be considered indicative of the UPR's success, it makes the analysis of the human rights issues raised by the states more complex and, above all, hinders the follow-up of the implementation of the recommendations by the SuRs. Indeed this high number of recommendations has been considered a shortcoming of the process by some authors (Viegas e Silva, 2013, p. 107). Finally, some authors also underline the lack of clarity of some recommendations as well as the overlapping and redundant nature of the themes to which they refer (De la Vega & Lewis, 2011, p. 380).

5. Motivations behind the recommendations: Lastly, one further point of criticism is that some states tend to focus more on issues of their own interest, instead of raising the real human rights issues of concern in the SuR (Viegas e Silva, 2013, p. 106). One example of this trend is the prominence that states give to civil and political (CP) rights versus economic, social and cultural rights (ESCR). In this regard, countries belonging to the Western European and Others Group (WEOG) are more active in CP rights while African and Asian countries prefer to make recommendations on ESCR (Mc Mahon, 2012, p. 22). The opposite tactic, to exclude the review of sensitive human rights issues, has also been identified by some scholars who argue that certain countries refer to alleged 'cultural values' to avoid the review of some human rights, such as the prohibition of discrimination on the grounds of gender or sexual orientation (Freedman, 2011, pp. 309-310). Lastly, states' own interests are also reflected in the information contained in the national reports. Again, with reference to the different treatment of CP and ESCR, few countries (Germany) gave comparable attention to CP and ESCR, while others, such as the Netherlands and the Czech Republic, made a limited reference to ESCR (Duggan-Larkin, 2010, pp. 556-557).

## 2. Ranking of human rights issues in the EU Member States' UPR

One conclusion that can be drawn from the study of the Reports of the Working Group is that the main human rights issues which are underlined by the reviewer states are, with a few specific exceptions, the same issues in all EU Member States. The EU Member States received 4,598 recommendations in total. Practically all of these recommendations, notably 94.16%, relate to the following six issues:<sup>178</sup>

*Table 2: Ranking of main human rights issues in the EU Member States' UPR*

Ranking	Human rights issue	No. recommendations received by the EU Member States	% of 4,598 total recommendations by issue

<sup>178</sup> The breakdown of the number of recommendations received by each EU Member State is available at <http://www.upr-info.org/database/statistics> accessed 13 Nov 2014.

1	International instruments	996	21.66%
2	Rights of the child	777	16.90%
3	Women's rights	691	15.03%
4	Minorities	638	13.88%
5	Migrants	629	13.68%
6	Racial discrimination	598	13.01%

The three top issues included in Chart 2, i.e. international instruments, rights of the child and women's rights, are also the three most mentioned issues in the ranking of the total number of UPR recommendations issued during the review of all the 193 UN Member States. Chart 3 shows this ranking of recommendations:

*Table 3: Ranking of main human rights issues in the UPR*

Ranking	Human rights issue	No. recommendations in total in the UPR	% of 35,469 total recommendations by issue
1	International instruments	7,227	20.38%
2	Women's rights	6,358	17.93%
3	Rights of the child	5,980	16.86%
4	Torture and ill-treatment	2,709	7.64%
5	Justice	2,688	7.58%

Source: UPR info.org, available at <http://www.upr-info.org/database/statistics> accessed 13 Nov 2014

A comparative analysis of the three top positions in these Charts shows that in the EU's ranking the second and third positions are occupied, respectively, by the rights of the child and women's rights, while this order is reversed in the UPR general statistics.

It is worth noting here that no EU Member State appears in the ranking of SuRs that received the highest number of recommendations on these five issues listed in Chart 3. However, some EU Member States occupy a position among the most 'recommended states' in many issues, notably concerning the topics of minorities, human trafficking and racial discrimination where four out of the five first positions are occupied by EU Member States. Chart 4 lists those themes for which the EU Member States are among the countries, which received the highest number of recommendations.

*Table 4: EU Member States among the top five countries receiving recommendations*

Human rights issue	EU Member States among the top five countries
Minorities	Czech Republic, France, Romania, Slovakia
Migrants	Cyprus, Germany, Malta, Spain
Human Trafficking	Czech Republic, Luxembourg, Romania, Slovenia
Racial discrimination	Austria, France, Germany, Netherlands
NHRI	Belgium
Disabilities	Ireland
Freedom of religion or belief	France, Germany
Asylum seekers-refugees	Greece, Luxembourg, Malta
National plan of action	Czech Republic, France
Corruption	Romania
Counter-terrorism	Spain, UK
Right to housing	Romania
Labour	Germany
Human rights violations by state agents	Slovakia
HIV-AIDS	Romania

### 3. Gaps in the human rights performance of the EU Member States

In the following, the main human rights gaps pointed out by the recommendations received by the EU Member States and/or raised by the reviewer states during the interactive dialogue will be discussed in more detail. The first part of this section will be dedicated to the six human rights issues that constitute almost the totality of the recommendations that the EU Member States received (notably, 94.15%, see Chart 2 above). These themes will be explained following the ranking of Chart 2 - i.e. starting with the issues that received the highest number of recommendations. The second part will address other human rights issues that, although they received significantly fewer recommendations, are also repeatedly mentioned in the UPRs of the majority of EU Member States (see below Chart 3).

#### *a) Ratification and/or signature of international human rights instruments*

The issue which receives the highest number of recommendations in the UPRs of EU Member States is their lack of ratification of certain international human rights instruments, as well as the lack or inadequate incorporation of these instruments into national law and the reservations and declarations

to their texts made by EU Member States. It is crucial to pay attention to the state of ratification of these instruments by the Member States because, in addition to being the first issue in the ranking, these instruments constitute one of the main legal foundations of the review, along with the other documents mentioned above (see section I.A). Moreover, the ratification of the core human rights treaties has been identified as one of the indicators of progress, with regard to the implementation of the recommendations by the SuR, that have arisen from the review process (Smith, 2013, p. 11).

At this point it is important to remember that the EU is a strong advocate of the universality of human rights and that the ratification and implementation of these key international and regional human rights treaties is one of the main objectives of the 'EU Strategic Framework on Human Rights and Democracy' (Council of the European Union, 2012, p. 4).

The majority of the recommendations relate to the lack of ratification of the 'International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families' (ICRMW) by the EU Member States. None of the EU Member States is party to the ICRMW and, as can be deduced from the comments of the Member States during the interactive dialogue, this seems unlikely to change in the near future. During their UPRs, many of the Member States have expressly mentioned their rejection of the accession to the ICRMW for diverse reasons: objection to the application of the provisions of the treaty to non-documented migrants or migrants in an irregular situation (Netherlands, Finland, Belgium, Italy); the existence of legal shortcoming in the treaty's text (Spain); the existence of legal obstacles arising from the competence of the EU in the area of migrant workers (Luxembourg, Finland, Portugal, Bulgaria); the claim that the migrant workers' rights are adequately protected under domestic law (Germany, Austria, Croatia, Slovenia); the contradiction of this treaty with other international obligations (Austria) or the treaty's limitations to the national authorities' capacity to take regulatory measures regarding the labour market (Austria).

The EU Member States have also received recommendations regarding the lack of ratification of other international human rights instruments, notably the following:<sup>179</sup>

- 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (OP-ICESCR): Only two EU Member States (Spain and Slovakia) have acceded to the OP-ICESCR without any declaration or reservation. Another three states (Belgium, Finland and Portugal) are also parties to this Protocol but have made reservations to this instrument in order to exclude the competence of the Committee on Economic, Social and Cultural Rights to receive individual communications.
- 'Optional Protocol to the Convention on the Rights of the Child' (OP-CRC) on a communications procedure: Twenty-one EU Member States have not yet ratified this instrument.
- 'International Convention for the Protection of all Persons from Enforced Disappearance' (CED): Twenty EU Member States have not yet ratified this instrument.

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<sup>179</sup> The information regarding the status of ratification, reservations and declarations is available at <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> accessed 18 November 2014.

- ‘Optional Protocol to the Convention against Torture’ (OP-CAT): All EU Member States have signed and/or ratified this instrument except for Belgium, Ireland, Latvia and Slovakia. Many of the comments related to this instrument refer to the lack of creation of the national preventive mechanism by the EU Member States required by this Protocol.
- ‘Convention on the Rights of Persons with Disabilities’ (CRPD): All EU Member States and the EU itself are parties except for Finland, Ireland and the Netherlands, which received recommendations during their most recent UPR.
- ‘Optional Protocol to the Convention on the Rights of Persons with Disabilities’ (OP-CRPD): In addition to the three states which have not ratified the CRPD, four more states have not ratified the Optional Protocol to this Convention (Bulgaria, Czech Republic, Poland and Romania).
- The ‘Optional Protocol to the International Covenant on Civil and Political Rights’ (OP-ICCPR): Signed and/or ratified by all EU Member States except for the UK.
- The ‘Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography’: Signed and/or ratified by all EU Member States except for Ireland.

Unlike the case of the ICRMW, where it is possible to find a common position and similar explanations by the Member States regarding the lack of accession to this instrument, their statements regarding the lack of ratification of the above-listed conventions were not expressed as clearly during the interactive dialogue or are more imprecise. Reasoning includes, for example, that the state is under the process of evaluating the consequences of the ratification of the relevant instrument, that the accession requires considerable resources and time, or refer to the difficulties to adapt the internal legislation to the provisions of the treaty in question.

Moreover, it should be highlighted that some of these international human rights instruments have been signed or ratified by some EU Member States after having received the recommendations of the first UPR cycle. In some cases, the SuR had already initiated the domestic process of acceding to the relevant human rights treaty at the time of the review, while in other cases the states have recognised that their progress in the ratification of the instruments were made under the process of the implementation of the recommendations received during the first cycle of the UPR. This is, for example, the case with Germany regarding the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, the CRPD and the OP-CRPD.

Lastly, there are issues regarding other international human rights instruments that have also been raised by the reviewer states during the interactive dialogue. Among them are certain International Labour Organisation (ILO) conventions, mainly no. 169 on the rights of indigenous and tribal peoples (only ratified by Denmark, Netherlands and Spain) and no. 189 on decent work of domestic workers (only ratified by Germany, Italy and Ireland); the ‘United Nations Convention against Corruption’; the UNHCR ‘Convention on the Reduction of Statelessness’; and, finally, some Council of Europe (CoE) conventions, such as the ‘European Charter for Regional or Minority Languages’, the ‘Framework Convention for the Protection of National Minorities’, the ‘Council of Europe Convention on Action Against Trafficking in Human Beings’, and the ‘Council of Europe Convention on preventing and

combating violence against women and domestic violence', which has only been ratified by eight EU Member States so far.

Finally, a considerable amount of recommendations received by the Member States are oriented towards the lifting or withdrawal of the high number of reservations and declarations to human rights instruments made by the Member States and towards bringing their national legislation in conformity with the international human rights standards on certain issues, such as torture, child trafficking or the prohibition of corporal punishment.

### *b) Rights of the child*

The rights of the child occupy the second position in the ranking of human rights issues in the EU Member States' UPRs. Although all the EU Member States are party to the 'Convention on the Rights of the Child' (CRC),<sup>180</sup> they have received more than 750 recommendations during their reviews, relating to gaps in the protection of the rights set out in this Convention, notably the child's right not to be separated from his or her parents (Article 9 CRC); the right to family reunification (Article 10 CRC); protection from violence, including sexual abuse (Articles 19 and 34); the right to an adequate standard of living (Article 27 CRC); non-discrimination (Article 2 CRC); the obligation of states to supervise the institutions responsible for the care and protection of children (Article 3.3 CRC), or the procedural guarantees of children accused of infringing penal laws (Articles 37 and 40 CRC).

A significant number of recommendations received by the EU Member States relate to two issues. On one hand, one of the most recurrent issues raised by the reviewer states is the alarming increase in the number of unaccompanied migrant and refugee children and the risks they face, including sexual exploitation and discrimination. On the other hand, the high number of children placed in social institutions is also an issue of concern regarding children's rights in EU Member States. In this regard, the statements of the reviewer states focused on the poor conditions of those centres, the insufficient professional training of the staff employed and the cases of abuse of children in institutional care, including sexual abuse, torture and degrading treatment.

The fight against child prostitution, child trafficking and child pornography is also a recurrent issue which is highlighted during the review of many EU Member States. A trend towards the increase in the demand for child pornography and prostitution is identified in some SuR countries and the reviewer states have, on several occasions, demanded a clearer definition of these crimes under national legislation. Corporal punishment of children is another issue frequently noted by the reviewer states during the UPR of several Member States, which are now required to increase their efforts to prohibit and prosecute this practice.

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<sup>180</sup> Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990. However, the OP-CRC III on a communications procedure (adopted by General Assembly resolution 66/138 of 19 December 2011) has only been ratified by six EU Member States so far.

The existence of child sex tourism is also a concern raised in the UPR of some EU Member States, as well as the phenomenon of street and homeless children and the problems concerning the state of health of children belonging to disadvantaged families.

Concerns regarding the national justice system applicable to minors are also underlined during the UPR. In particular, the increase in the number of children in custody or detention, the incarceration of children in adult prisons, the lowering of the minimum age of criminal responsibility and the trial of juveniles under regular criminal law.

Finally, there are more specific issues that affect concrete countries, such as the cases of clerical sexual abuse of minors (Ireland), the use of alcohol among young people and bullying and discrimination in schools (Finland), the age of enrolment into the armed forces (Austria) and the problems associated with children of incarcerated parents (UK).

### *c) Women's rights*

The issue of women's rights is the third in the ranking of recommendations received by the EU Member States. Discrimination against women in different spheres is the most cited issue, regardless of the ratification of the respective key human rights instruments by all of the EU Member States, among them, the UN 'Convention on the Elimination of All Forms of Discrimination against Women' (CEDAW), the prohibition of discrimination included in Article 14 of the 'European Convention on Human Rights' (ECHR), Article 2 of the UN 'International Covenant on Civil and Political Rights' (ICCPR), Article 2 of the 'International Covenant on Economic, Social and Cultural Rights' (ICESCR) or Article 21 of the 'Charter of Fundamental Rights of the European Union'.

In connection with this topic, the reviewer states mainly draw attention to the labour rights of women codified in Article 11 CEDAW, including topics such as discrimination in the labour market, the expectation of women to choose between career and family, the concentration of women in part-time work and, in particular, the gender pay gap, which is mentioned in the review of the majority of the EU Member States, regardless of the right to equal remuneration set forth in Article 11(d) CEDAW. Discrimination against women in general is also noted by many reviewer states, which also highlight the subsistence of stereotypical gender roles among EU Member States and the inequalities that women still face. In this regard, another recurrent issue is the underrepresentation of women in public and political life in many Member States.

Another issue that attracts a great number of recommendations is violence against women, a question which is raised in almost all reviews of the EU Member States. In connection with this topic, the reviewer states have emphasised the high level of violence against women within the EU Member States, in particular, in the domestic sphere, including concerns about the low rates of reporting due to, among other reasons, traditional attitudes, the need to improve access to justice for victims, or the lack of adequate formulations in the national criminal codes in order to punish rape and sexual abuse, regardless of the existence of marital relations or other type of relationship of those concerned. It is worth noting here that, in spite of this issue being a clear matter of concern in the human rights situation of the EU Member States, the majority of them are not party to the Council of Europe

Convention on preventing and combating violence against women and domestic violence (see section B.3.a above).

Finally, some specific issues are mentioned, such as the right to termination of pregnancy in certain cases (Ireland) or the existence of a waiting period for remarriage for widowed or divorced women in Luxembourg.

#### *d) Rights of national minorities*

The protection of the rights of national minorities also occupies a high position in the list of human rights issues arising during the EU Member States' reviews. Many of the comments during the interactive dialogue refer to the discrimination of ethnic minorities within the Member States, regardless of the prohibition of discrimination included in the human rights instruments to which they are party, i.e., Article 14 of the ECHR, the UN 'International Convention on the Elimination of All Forms of Racial Discrimination' (CERD), Article 2 of the ICCPR, Article 2 of the ICESCR, Article 21 of the 'Charter of Fundamental Rights of the European Union', or the CoE Framework Convention for the Protection of National Minorities (ratified by all EU Member States except for Belgium, France, Greece and Luxembourg). In this regard, the reviewer states have highlighted the unequal access of minorities to employment, housing and education (where education is in the language of the community and respects their culture); the impact of austerity policies on the rights of these communities; the lack of official recognition of minorities in national legislation; and the reluctance of victims of discrimination to bring cases to courts.

Other issues, such as episodes of violence, intolerance and prejudice against these communities, hate speech and stereotyping, including by politicians and the media, as well as a lack of adequate statistics regarding these communities, are also emphasised by the reviewer states.

In particular, the failure of the Member States regarding the implementation of the rights of the Roma is the issue most frequently raised during the UPRs, although discrimination against other minorities such as the Slovenian minority in Austria and Italy, the Travellers in Ireland, the Sami in Finland and Sweden, the Sinti in Italy or the Russian-speaking minority in the Baltic States, as well as the high number of stateless persons and non-citizens living in these latter states, has also been noted by the reviewer states.

With regard to Roma communities, the concern of the reviewer states has been directed at the challenge of their integration and their access to educational, employment and social rights, in particular the lack of inclusive education in some EU Member States, and the high rates of school drop-out and the placement of Roma children in special schools in some countries; or the impact of the economic crisis and the budgetary measures on the rights of Roma individuals and communities. Special attention should be given to two specific issues mentioned in the review of some countries: first, some Governments' policies on forced eviction and expulsion of Roma from unauthorised or immigration camps (France, Italy); and second, practices of forced sterilisation in some countries such as the Czech Republic and Slovakia.

### *e) Rights of Migrants*

The protection of the rights of migrants ranks fifth in the list of human rights issues according to the number of recommendations received during the UPRs of the EU Member States. As mentioned above (see section C1), an issue that is noted in all EU Member States' reviews is the lack of their ratification of the ICRMW, although allegations of exploitation and abuse of migrant workers in these states are frequently raised during the interactive dialogue. The fact that some provisions of the treaty should be applicable to all migrant workers, including non-documented migrants or migrants in irregular situations in the territory of a state, is one of the main reasons why EU Member States refuse the ratification of this treaty. In fact, the existence of restrictions concerning the recognition of rights to irregular or undocumented migrants is one of the most recurrent issues in the UPR. In this regard, the reviewer states express their concern over the limited access of undocumented migrants to basic services, cases of mistreatment by the police against such migrants, the existence of an obligation of civil servants to report irregular migrants to immigration authorities in some countries, the categorisation of illegal residence as a criminal offence under national legislation and, finally, general discrimination against irregular immigrants.

Other issues of concern are the unequal access of migrants to the enjoyment of human rights, including ESCR, in particular, the rights to employment, housing, education and health, as well as civil rights, such as the right to participate in regional elections.

In addition, another cluster of issues relate to the rise of discriminatory attitudes, racism, xenophobia and intolerance against migrant communities, including violent crimes and discrimination in law-enforcement and judicial systems. In this regard, the role of politicians and the media in portraying a negative image of migrants and minority groups is highlighted.

The reviewer states also draw attention to the strict residency and citizenship requirements for migrants and asylum seekers in some countries and the obstacles to family-reunification procedures.

A final cluster of issues relates to national judicial systems, including concerns regarding the high number of migrants in detention, cases of ill-treatment, the fact that foreigners receive more severe sentences in criminal justice systems and the overcrowding of immigration detention facilities.

### *f) Racial discrimination*

All Member States of the EU, without exception, have received recommendations during their UPR regarding the issue of racial discrimination, notwithstanding their ratification of the CERD as well as all other main human rights instruments previously mentioned, which set forth the prohibition of discrimination (see points 5 and 6 above). Many of the comments issued during the interactive dialogue address the role of public institutions and authorities, both regarding their own involvement in malpractice, as well as in spreading a negative image of ethnic minorities. One issue often attributed to the Member States is racial profiling by law enforcement officials, as well as allegations of institutional racism, the failure of the institutions to investigate and prosecute racially motivated hate crimes, and a lack of a comprehensive strategy on racial discrimination. Hate speech, racial stereotyping and prejudice

in statements issued by politicians and the media are also attributed to the EU Member States as factors that contribute to spreading xenophobic attitudes and intolerance.

The rise in race-based violent crimes and in the levels of racism and intolerance against migrants are also matters of concerns raised by the reviewer states. In addition, the lack of adequate statistics on racist incidents is also a recurrent issue highlighted in the EU Member States' reviews.

Finally, incidents of right-wing extremism on the internet in some countries, and the need to improve governments' responses to combat these acts, is also mentioned by the reviewer states. Also covered are some country-specific themes, such as the lack of a provision prohibiting organisations that incite racial discrimination in Belgium or the disproportionate budget cuts to mechanisms dealing with the anti-racism agenda due to the economic recession in Ireland.

#### 4. Other human rights issues

This section will address other human rights issues which were raised during the UPRs of the EU Member States. There is a significant disparity between the number of recommendations made relating to the main issues listed in above section C and the rest of the human rights issues raised during the EU Member States' reviews. In this section, a brief summary of some of these additional human rights concerns will be made, although due to length restraints it is not possible to address all of them here. Thus, attention will be paid to those themes which have received a higher number of recommendations or that have achieved greater media attention within the EU. In connection with the latter point, some authors explain that the fact that the reviews sometimes focus on issues more widely reported in the media is problematic because it highlights 'headline issues', overshadowing other issues which also constitute grave violations of human rights (Smith, 2013, p. 15). Chart 5 shows the total number of recommendations received by the Member States regarding these other themes, although, as previously mentioned, there are more issues which will not be elaborated in the present report.

Table 5: Other human rights issues in the EU Member States' UPR

Human rights issue	No. recommendations in total in the UPR	% of 4,598 total recommendations by issue
Detention conditions	332	7,22%
Human trafficking	289	6,29%
Torture and ill-treatment	249	5,42%
NHRI	215	4,68%
Rights of asylum seekers and refugees	202	4,39%
Rights of persons with disabilities	201	4,37%
Freedom of religion and belief	180	3,91%

Justice	132	2,87%
Discrimination based on sexual orientation	125	2,72%
ESCR	107	2,33%
Counter-terrorism policies	46	1,00%
Freedom of the press	23	0,50%

In what follows we will briefly describe the main challenges which the EU Member States face regarding these human rights issues:

***a) Detention conditions***

With regard to detention conditions in the EU Member States, the issue that is more frequently noted by the reviewer states is overcrowding and low living standards in prisons. The excessive use of force by law enforcement officials during and after detention, including the use of tasers, is another issue recurrently underlined during the interactive dialogue, alongside the lack of effective enjoyment of some procedural rights, such as the access to a lawyer, practices of lengthy pre-charge detention in some countries and high rates of suicide in prisons.

***b) Human trafficking***

It has been highlighted during the reviews that many EU Member States are destination countries of victims of human trafficking, particularly women and children. Other concerns related to the need to increase the states' efforts to identify and support victims of human trafficking, as well as the low number of convictions for human trafficking in the Member States. Finally, certain behaviours that have an influence on human trafficking, such as sex tourism, are also identified as an acute problem in the EU Member States.

***c) Torture and ill-treatment***

Regardless of the ratification of the UN 'Convention against Torture' by all EU Member States, torture is one of the issues, which attracts frequent attention during the UPRs. Some concerns expressed by the reviewer states relate to allegations of torture and ill-treatment committed by the police, in particular against asylum seekers and irregular immigrants; the excessive use of force by the police and special measures against participants of demonstrations, and their cruel treatment; high levels of impunity in cases of police brutality; or the lack of a definition or the inclusion of unclear or inadequate definitions of the crime of torture in national legislation. Involvement of national authorities in practices of extraordinary rendition, secret detention and transit of secret flights within the framework of counter-terrorism policies are also reported regarding countries such as the Czech Republic, Denmark, Finland, Germany, Lithuania, Poland, Spain, Sweden and the UK.

#### ***d) National Human Rights Institutions***

The inexistence of a National Human Rights Institution (NHRI) in several EU Member States or the lack of alignment of these national institutions with the Paris Principles is also a matter of concern in countries such as Belgium, the Czech Republic, Cyprus, Italy, Latvia, Lithuania, Malta, Slovakia or Sweden.

#### ***e) Rights of refugees and asylum seekers***

The reduced number of refugees accepted by EU Member States and the deportation of asylum seekers, including to countries where their safety is endangered – an infringement of the non-refoulement rule, are two of the most important gaps regarding the protection of the rights of refugees and asylum seekers in EU Member States. Other issues relate to the detention periods for asylum-seekers, the high rate of unemployment among asylum seekers and the issue of statelessness in countries such as Denmark, Estonia, Latvia, Lithuania and Luxembourg.

#### ***f) Rights of persons with disabilities***

The reviews of the EU Member States show that significant challenges remain in connection with the protection of the rights of persons with disabilities, especially regarding their equal access to education, employment, housing, transport and cultural rights.

#### ***g) Freedom of religion***

Discrimination against religious minorities is also underlined by the reviewer states during the EU Member States' UPRs, raising questions related to the high levels of religious intolerance, islamophobia, problems faced by Muslim communities, de facto discrimination in access to education, the prohibition in some countries of wearing religious symbols in schools and public spaces, or defamation of Islamic religious symbols and personalities by the media.

#### ***h) Justice***

With regard to EU Member States' justice systems, the reviewer states made recommendations about the excessive length of trial proceedings; the failure to provide detainees with effective access to legal counsel, in particular for migrants and asylum seekers; the charging of court fees; the way in which data is processed within the judiciary and the lack of independence of the judiciary.

#### ***i) Discrimination based on sexual orientation***

Discrimination of LGBTI persons is also a matter of concern in the human rights situation of the EU Member States, in particular the existence of inequalities regarding the status of same-sex partners, the denial of same-sex marriage, incidents of homophobia, violence and intolerance against LGBTI individuals and discrimination in the labour market.

#### ***j) ESCR***

Concerning the protection of ESCR, the reviewer states expressed their concerns about the impact of the economic crisis on ESCR, stating specifically that responses to the crisis should not disproportionately impact upon the most vulnerable, in particular the elderly, women and children, and should not incite racism, xenophobia and intolerance against foreigners, immigrants and persons belonging to minorities. Moreover, the emergence of areas of informal economy where workers, in particular migrants, are not protected is another matter of concern.

### *k) Counter-terrorism measures*

In connection with counter-terrorism policies and their execution, the most recurrent issues are allegations of practices of extraordinary rendition, cooperation with CIA flights, the existence of secret detention centres and the expulsion of foreign terrorist suspects from EU countries such as the UK, the Czech Republic, Denmark, Finland, Germany, Lithuania, Poland, Spain and Sweden.

### *l) Media and freedom of the press*

Lastly, some issues regarding freedom of the press are also highlighted in some countries; in particular, the political influence over the media, the high level of concentration of the audio-visual market and incidents of threats against journalists.

## **C. Conclusion**

The analysis of the Outcome Reports produced in the course of the UPRs of the EU Member States shows that six human rights issues attract almost all recommendations issued by the reviewer states (94.16%), namely the lack of ratification or signature of international human rights instruments, the rights of the child, women's rights, the rights of national minorities, the rights of migrants and racial discrimination.

Even though one of the main objectives of the EU Strategic Framework on Human Rights and Democracy is the promotion of the universality of human rights and, consequently, the universal adherence to the key international and regional human rights treaties, the lack of ratification by the EU Member States of certain human rights instruments is the 'gap' that has received the highest number of recommendations during the UPRs of the EU Member States. The majority of the recommendations relate to the failure to ratify the ICRMW, although the failure to ratify other key human rights instruments, such as the OP-ICESCR, OP-CRC on a Communications Procedure, CED, OP-CAT, CRPD, OP-CRPD, OP-ICCPR and the OP-CRC on the Sale of Children, Child Prostitution and Child Pornography, has also been brought up by reviewer states.

In addition to this gap, Chart 6 (below) shows the summary of the main gaps that are attributed to the EU Member States regarding the six issues most referred to:

*Table 6: Summary of gaps attributed to EU Member States in the UPR*

Ranking	Human rights issue	Human rights gaps more frequently attributed to the EU Member States
1	International instruments	<ul style="list-style-type: none"> <li>• Lack of ratification and/or signature of, in particular, ICRMW, OP-ICESCR, OPs-CRC, CED, OP-CAT, CRPD, OP-CRPD, OP-ICCPR</li> <li>• Lack of or inadequate incorporation into national law</li> <li>• Inclusion of reservations and declarations to the content and scope of international instruments</li> </ul>
2	Rights of the child	<ul style="list-style-type: none"> <li>• Increased number of unaccompanied migrant and refugee children</li> <li>• High number of children placed in social institutions</li> <li>• Increase in the demand for child pornography and prostitution</li> <li>• Practices of corporal punishment against children</li> </ul>

		<ul style="list-style-type: none"> <li>• Child sex tourism</li> <li>• Street and homeless children</li> <li>• Lack of consideration of children's needs in national justice systems</li> </ul>
3	Women's rights	<ul style="list-style-type: none"> <li>• Discrimination against women, in particular, labour rights</li> <li>• Stereotypical gender roles and inequalities</li> <li>• Underrepresentation of women in public and political life</li> <li>• Violence against women, in particular, domestic violence</li> </ul>
4	Minorities	<ul style="list-style-type: none"> <li>• Discrimination: unequal access to employment, housing, education, ESCR, in particular of Roma communities</li> <li>• Adverse impact of austerity policies on the rights of minorities</li> <li>• Lack of official recognition of minorities</li> <li>• Violence, intolerance and prejudice against minorities</li> <li>• Hate speech and stereotyping by public authorities and media</li> </ul>
5	Migrants	<ul style="list-style-type: none"> <li>• Lack of ratification of the ICRMW</li> <li>• Exploitation and abuse of migrant workers</li> <li>• Restrictions in the recognition of rights of irregular or undocumented migrants</li> <li>• Discrimination in the access to ESCR and CP rights</li> <li>• Discriminatory attitudes, racism, xenophobia and intolerance against migrants</li> <li>• Strict residency and citizenship requirements</li> <li>• Obstacles to family-reunification procedures</li> <li>• Discrimination in national judicial systems</li> </ul>
6	Racial discrimination	<ul style="list-style-type: none"> <li>• State malpractice: racial profiling, institutional racism, lack of investigation and prosecution of racially motivated hate crimes, lack of a comprehensive strategy on racial discrimination</li> <li>• Responsibility of politicians and the media in spreading a negative image of ethnic minorities</li> <li>• Race-based violent crimes</li> <li>• Incidents of right-wing extremism on the internet</li> </ul>

Moreover, there are other human rights issues that are also regularly highlighted by the reviewer states: detention conditions, human trafficking, torture and ill-treatment, NHRIs, asylum seekers and refugees, rights of persons with disabilities, freedom of religion and belief, justice, discrimination based on sexual orientation, ESCR, counter-terrorism policies and freedom of the press.

In order to analyse the list of identified human rights gaps, it should not be overlooked that the UPR is, in essence, an intergovernmental procedure, which consequently provides a picture of the main human rights issues in one state according to the perception of other states. Therefore, the issues raised in a particular UPR depend on the willingness of the reviewer states to conduct the review in accordance with the principles outlined in HRC Resolution 5/1, that is, 'in an objective, transparent, non-selective,

constructive, non-confrontational and non-politicized manner'. The trends and dynamics between the states which have been identified so far by the observers of the process show that, on one hand, many countries play the role of 'friendly states', in the course of the review of countries belonging to the same regional group, by issuing positive comments and avoiding sensitive human rights issues and, on the other hand, that many states tend to focus more on issues of their own interest instead of raising the real issues of concern in the SuR. Both trends raise questions regarding the effective implementation of the principles mentioned above. Thus significant challenges remain to overcome the same criticisms that led to the extinction of the Human Rights Commission, notably the politicisation, selectivity and double standards in the review of human rights violations in specific countries.

It is also worth noting that the UPR is a process subject to time and financial limitations, which means that it cannot be totally comprehensive and cannot cover all the relevant human rights obligations of the SuRs. Equally, the UPR is not a rigorous technical legal assessment of the implementation of those obligations by the states and the main documentation on which the review is based is not produced by a team of experts, unlike the work of the treaty bodies and the special procedures.

The main challenge for the adequate functioning of the UPR lies with the implementation of the recommendations adopted at national level. The EU should encourage its Member States to fully comply with the accepted recommendations, although, as has been rightly emphasised by the European Parliament, 'those recommendations which were not accepted by the State under review should not be excluded from the process' (European Parliament Resolution, 2012/2530 (RSP), para. 33). Accordingly, EU Member States should lead by example, complying scrupulously with the accepted recommendations and taking into serious consideration those recommendations that they did not accept.<sup>181</sup> A good practice that some EU Member States are adopting is the submission of interim reports on the progress of implementation of the accepted recommendations (Wouters & Meuwissen, 2014, p. 169). Along these lines, the European Parliament has encouraged EU Member States to submit a 'voluntary mid-term update of the follow-up to accepted recommendations' (European Parliament, 2012/2530 (RSP), para. 37). The implementation of the recommendations adopted by the HRC should also be taken into account by the EU in its dialogues and cooperation with third countries.

The process of preparation of the national reports to be submitted to the HRC for the UPR, and the subsequent monitoring of the recommendations adopted by the HRC, is a good opportunity for the participation of civil society and other stakeholders, such as NHRIs, in the evaluation of the human rights situation in the respective countries.<sup>182</sup> The EU Member States should provide opportunity for the meaningful participation of human rights organisations during the process of elaboration of the national report. Some SuRs have, under the framework of the UPR, even incorporated NGO members as part of

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<sup>181</sup> The systematic rejection by EU Member States of the recommendation to ratify the UN Convention on the Protection of the Rights of All Migrant Workers and Their Families strongly undermines the coherence and credibility of both EU Member States and the EU as leading players in the global human rights arena.

<sup>182</sup> Against the background of the experience of the first rounds of the UPR in 2008, the EU Annual Report on Human Rights 2008 highlighted that 'the process of preparation of a number of national reports was an incentive for many states under review to involve civil society organisations in the evaluation of national human rights situation' (Council of the European Union, 2008).

their official delegation, a 'good practice [that] sets a valuable precedent for other delegations to follow' (Domínguez Redondo, 2008, p. 729).

Finally, some scholars have proposed the submission of the EU itself to the UPR process. This would be a relevant 'step beyond', and 'would add to the consolidation of the EU as a credible and distinct multilateral human rights actor' (Wouters & Meuwissen, 2014, p. 172).

## Bibliography

### 1. Legal and policy instruments

*Charter of Fundamental Rights of the European Union* (2000), OJ C364/1.

*Convention for the Protection of Human Rights and Fundamental Freedoms*, signed in Rome on 4 November 1950.

*Convention on the Elimination of All Forms of Discrimination against Women* New York, 18 December 1979.

*Convention on the Rights of the Child* adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990.

*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987.

Council of the European Union (2012), *Human Rights and Democracy: EU Strategic Framework and EU Action Plan*, 11855/12.

*European Parliament Resolution of 16 February 2012 on Parliament's position on the 19th session of the UN Human Rights Council*, 2012/2530 (RSP).

General Assembly (2006), *Resolution adopted by the General Assembly on 15 March 2006 no. 60/251. Human Rights Council*, A/RES/60/251.

Human Rights Council (2007), *Resolution 5/1. Institution-building of the United Nations Human Rights Council*.

*International Convention on the Elimination of All Forms of Racial Discrimination*, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969.

*International Covenant on Economic, Social and Cultural Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.

*International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

### 2. Literature

#### a) Book chapters

Bernaz, N. (2009), 'Reforming the UN Human Rights Protection Procedures: a legal perspective on the establishment of the Universal Periodic Review Mechanism', in Boyle, K. (ed) *New institutions for Human Rights Protection*, Oxford: Oxford University Press.

De la Vega, C. & Lewis, T. (2011), 'Peer Review in the Mix: How the UPR Transforms Human Rights Discourse', in Bassiouni, M. C. & Schabas, W. (eds) *New Challenges for the UN Human Rights Machinery*, Antwerp: Intersentia.

Márquez Carrasco, C. & Nifosi Sutton I. (2009), 'From the Commission on Human Rights to the Human Rights Council', in Gómez Isa, F. & De Feyter, K. (eds), *International Human Rights Law in a Global Context*, Bilbao: Deusto University Press.

Nowak, M. (2006), 'From the Human Rights Commission to the New Council', in Almqvist, J. & Gómez Isa, F. (eds) *The Human Rights Council: Challenges and Opportunities*, Madrid: FRIDE.

### **b) Journal articles**

Abebe A. M. (2009), 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council', *Human Rights Law Review*, vol. 9 (1), pp. 1-35.

Alston, P. (2006), 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council', *Center for Human Rights and Global Justice Working Paper*, no. 4, pp. 1-42.

Cox, E. (2010), 'State Interests and the creation and functioning of the United Nations Human Rights Council', *Journal of International Law and International Relations*, vol. 6, no. 1, pp. 87-120.

Domínguez Redondo, E. (2008), 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session', *Chinese Journal of International Law*, vol. (3), pp. 721-734.

Duggan-Larkin, J. (2010), 'Can an Intergovernmental mechanism increase the protection of human rights? The potential of Universal Periodic Review in relation to the realisation of economic, social and cultural rights', *Netherlands Quarterly of Human Rights*, vol. 28 (4), pp. 548-581.

Freedman, R. (2011), 'New mechanisms of the UN Human Rights Council', *Netherlands Quarterly of Human Rights*, vol. 29 (3), pp. 289-323.

McMahon, E. R. & Ascherio, M. (2012), 'A step ahead in promoting human rights? The Universal Periodic Review of the UN Human Rights Council', *Global Governance*, vol. 18, pp. 231-248.

Smith, R. (2013), 'To see themselves as others see them: the five permanent members of the Security Council and the Human Rights Council's Universal Periodic Review', *Human Rights Quarterly*, vol. 35 (1), pp. 1-32.

Sweeney, G. & Saito, Y. (2009), 'An NGO assessment of the new mechanisms of the UN Human Rights Council', *Human Rights Law Review*, vol. 9 (2), pp. 203-223.

Viegas e Silva, M. (2013), 'The United Nations Human Rights Council: Six years on', *SUR – International Journal on Human Rights*, vol. 18 (18), June, pp. 97-112.

Wouters, J. & Meuwissen, K. (2014), 'The European Union at the UN Human Rights Council: Multilateral Human Rights Protection Coming of Age?', *European Journal of Human Rights*, 2015 (2), pp. 135-172.

### **c) Policy and other reports and documents**

Amnesty International (2011), *Making it work. The reviews of the UN Human Rights Council, 2011*, available at <http://www.amnesty.org/en/library/info/IOR41/001/2011/en> accessed 12 November 2014.

Council of the European Union (2008), *EU Annual Report on Human Rights 2008*, 14146/2/08, REV 2, 27 November 2008.

General Assembly, Human Rights Council (2014), *Report of the Working Group on the Universal Periodic Review. Slovakia*, A/HRC/26/12.

General Assembly, Human Rights Council (2014), *Report of the Working Group on the Universal Periodic Review. Cyprus*, A/HRC/26/14.

General Assembly, Human Rights Council (2014), *Report of the Working Group on the Universal Periodic Review. Portugal*, A/HRC/27/7.

General Assembly, Human Rights Council (2013), *Report of the Working Group on the Universal Periodic Review. France*, A/HRC/23/3.

General Assembly, Human Rights Council (2013), *Report of the Working Group on the Universal Periodic Review. Romania*, A/HRC/23/5.

General Assembly, Human Rights Council (2013), *Report of the Working Group on the Universal Periodic Review. Luxembourg*, A/HRC/23/10.

General Assembly, Human Rights Council (2013), *Report of the Working Group on the Universal Periodic Review. Germany*, A/HRC/24/9.

General Assembly, Human Rights Council (2013), *Report of the Working Group on the Universal Periodic Review. Malta*, A/HRC/25/17.

General Assembly, Human Rights Council (2012), *Report of the Working Group on the Universal Periodic Review. Finland*, A/HRC/21/8.

General Assembly, Human Rights Council (2012), *Report of the Working Group on the Universal Periodic Review. United Kingdom of Great Britain and Northern Ireland*, A/HRC/21/9.

General Assembly, Human Rights Council (2012), *Report of the Working Group on the Universal Periodic Review. Poland*, A/HRC/21/14.

General Assembly, Human Rights Council (2012), *Report of the Working Group on the Universal Periodic Review. The Netherlands*, A/HRC/21/15.

General Assembly, Human Rights Council (2012), *Report of the Working Group on the Universal Periodic Review. Czech Republic*, A/HRC/22/3.

General Assembly, Human Rights Council (2011), *Report of the Working Group on the Universal Periodic Review. Bulgaria*, A/HRC/16/9.

General Assembly, Human Rights Council (2011), *Report of the Working Group on the Universal Periodic Review. Croatia*, A/HRC/16/13.

General Assembly, Human Rights Council (2011), *Report of the Working Group on the Universal Periodic Review. Estonia*, A/HRC/17/7.

General Assembly, Human Rights Council (2011), *Report of the Working Group on the Universal Periodic Review. Austria*, A/HRC/17/8.

General Assembly, Human Rights Council (2011), *Report of the Working Group on the Universal Periodic Review. Belgium*, A/HRC/18/3.

General Assembly, Human Rights Council (2011), *Report of the Working Group on the Universal Periodic Review. Denmark*, A/HRC/18/4.

General Assembly, Human Rights Council (2011), *Report of the Working Group on the Universal Periodic Review. Latvia*, A/HRC/18/9.

General Assembly, Human Rights Council (2011), *Report of the Working Group on the Universal Periodic Review. Greece*, A/HRC/18/13.

General Assembly, Human Rights Council (2011), *Report of the Working Group on the Universal Periodic Review. Hungary*, A/HRC/18/17.

General Assembly, Human Rights Council (2011), *Report of the Working Group on the Universal Periodic Review. Ireland*, A/HRC/19/9.

General Assembly, Human Rights Council (2011), *Report of the Working Group on the Universal Periodic Review. Lithuania*, A/HRC/19/15.

General Assembly, Human Rights Council (2010), *Report of the Working Group on the Universal Periodic Review. Cyprus*, A/HRC/13/7.

General Assembly, Human Rights Council (2010), *Report of the Working Group on the Universal Periodic Review. United Kingdom of Great Britain and Northern Ireland*, A/HRC/13/10.

General Assembly, Human Rights Council (2010), *Report of the Working Group on the Universal Periodic Review. Portugal*, A/HRC/13/10.

General Assembly, Human Rights Council (2010), *Report of the Working Group on the Universal Periodic Review. Italy*, A/HRC/14/4.

General Assembly, Human Rights Council (2010), *Report of the Working Group on the Universal Periodic Review. Slovenia*, A/HRC/14/15.

General Assembly, Human Rights Council (2010), *Report of the Working Group on the Universal Periodic Review. Spain* (2010), A/HRC/15/6.

General Assembly, Human Rights Council (2010), *Report of the Working Group on the Universal Periodic Review. Sweden*, A/HRC/15/11.

General Assembly, Human Rights Council (2009), *Report of the Working Group on the Universal Periodic Review. Luxembourg*, A/HRC/10/72.

General Assembly, Human Rights Council (2009), *Report of the Working Group on the Universal Periodic Review. Germany*, A/HRC/11/15.

General Assembly, Human Rights Council (2009), *Report of the Working Group on the Universal Periodic Review. Malta*, A/HRC/12/7.

General Assembly, Human Rights Council (2009), *Report of the Working Group on the Universal Periodic Review. Slovakia*, A/HRC/12/17.

General Assembly, Human Rights Council (2008), *Report of the Working Group on the Universal Periodic Review. The Netherlands*, A/HRC/8/31.

General Assembly, Human Rights Council (2008), *Report of the Working Group on the Universal Periodic Review. Czech Republic*, A/HRC/8/33.

General Assembly, Human Rights Council (2008), *Report of the Working Group on the Universal Periodic Review. France*, A/HRC/8/47.

General Assembly, Human Rights Council (2008), *Report of the Working Group on the Universal Periodic Review. Romania*, A/HRC/8/49.

Human Rights Watch (2010), *Curing the selectivity syndrome. The 2011 review of the Human Rights Council*, available at <http://www.hrw.org/sites/default/files/reports/hrc0610webwcover.pdf> accessed 12 November 2014.

McMahon, E. R. (2012), *The Universal Periodic Review: a work in progress. An evaluation of the first cycle of the new UPR mechanism of the United Nations Human Rights Council*, available at <http://www.upr-info.org/en/library/Studies> accessed 12 Nov 2014.

McMahon, E. R. (2010), *Herding Cats and Sheep: Assessing State and Regional Behavior in the Universal Periodic Review Mechanism of the United Nations Human Rights Council*, available at <http://www.upr-info.org/en/library/Studies> accessed 12 November 2014.

Smith, K. (2011), *The European Union and the Review of the Human Rights Council*, European Parliament, Directorate-General for External Policies of the Union, EXPO/B/DROI/2010/06.

Wouters, J., Sudsehna, S. & Bernaz, N. (2008), *The Role of the European Union in the Human Rights Council*, Study for the European Parliament Policy Department for External Policies, EXPO/B/DROI/2007/41.

PART 2:  
Regional human rights protection systems in  
Africa, the Americas and Asia

## VII. African human rights protection systems<sup>183</sup>

### A. Introduction

The African human rights system has grown immensely in the last 30 years both with regard to its normative coverage and its institutional framework. When the Organization of African Unity (OAU) was replaced by the African Union (AU) in 2002, the promotion and protection of human rights was put squarely on the agenda of the new organisation. Through the 'African Charter on Human and Peoples' Rights' (ACHPR), supplemented by other regional treaties, the African human rights system complements the global human rights regime.

This chapter supplements the chapter on African regional human rights protection in an earlier FRAME report, 'D 4.1 Mapping study on relevant actors in human rights protection', and examines the gaps, tensions and contradictions that exist in the African regional human rights system. This chapter also touches on the role of sub-regional human rights initiatives, in particular the role of sub-regional courts in the enforcement of human rights.

On the one hand, this chapter analyses the gaps which imply the difference between the status quo and the desired standards/performance, in terms of the approach of other human rights systems and academic debate. 'Tensions' and 'contradictions', on the other hand, refer to inconsistencies within the African human rights system and the lack of implementation of accepted regional standards.

### B. The African Union

#### 1. Gaps, tensions and contradictions with regard to regional instruments

The African legal protection of human rights can be traced back to the 1963 Charter of the OAU, although this Charter only made tacit reference to the notion of human rights in its preamble. The real breakthrough for human rights protection for the region came in 1981 when the OAU adopted the African Charter, which entered into force five years later.

With the transition from the OAU to the AU in 2002, the latter recognised the protection of human rights as one of its cardinal objectives. The renewed focus on human rights has seen the adoption of many new human rights instruments by the AU.

#### a) African Charter on Human and Peoples' Rights

The ACHPR, adopted in 1981, provides extensively for a variety of internationally recognised human rights standards. Uniquely among general human rights treaties, the ACHPR provides for civil, political, economic, social, cultural and peoples' rights, as well as duties. With the exception of South Sudan, all AU member states have ratified the treaty. Only two states, Egypt and Zambia, have entered reservations to the Charter. Egypt's reservation states that certain provisions of the Charter (Articles 8(3) and 18(3)) should be interpreted in accordance with Islamic law and that access to information

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under Article 9(1) should be limited to what is already provided under Egyptian law. Zambia's reservation (or rather interpretive declaration) relates to access to public property. When ratifying the ACHPR, South Africa attached a declaration stating that ratifying states should work on strengthening the enforcement mechanisms of the Charter, should clarify rules on limitations and should revise the provision in relation to Zionism in the Charter's preamble (Heyns, 2003-2004, p. 682).

The ACHPR has been criticised for leaving out some individual rights entirely and for not providing enough detail with regard to other rights (Viljoen, 2012, p. 215). For instance, unlike the 'International Covenant on Civil and Political Rights' (ICCPR), the Charter fails to provide for the right to freedom from forced labour or the right to privacy (Heyns & Killander, 2013, p. 445).

In contrast, with regard to peoples' rights, the ACHPR is much more detailed than the two United Nations (UN) covenants (Heyns & Killander, 2013, p. 445). Whereas the ICCPR and the 'International Covenant on Economic, Social and Cultural Rights' (ICESCR) merely provide for a right to self-determination, the African Charter broadens peoples' rights to include the right to equality (Article 19), to existence and self-determination (Article 20), the right to property (Article 21), the right to development (Article 22) and the right to international and domestic peace and security (Article 23).

Many rights have been weakened through the inclusion of 'claw-back clauses' in the ACHPR (Heyns, 2003-2004, pp. 688-689). For example, Article 9 provides that every individual has the right to express his or her opinion 'within the law'. This could be interpreted as providing for the right only to the extent that it is not incoherent with national law. Heyns (2003-2004, p. 685) asserts that such an interpretation would render the ACHPR insignificant and would weaken the entire notion of regional monitoring of domestic legislation and practices. However, to its credit, the African Commission on Human and Peoples' Rights has held that '[i]nternational human rights standards must always prevail over contradictory national law' (*Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para. 66).

The ACHPR has also been criticised for the 'minimalist' approach adopted during the drafting process, which led to the guarantee of only a modest amount of socio-economic rights (Viljoen, 2012, p. 215). The most important omissions include the right to an adequate standard of living, which includes adequate food, clothing and housing; the right to social security; the right to form and join trade unions; the right to paid periodic holidays; and the right to leisure and rest, reasonable limitation of working hours and remuneration for public holidays (Ssenyonjo, 2012, p. 56).

Commentators have also condemned the ACHPR's procedural hazards, especially with regard to the admissibility requirements under Article 56 for the submission of communications to the African Commission. But for the Commission's creative interpretation, fewer communications would have survived admissibility (Chigara, 2012, p. 407).

The ACHPR has also been criticised for failing to completely separate the competence of the African Commission from the scrutiny and manipulation of state parties (Chigara, 2012, p. 404; Heyns, 2001, p. 159). Indeed, by subtracting and transferring some of the mandate of the African Commission to the Assembly of Heads of State and Government (AU Assembly), the Charter has compromised the

protective function of the former. Thus, the manner in which the ACHPR places the competence of the monitoring bodies at the mercy of the AU Member States 'presents a significant obstacle' (Heyns, 2003-2004, p. 688).

While the discrepancies on paper between the ACHPR and the UN covenants could be a matter of concern, and have indeed led to calls for the revision of the Charter (Heyns, 2001, p. 159), the African Commission has in its interpretation of the ACHPR, taken a broad approach. Consequently, substantive protection provided under the African Charter is even broader than under the two covenants. The African Commission has incorporated through interpretation limitations, which are not included in the ACHPR, such as the progressive realisation of socio-economic rights (Viljoen, 2012, p. 217).<sup>184</sup>

As in the UN and the European and Inter-American human rights systems, the African Charter has been complemented by a number of specialised treaties focusing on groups with particular needs or vulnerabilities.

### *b) OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*

The regional instrument governing the protection of refugee rights in Africa is the 'OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (hereinafter OAU Refugee Convention) of 1969. The Convention was adopted shortly after the 1967 Protocol to the UN's 1951 Convention relating to the Status of Refugees. By July 2015, the OAU Refugee Convention had been ratified by 45 AU Member States (African Commission on Human and Peoples' Rights, 2015).

The OAU Refugee Convention builds upon and broadens the definition of a refugee in the 1951 Convention (Sharpe, 2012, pp. 146-147). Thus, the term 'refugee' does not only cover those suffering individual persecution but 'shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality' (Article 1(2)). There are very few African states that have not ratified both the UN Convention and Protocol and the OAU Refugee Convention.

Regarding implementation and compliance, the OAU Refugee Convention lacks a monitoring body. A supervisory body could inspire states to adjust their domestic legislation to reflect international standards (Viljoen, 2012, p. 243). Accordingly, only a few ratifying states have incorporated the Convention's provisions into their domestic legislation, while most states refuse to abide by the provisions in practice (Viljoen, 2012, p. 245). For example, there have been many cases where state parties to the Convention have prohibited entry at border points or forcibly repatriated refugees (Institute for Security Studies, 2014).

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<sup>184</sup> The principle of progressive realisation purports that in light of the resource constraints faced by many countries, the fulfilment of socio-economic rights can only be attained over time. Nonetheless, irrespective of the level of available resources, governments are expected to take immediate and deliberate steps towards the full implementation of these rights. For further reading, see *Committee on Economic, Social and Cultural Rights (CESCR)*, General Comment No. 3.

***c) African Charter on the Rights and Welfare of the Child***

The adoption of the 'African Charter on the Rights and Welfare of the Child' (ACRWC), in 1990 to complement the UN Convention on the Rights of the Child (CRC), has been attributed to the lack of participation of African states in the drafting of the CRC and the failure of the CRC to address certain unique African challenges. For example, the limited role of the family in the development of the child, the use of child soldiers, the position of expectant mothers, the condition of children in detention and the prevalence of harmful cultural practices (Viljoen, 1998, p. 2005).

The ACRWC has been hailed for giving wider protection to children than the CRC (Van Bueren, 1995, p. 402; Gose, 2002, p. 27). Whereas the CRC permits the recruitment of children who are above the age of 15 in armed conflicts (CRC, Article 38), the ACRWC completely abolishes the recruitment of minors (Article XXII (2)). It also markedly broadens the scope of Article 22 of the CRC by extending its provisions on refugee children to cover situations of internally displaced children in the region (Article XXIII).

As pointed out by Mezmur (2008, p. 28) there are only a few instances, such as juvenile justice, where the CRC provides broader protection than the ACRWC. However, all states which have ratified the ACRWC have also ratified the CRC and thus enjoy the highest level of protection provided by either of the treaties (Chirwa, 2002, p. 170). This of course does not mean that either of the two instruments are widely implemented, despite national legislation related to children being based on the CRC and the ACRWC in many African states.

In terms of operationalisation, the ACRWC does not explicitly oblige states to publish it or raise public awareness of its existence (see Article 42 of the CRC). For instance, whereas Article 17 of the CRC sets out a comprehensive strategy for the dissemination and implementation of its provisions, Article 1(1) of the ACRWC merely encourages states to 'undertake the necessary steps' to give it effect. This is regrettable bearing in mind that a human rights instrument can only be effective if the general public are made aware of its ratification and content, and not only a small class of human rights experts (Gose, 2002, p. 33).

***d) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)***

The 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (the Maputo Protocol) was adopted to extend the protection of women under the ACHPR, which, according to some interpreters, incorporates the 'UN Convention on Elimination of all Discrimination against Women' (CEDAW) in Article 18 (Viljoen, 2012, p. 253). However, the Protocol provides much more extensive protection than CEDAW, spanning from rights to peace, personal security and marriage, to protection of elderly and disabled women and health-related rights.

According to Viljoen (2012, p. 253), the Maputo Protocol 'speaks in a clearer voice about issues of particular concern to African women, locates the CEDAW in African reality, and returns some casualties of quests for global consensus into its fold.' In contrast, Chirwa (2006, p. 92) criticises the Protocol for presenting women's rights as 'fundamentally and intrinsically antithetical to African values and that the only way these rights can be realised is by overhauling the social fabric of African societies'. This

assertion is premised on the fact that the Protocol ignores completely in its preamble that the customs and values of African civilisation would inspire and characterise the concept of women's rights (Chirwa, 2006). Against this backdrop, popular acceptance of the provisions in the Protocol may not be forthcoming.

Despite this, the Maputo Protocol does recognise some African realities. For example, the CEDAW Committee has declared that polygamy violates CEDAW, while the Protocol on the Rights of Women in Africa provides, in Article 6(c), that 'monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected'.

While the Protocol advances some positive standard setting relevant for the protection of women, it omits key provisions. It fails to reflect on the situation of poverty in the region, which disproportionately affects women in rural areas (Viljoen, 2012, p. 255). Moreover, the Protocol fails to cover the distinct effect of HIV/AIDS on women in Africa. It should, however, be noted that the African Commission has a mandate to interpret the Protocol and that, for example, the latter issue has been dealt with in the Commission's general comments on Article 14 of the Protocol, which covers health and reproductive rights.

Viljoen (2012, p. 255) has criticised the Maputo Protocol for duplicating and restating some of the existing state obligations under the ACHPR and the CEDAW, as well as for being over-ambitious (Manjoo, 2012, p. 148). The Protocol sets out difficult objectives and directives which imposes obligations on states to adopt stringent measures to implement its substantive provisions and obliges states to adopt rigid legislative and institutional measures, such as incorporating gender perspectives in their policy decisions, budgets, development plans, programmes and activities and modifying cultural and social patterns. Despite being widely ratified, states have been reluctant to report on the measures that they have taken to implement the Protocol. More than a decade after its entry into force, only one state party, Malawi, has covered the Maputo Protocol in its state report to the African Commission (Killander & Nkrumah, 2014, p. 278).

#### *e) Other relevant human rights instruments*

While the treaties discussed above are examples of where the AU has followed the lead of the UN, many of the newer AU human rights instruments have no equivalent in the UN or in other regional human rights systems. Such treaties include the 'African Charter on Democracy, Elections and Governance', the 'African Youth Charter' and the 'Convention for the Protection and Assistance of Internally Displaced Persons in Africa' (IDP Convention). Some of these can be seen as hardening soft law originating from the UN, such as the 1998 'UN Guiding Principles on Internal Displacement in relation to IDPs (internally displaced persons)', and others as the hardening of soft law developed within the AU, such as the prohibition of unconstitutional change of government, which started as a declaration adopted by the OAU Assembly before being included in the 'AU Constitutive Act' and further developed in the African Charter on Democracy, Elections and Governance.

There are different opinions on whether there is a need for elaboration of further African human rights treaties. The African Commission has prepared a 'Draft Protocol on the Rights of Persons with Disabilities' (African Commission on Human and Peoples' Rights, 2014). Kanga (2013) argues for the adoption of such a protocol as particular concerns of Africa were left out in the 'UN Convention on the Rights of Persons with Disabilities' (CRPD), such as harmful traditional practices and the potential usefulness of traditional African concepts such as *Ubuntu* (humanity) in assisting persons with disabilities.<sup>185</sup>

Viljoen and Biegon (2014), on the other hand, argue that the focus should be on the implementation of the CRPD in African state parties and on the work that can be undertaken by the African Commission on Human and Peoples' Rights and the African Committee on the Rights and Welfare of the Child in relation to the protection of disabled persons recognised under the ACHPR, Women's Protocol and the ACRWC.

## 2. Gaps, tensions and contradictions with regard to regional institutions

The above discussion has traced the various legal instruments adapted to protect human rights in Africa. Some of these treaties have established institutions to implement the protected rights and monitor state obligations, a number of them already briefly mentioned above. The primary organs of the AU with a human rights related mandate are the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights (ACTHPR), the African Children's Committee, the African Peer Review Mechanism (APRM) and the Pan-African Parliament.

It is noteworthy to emphasise that many of these institutions were developed under the aegis of the OAU which was later transformed into the AU. Though these institutions have made some positive contributions to the advancement of human rights since their establishment, concern must be raised over the serious setbacks which limit their progress.

### a) African Commission on Human and Peoples' Rights

Article 30 of the ACHPR calls for the establishment of the African Commission on Human and Peoples' Rights. The Commission is responsible for monitoring the implementation of the ACHPR and the Women's Protocol. It has both promotional and protective mandates. Its promotional mandates include organising seminars, disseminating information, undertaking studies and making recommendations to governments, including through concluding observations on state reports. The Commission performs its protective role by considering inter-state and individual communications which allege violations of the ACHPR and other human rights instruments. Each commissioner serves for a renewable six year term. The Commission is included in the AU architecture as an independent organ, though this is not explicit in the AU Constitutive Act. The Commission is financed by the AU and reports to the AU Executive Council.

Based on a survey of common features and best practices of existing regional human rights systems, Heyns and Killander (2010) suggest minimum standards in relation to the functioning of regional human rights institutions. This recommendation was made in light of the fact that due to the growth of the

<sup>185</sup> The concept of Ubuntu is an ancient African philosophy roughly translated to mean human kindness or humanity to others (Mokgoro, 1998). The principle therefore challenges individuals to value the community and people above self interest (Kamwangamalu, 1999).

number of regional systems, they are becoming more relevant. However, this proliferation has a tendency to create an overlap between some systems, and possibly results in lower standards of protection than global standards. The minimum standards recommended relate to the principles and objectives of the inter-governmental organisation (IGO), membership criteria, follow-up by the political bodies of the IGO on decisions by regional human rights bodies, the treaty-based rights catalogue, complementarity with the UN human rights system, the mandate and composition of regional human rights bodies and measures taken by IGOs to ensure the efficient functioning of regional human rights bodies, such as the provision of adequate resources. Minimum standards recommended include the following:

- i. regional human rights supervisory systems need to be founded on a treaty to which all states in the region are party;
- ii. regional systems should be tailored towards complementarity with the UN human rights system;
- iii. global standards should serve as minimum requirements for regional systems;
- iv. a regional judicial or quasi-judicial body with a human rights mandate should be composed of independent and impartial experts;
- v. judges and commissioners of monitoring bodies should be widely representative of the (sub-) region, with regards to geography, language, gender and legal system;
- vi. the judges and commissioners should be mandated to appoint other legal and administrative staff to ensure the continuing effectiveness of the monitoring bodies;
- vii. the IGO should provide the secretariat of the monitoring body with adequate resources.

Notable gaps in the African regional human rights system relate to membership criteria, political follow-up of decisions, participatory and transparent selection of members of monitoring bodies and ensuring the effective functioning of human rights bodies.

It is noticeable that the membership criteria for the AU are not based on observance of human rights and democracy. On the contrary, membership requirements in the AU are conditioned solely on a state being an African state which has ratified the AU Constitutive Act (Aneme, 2010). In addition, only an unconstitutional change of government, and not serious human rights violations, have been used to suspend Member States,<sup>186</sup> despite the possibility under the AU Constitutive Act to sanction states which fail to comply with the decisions and policies of the Union.

The effective functioning of the system has been undermined by resource constraints and the fact that the human rights bodies lack the mandate to recruit their own staff. All recruitment is undertaken by the human resources division of the AU Commission, based in Addis Ababa, Ethiopia. This compromises the independence of the Commission and casts doubts on the open and transparent nature of the recruitment process. Although the Executive Council has repeatedly called on the AU to expedite action to increase the number of staff of the African Commission, the appointment of new legal officers for the

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<sup>186</sup> For example Egypt was suspended as a member following the military coup that ousted President Morsi in July 2013 (Aljazeera, 2013; Voice of America, 2013).

Secretariat has been slow (Killander & Nkrumah, 2014, p. 277). The Commission continues to be less resourced than the ACtHPR, despite its much broader mandate.

The seat of the African Commission in Banjul, the Gambia, has attracted some criticism due to human rights violations in the country and the autocratic nature of the Gambian president, who took power in a military coup in 1994 (Viljoen, 2012, p. 293). For the last two decades, the Gambia has been riddled with gross and systematic human rights abuses, coupled with threats from its Head of State that 'he would kill anyone, especially human rights defenders and their supporters' whom he considers as enemies of the state (Viljoen, 2012, p. 293). These practical problems, and the lack of security for Commission participants, have led to calls for the AU to relocate the Secretariat of the Commission to an African country with a suitable human rights record (Viljoen, 2012, p. 293).

The Commission's main methods of monitoring are through state reporting, communications, special procedures and missions.

As with the UN, state reports on the implementation of the ACHPR are long overdue in most cases, while a few states have never submitted a report. Furthermore, only one state has so far reported on implementation of the Protocol on the Rights of Women in Africa, despite wide ratification of the Protocol and quite clear guidelines on reporting for this particular protocol (Killander & Nkrumah, 2014, p. 278). Similarly, reporting on the implementation of the IDP Convention is lacking, despite state reports being required under Article 14 of the Convention from all states who have ratified the treaty.

Article 62 of the ACHPR obliges state parties to submit a report containing steps taken to implement the provisions of the Charter and the Maputo Protocol. Ironically, as with the UN, a lack of reporting is actually preventing the system from collapse, as the Commission could never handle the reports if they were all submitted on time. This reporting problem is compounded by the fact that the Charter requires that reporting should be completed every second year, which is unrealistic. Further, although the Commission's 'Simplified Guidelines for State Reporting' have been considered 'more concise [and following] a more logical sequence' (Viljoen, 2000, p. 113), states often find it difficult to fulfil most of the requirements set out. Inefficiency and ignorance often account for this sorry state of affairs (Viljoen, 2007a).

Another major weakness of the African Commission relates to its lack of an efficient system to deal with communications.<sup>187</sup> Considering the generally liberal approach taken by the Commission in relation to admissibility criteria and the wide ratification of the ACHPR, it may come as quite a surprise that the Commission does not receive many petitions and that it has taken the Commission, in some instances, more than a decade to reach a decision. Such prolonged delay negates the right to a hearing within a reasonable time, provided for in the Charter.

In addition, the Commission does not publish its decisions on communications promptly. This may be related to the fact that decisions are no longer attached to the activity reports of the African

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<sup>187</sup> A communication is a petition submitted by a state against another state (inter-state communication, Articles 47-54) or by individuals/ NGOs against a state (Articles 55-59) alleging human rights violations.

Commission (Killander & Nkrumah, 2014, p. 295). Considering that non-governmental organisations (NGOs) play a crucial role in the implementation of decisions, particularly by mounting international pressure against non-complying states, the delay or non-publication of these reports denies NGOs the opportunity to hold governments accountable. This undoubtedly has the potential of increasing cases of non-compliance since there will be less or no external pressure for implementation of Commission recommendations (Viljoen & Louw, 2007).

There has been some criticism that the political organs of the AU have too much control over the Commission, for example in relation to the publication of its activity report (Chigara, 2012, p. 406; Killander, 2006). The AU Executive Council has used this power to prevent publication of the report and to criticise the Commission for not giving states adequate opportunity to respond to allegations. Political control of the publication of reports is absent in other international human rights systems. The requirement that the Commission should submit its decisions to the state for comments before they are submitted to the AU Assembly has been criticised by the 2007 AU audit as interfering with the independence of the Commission (para. 236).

The independence of the commissioners, which was often criticised in the past, is no longer much of an issue. However, as with other AU bodies, the process for nomination and election of members is obscure and there is clearly a need for the nomination process to 'be democratized to ensure more people-responsive representation' (Viljoen, 2012, p. 564).

As with most international human rights bodies, the Commission suffers from the issue of non-compliance of state parties with its recommendations. For example, following its decision in *Good v Botswana*, the Government of Botswana, via a diplomatic note, stated that the Commission is not a court and its recommendations are therefore non-binding (Killander & Nkrumah, 2014, p. 248). Although the Commission, in presenting its 32<sup>nd</sup>-33<sup>rd</sup> activity report, called on the Executive Council to initiate steps against the non-complying state, the latter did not take any action.

#### ***b) African Committee on the Rights and Welfare of the Child***

The Children's Rights Committee established under the ACRWC faces many of the same challenges as the African Commission with regard to sufficient staffing, state reporting and handling of communications (Viljoen, 2012: 397; Bekker, 2012). Committee members and academic observers have criticised the provision in the ACRWC providing that members of the Committee cannot be re-elected. Although Article 37(1) to some extent contributes to the independence of committee members, according to Viljoen (2012, p. 398) this provision 'impedes continuity'. This issue was addressed by the AU Assembly in 2014 through amendment of the ACRWC (Decision on the report of the African Committee on the African Committee on the Rights and Welfare of the Child, Assembly/AU/Draft/Dec.528(XXIII), para. 3). Since its inception in 2002, the Children's Committee has been empowered to hear complaints received from individuals or NGOs on alleged violations of the ACRWC (Viljoen, 2012, p. 397). Of the handful of complaints received, the Committee had, as of December 2014, only handed down one merits decision. The Committee requested an advisory opinion from the African Court on whether it was competent to submit cases to the Court, similar to the African Commission, despite the Court Protocol's explicit wording to the contrary. The Court held in its advisory

opinion delivered in December 2014 that the Committee did not have such competency due to the clear wording of the Court Protocol. The Committee will therefore have to wait until the entry into force of the Protocol on the African Court of Justice and Human Rights before it can submit cases to the Court, as its competency to do so is explicitly provided for in this Protocol.

### *c) African Court on Human and Peoples' Rights*

The African Court on Human and Peoples' Rights was established in January 2006 to complement the protective mandate of the African Commission. Half of the AU member states have ratified the 'Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights' establishing the Court and, out of these, seven have made a declaration allowing individuals and NGOs direct access to the Court following exhaustion of domestic remedies, thus allowing complainants to bypass the African Commission. The Court issued its first order for provisional measures against Libya in March 2011 and delivered its first merits judgment in a case against Tanzania in 2013. It delivered two merits judgments in contentious cases in 2014, both against Burkina Faso.

The judges are elected by the AU Assembly and not by the state parties to the Protocol, though only citizens of state parties to the Protocol establishing the Court can be elected as judges. The involvement of states that are not party to the protocol in the election of judges by the AU Assembly has been criticised as 'inappropriate' (Viljoen, 2012, p. 421). As with elections to the African Commission and Children's Committee, the election of judges to the African Court is squarely in the hands of states, which control both nomination and election in a mostly non-transparent manner.

With regard to the substance of the Court's work, one of the shortcomings is the delay in finalising applications. The court is obliged to render judgment within 90 days of completing proceedings. However, Article 28(1) is silent on how long such deliberation may take. Thus, in its first merit judgment after the oral hearings were held in June 2012, it took the court a whole year to deliver its judgment.

In all litigation, lack of legal aid is a constraint. Taking a petition to the African Court is a costly process, particularly with respect to travel expenses and senior advocates. Consequently, many potential litigants are not able to access the Court. To some extent this problem is addressed through the Court Protocol which sets out that free legal aid may be provided in cases 'where the interests of justice so require' (Article 10(2)). However, the rules of the Court fail to address what constitutes interests of justice, at what stage of the petition such an application can be made and to whom it can be made (Viljoen, 2012, p. 444).

The Court is set to have its mandate expanded when the 'Protocol on the Statute of the African Court of Justice and Human Rights' enters into force which will create a general affairs section and a human rights section. The 2014 adoption by the AU Assembly of a protocol providing the Court with jurisdiction over international crimes is potentially far-reaching in terms of reducing mass atrocities and crimes against humanity in the region. But the Protocol is unlikely to receive the required ratifications to enter into force in the near future. Compared to the International Criminal Court, the new AU Protocol expands the crimes covered to include not only genocide, crimes against humanity and war crimes, but

also terrorism, corruption and unconstitutional change of government, to name a few. Controversially, the Protocol provides for immunity for senior state officials while in office.

#### *d) African Peer Review Mechanism*

The APRM is not a human rights body, unlike the other continental bodies discussed above. On the contrary, it is an AU organ whose overarching mandate is to evaluate and monitor agreed norms of economic, political and corporate governance. However, human rights is part of its broad mandate to make recommendations for improvement of governance in participating states. The enthusiasm in the early years of the APRM has died down and while 33 states have signed up for review, less than half have completed the first round of review. The process initially enjoyed broad regional support, because it was envisaged as an 'approach designed and implemented by Africans for Africa' (African Peer Review Mechanism, 2011-2014).

Devised to ensure African ownership and confidence in the institution, the APRM was meant to be funded by African states themselves (APRM Trust Fund and APRM Operating Account). However, most African governments are known for their habit of not paying their dues (Williams, 2006). For instance at the end of 2011, only 35.7% of the total assessed contributions to the AU had been paid by AU states (Reitmaier, 2014, p. 8). Thus, contributions by Western states have played a key role in the APRM process (Reitmaier, 2014, p. 8).

However, as observed by Reitmaier (2014, pp. 8-9), donor support has been drastically reduced recently. Mukamunana and Kuye (2005, p. 600) attribute lack of donor funding to the mechanism's failure to 'convince donors and investors that fundamental changes regarding human rights and good governance are afoot'. Reitmaier (2014, pp. 8-9) on the other hand, affirms that this cutback is traced to the failure of the APRM Secretariat to account for funds given by donors.

The process is envisaged as a peer learning process, with the assumption that states will act in good faith towards the implementation of recommendations. Participating states should provide regular implementation reports to the Forum of Heads of State and Government participating in the APRM, but are at liberty not to implement recommendations they do not agree with.

#### *e) African Governance Architecture (AGA)*

As can be seen from the above there are numerous actors that make up the African human rights system. There has been criticism of insufficient coordination. Coordination is particularly important in the context of scarcity of resources. The African Governance Architecture (AGA), through its African Governance Platform, brings together regional and sub-regional actors involved in the promotion and protection of human rights in Africa. The AGA Secretariat is based in the Department of Political Affairs of the AU Commission in Addis Ababa (Wachira, 2014). It is questionable whether additional state reporting, such as under the AU Democracy Charter (in this case to the AU Commission), is a good idea considering the low level of compliance with state reporting obligations under the African Charter and African Children's Charter. However, as noted above, states that do report to the African Commission rarely include information about implementation of additional treaties that they are required to report on, such as the Women's Protocol and the IDP Convention.

Hopefully, constructive engagement with the main African human rights bodies, the African Commission, Court and Children's Committee, will not be limited to the AU Commission's Department of Political Affairs, but will be more fully integrated into the agenda of the AU political organs. Organs established to provide wider participation in AU decision making, such as the Pan-African Parliament and the Economic, Social and Cultural Council (ECOSOCC) have the potential to become important players advocating for AU leaders to take action in line with recommendations and decisions of the human rights bodies. However, currently these organs are 'barely functional' (Viljoen, 2012, p. 564) and do not play any significant role in the promotion of human rights in the region. Wachira (2014, p. 1) concludes that this poor performance can be attributed to 'inefficiency, ineffectiveness, and duplication of efforts and resources'.

## C. Sub-regional economic communities

### 1. Sub-regional instruments

Sub-regional human rights instruments do not generally contradict what has been adopted at the continental level. One example of a conflicting provision is Article 8(2) of the South African Development Community (SADC) Protocol on Gender and Development that, similarly to the UN Convention on the Rights of the Child, provides that the minimum age for marriage may be lower than 18 years if specified by law, while the Protocol on the Rights of Women in Africa and the African Children's Charter provides for 18 years as an absolute rule.

### 2. Monitoring bodies

At the sub-regional level, human rights monitoring mainly takes the form of judicial oversight in two regional economic communities (RECs): the East African Community (EAC) and the Economic Community of West African States (ECOWAS). The courts in the EAC and ECOWAS (and formerly in the SADC) have been at the forefront of protecting human rights through adjudication (Viljoen, 2012, p. 490).

The existence of sub-regional courts with a human rights mandate may lead to conflicting jurisprudence. However, most observers believe that the more protection there is, the better. This is illustrated by the civil society campaign to reestablish the possibility of individuals and NGOs to bring human rights cases before the SADC Tribunal, which was removed by the SADC Summit following Zimbabwe's reaction to the finding of the SADC Tribunal that the implementation of its land reform programme violated the prohibition of racial discrimination.

#### a) *East African Court of Justice (EACJ)*

The 'East African Court of Justice' (EACJ) has dealt with some human rights cases as part of its mandate to ensure the application of the rule of law and good governance in the EAC. However, the Court has clearly set out that it is not a human rights court, since a protocol establishing a human rights mandate of the Court has not yet been adopted.

#### b) *ECOWAS Community Court of Justice (ECCJ)*

The ECOWAS Community Court of Justice (ECCJ) has a clear human rights mandate with the African Charter as its main normative instrument. Similarly to the EACJ, the ECCJ does not require exhaustion of local remedies and it thus functions similarly to a national constitutional court with primary and final jurisdiction. In addition to inviting forum shopping, this can clearly lead to conflict with national courts and could place extra constraints on the resources of the Court once the system becomes popular among litigants (Enabulele, 2012; Viljoen, 2012, p. 489).

## D. Gaps, tensions and contradictions with regard to NGOs

African NGOs have contributed to human rights standard setting by directly engaging with treaty monitoring bodies, as well as engaging with government representatives to ensure compliance with international norms. The role of NGOs has been particularly visible in their engagement with the African Commission. Whereas it is imperative that the Commission functions independently from NGOs as well as governments, NGOs provide support to the activities of the monitoring bodies by initiating normative developments, litigating and publicising the work of the monitoring bodies. International NGOs are more

active in their engagement with the Commission than NGOs based in Africa, even though many Africa based NGOs have observer status with the Commission (Viljoen, 2012, p. 386).

While the Commission has generally been very open to NGO initiatives, even to the extent of being criticised by states for adopting resolutions proposed by NGOs verbatim, it is of concern that a majority of the commissioners have been hesitant in endorsing work aimed at eliminating discrimination based on sexual orientation and refused to grant the Coalition of African Lesbians (CAL) observer status in 2010 (Viljoen, 2012, p. 266). However, even in the area of LGBTI rights there are positive developments, as illustrated by the Commission's adoption of a resolution on violence against persons because of their actual or perceived sexual orientation in 2014, and the eventual granting of observer status to CAL in April 2015.

Legalistic formalism and uncertainty regarding observer status have been a major constraint to NGOs willing to participate in the deliberations of the African Children's Committee. For instance, its criteria that an NGO should represent the 'majority of African citizens' as well as the requirement of an elected children's representative have barred most external NGOs (Viljoen, 2012, p. 406).

Another one of the AU organs is ECOSOCC, which was established to provide civil society organisations with a voice in AU decision-making. The impact of ECOSOCC has been limited and many human rights NGOs are excluded through restrictive membership criteria, such that at least 50% of the 'basic resources' of an ECOSOCC member must 'be derived from contributions of the members of the organisations' (Statutes of the Economic, Social and Cultural Council, Article 6(6)).

## **E. Conclusion**

The UN creates legitimacy for its human rights norm setting through a claim to universality (Viljoen, 2011, p. 192). Regional human rights norm setting initiatives in Africa are often norm-imitating and come about as a result of a perceived lack of participation in devising UN norms, or a feeling that issues of regional concern have not been sufficiently dealt with. This most often results in stronger protection, at least on paper, in the African treaties. In other instances, African norm setting initiatives are breaking new ground, in particular by codifying in binding treaties what is elsewhere only covered by declaratory statements. NGOs often take the lead in developing new treaties, which African states often widely ratify without much consideration of actual implementation.

The African regional human rights system is often viewed as the weaker sibling among the three established regional human rights systems – European, Inter-American, African. This may be true if one considers the gap between the extensive normative framework and the reality on the ground in African states. In terms of coverage and scope of human rights norms, Africa probably has the most extensive human rights protection of any region. Read together with the strong human rights protection set out in African national constitutions, there should be little reason for concern. Of course, paper is different from reality and while African states have been quick to sign and ratify regional and UN human rights treaties and adopt constitutional rights and rights friendly legislation, implementation has often fallen behind.

The often weak institutional framework for rights enforcement at the national level is mirrored at the regional level, with numerous organs with a human rights mandate, but few that live up to their normative ideal. Many challenges derive from the institutions themselves, but the main problem is that most African states do not take the institutions, and the commitment they have made to human rights, seriously.

## Bibliography

### 1. Legal and policy instruments

African Commission on Human and Peoples' Rights (2014), *Draft Protocol on the Rights of Persons with Disabilities*, available at <http://www.achpr.org/news/2014/04/d121> accessed 8 July 2015.

UN General Assembly (1986), *Declaration on the Right to Development*, A/RES/41/128, 4 December 1986.

### 2. Case Law

*Media Rights Agenda and Others v Nigeria* (2000), African Commission on Human and Peoples' Rights, AHRLR 200 (ACHPR 1998).

### 3. Literature

#### a) Books

Viljoen, F. (2012), *International Human Rights Law in Africa*, Oxford: Oxford University Press.

#### b) Book chapters

Bekker, G. (2012), 'The African Committee of Experts on the Rights and Welfare of the Child', in Ssenyonjo, M. (ed), *The African Regional Human Rights System: 30 Years After the African Charter on Human and Peoples' Rights*, Leiden: Martinus Nijhoff Publishers, pp. 249-264.

Chigara, B. (2012), 'Tentative Reflections on the African Charter on Human and Peoples' Rights', in Ssenyonjo, M. (ed), *The African Regional Human Rights System: 30 Years After the African Charter on Human and Peoples' Rights*, Leiden: Martinus Nijhoff Publishers, pp. 401-420.

Heyns, C. & Killander, M. (2013), 'Africa' in Moeckli, D., Shah, S. & Sivakumaran, S. (eds), *International Human Rights Law*, Oxford: Oxford University Press, pp. 441-457.

Heyns, C. & Killander, M. (2010), 'Towards Minimum Standards for Regional Human Rights Systems' in Arsanjani, M.H., Katz Cogan, J., Sloane, R.D. & Wiessner, S. (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, Leiden: Martinus Nijhoff Publishers, pp. 527-558.

Ssenyonjo, M. (2012), 'Economic, Social and Cultural Rights in the African Charter', in Ssenyonjo, M. (ed), *The African Regional Human Rights System: 30 Years After the African Charter on Human and Peoples' Rights*, Leiden: Martinus Nijhoff Publishers, pp. 55-100.

#### c) Journal articles

Chirwa, D. M. (2006), 'Reclaiming (Wo)manity: The Merits and Demerits of the African Protocol on Women's Rights', *Netherlands International Law Review*, vol. 53, pp. 63-96.

Chirwa, D. M. (2002), 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child', *The International Journal of Children's Rights*, vol. 10, pp.157-177.

Enabulele, A. O. (2012), 'Sailing against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice', *Journal of African Law*, vol. 56, pp. 268-295.

Heyns, C. (2003-2004), 'African Regional Human Rights System: The African Charter', *Penn State Law Review*, vol. 108, pp. 679-702.

Heyns, C. (2001), 'African Regional Human Rights System: In Need of Reform', *African Human Rights Law Journal*, vol. 1 (2), pp. 155-174.

Kamga, S. A. D. (2013), 'A Call for a Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa', *African Journal of International and Comparative Law*, vol. 21, pp. 219-249.

Kamwangamalu, N. M. (1999), 'Ubuntu in South Africa: A sociolinguistic perspective to a pan-African concept', *Critical Arts*, vol. 13 (2), pp. 24-41.

Killander, M. & Nkrumah, B. (2014), 'Human Rights Developments in the African Union during 2012 and 2013', *African Human Rights Law Journal*, vol. 14, pp. 275-296.

Mezmur, B. (2008), 'The African Children's Charter versus the UN Convention on the Rights of the Child: a zero-sum game?', *SA Publiekreg/SA Public Law*, vol. 23 (1), pp. 1-29.

Mokgoro, J. Y. (1998), 'Ubuntu and the law in South Africa', *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, vol. 1 (1), pp. 1-11.

Mukamunana, R. & Kuye, J. O. (2005), 'Revisiting the African Peer Review Mechanism: the case for leadership and good governance in Africa', *Journal of Public Administration: Special Issue 3*, vol. 40, pp. 590-604.

Sharpe, M. (2012), '1969 African Refugee Convention: Innovations, Misconceptions, and Omissions', *McGill Law Journal*, vol. 58, pp. 95-147.

Van Bueren, G. (1995), 'The International Law on the Rights of the Child', *Fordham International Law Journal*, vol.19 (2), pp. 831-839.

Viljoen, F. (2000), 'State reporting under the African Charter on Human and Peoples' Rights: a boost from the South', *Journal of African Law*, vol. 44 (1), pp. 110-118.

Viljoen, F. (1998) 'Supra-national Human Rights Instruments for the Protection of Children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child', in *The Comparative and International Law Journal of Southern Africa*, vol. 31 (2), pp. 199-212.

Viljoen, F. & Biegon, J. (2014) 'The Feasibility and Desirability of an African Disability Rights Treaty: Further Norm-elaboration or Firmer Norm-implementation', *South African Journal on Human Rights*, vol. 30, pp. 345-365.

Viljoen, F. & Louw, L. (2007). State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004, *American Journal of International Law*, vol. 101 (1), pp. 1-34.

Williams, P. D. (2006). Military responses to mass killing: The African Union mission in Sudan. *International Peacekeeping*, vol. 13 (2), 168-183.

#### **d) Policy and other reports**

African Commission on Human and Peoples' Rights (2015), *AU Convention Governing Specific Aspects of Refugee Problems in Africa*, available at <http://www.achpr.org/instruments/refugee-convention/> accessed 7 July 2015.

African Peer Review Mechanism (2011-2014), *Welcome to the APRM Website*, available at <http://aprm-au.org/> accessed 11 February 2014.

Aljazeera (2013), *African Union suspends Egypt*, 6 July 2013, available at <http://www.aljazeera.com/news/africa/2013/07/201375113557928109.html> accessed 7 July 2015.

Aneme, G.A. (2010), *Introduction to the Norms and Institutions of the African Union*, available at [http://www.nyulawglobal.org/globalex/African\\_Union.htm](http://www.nyulawglobal.org/globalex/African_Union.htm) accessed 10 February 2015.

Audit of the African Union (2007), available at [www.pambazuka.org/actionalerts/images/uploads/AUDIT\\_REPORT.doc](http://www.pambazuka.org/actionalerts/images/uploads/AUDIT_REPORT.doc) accessed 11 February 2014.

Gose, M. (2002), *The African Charter on the Rights and Welfare of the Child*, Community Law Centre, University of the Western Cape.

Institute for Security Studies (2014), *The controversial repatriation of Somali refugees from Kenya*, available at <http://www.issafrica.org/iss-today/the-controversial-repatriation-of-somali-refugees-from-kenya> accessed 6 February 2014.

Reitmaier, A. (2014), *Funding African Governance Institutions and Processes: Insights and Lessons*, SAIIA Occasional Paper No 177.

Voice of America (2013), *African Union Suspends Egypt*, 5 July 2013, available at <http://www.voanews.com/content/african-union-suspends-egypt/1695646.html> accessed 7 July 2015.

Wachira, G. M. (2014), *Consolidating the African Governance Architecture*, Policy Briefing 96, SAIIA Governance and APRM Programme.

## VIII. Inter-American Human Rights System<sup>188</sup>

### A. Introduction

The Inter-American Human Rights System (IASHR) has been developed on the initiative of the Organization of American States (OAS) and is, today, a rather complex system (see chapter III.B of FRAME report D 4.1). Having adopted several treaties and instruments, the two most important of which are the 'American Convention on Human Rights' (ACHR) and the 'American Declaration of the Rights and Duties of Man', the Inter-American System revolves around two major bodies, the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR). In this chapter, an analysis of the tensions, gaps and contradictions concerning the IASHR has been carried out. The chapter is divided into three parts: tensions concerning regional human rights instruments, the institutional dimension of the IASHR and the contribution of non-governmental organisations (NGOs).

### B. The legal perspective: tensions concerning regional instruments

In this section, the instruments of the IASHR are analysed. This section addresses two dimensions: first, it elaborates on how international law interacts with domestic law in the American context and second, it analyses areas where the standards of the IASHR have been rejected by certain states, namely through amnesties and military jurisdiction.

#### 1. Overview of the interaction between international human rights law and domestic law of the Member States

Three levels of analysis can be distinguished in regard to the interaction between international law and the domestic law of the OAS Member States: a) the way in which international standards are incorporated into domestic legal systems, b) the place of international treaties in the hierarchy of the national legal system, and c) the question of the self-executing nature of international norms (Salmón, 2007, p. 30).

There is no obligation to adopt either the dualistic or monistic approach in international law; in most cases national constitutions determine how an international norm is implemented at the domestic level (Acevedo, 1992, p. 139). A study of the constitutions of the Americas shows that there is a trend towards the incorporation of conventional international standards via the monistic approach. In cases where no specific regulation is provided, the legislative or administrative practice of the state in question, or other regulations laid down in the respective constitutions, are decisive in determining how international law will be implemented.

Regarding the second level of analysis, four levels where international treaties might be placed within the hierarchy of a national legal system can be distinguished. These are the following: a) supra-

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constitutional, when treaties prevail over any domestic legal norm, including the constitution; b) constitutional, when the treaty is not integrated into the constitution, but its provisions share the same value as the norms contained in the constitution; c) sub-constitutional, when the norms in the international treaty have a lower position than constitutional norms but a higher position in relation to other domestic provisions; and d) legislative equality, when the treaty is on the same level as any other legal provision in the domestic environment. An analysis of constitutions of Spanish-speaking Latin American OAS Member States shows that the routes taken are diverse.

*Table 7: Hierarchy of International Treaties in Latin American States*

State	Status	Norms
Argentina	Supra-constitutional for treaties in general, constitutional for some treaties on human rights.	Article 75, subsection 22 of the Constitution of Argentina.
Bolivia	Legislative equality for treaties in general.	Article 257 of the Constitution of Bolivia.
Brazil	Constitutional for rights contained in human rights treaties.	Article 5, subsection 2 of the Constitution of Brazil.
Chile	Constitutional for rights contained in human rights treaties.	Article 5 of the Constitution of Chile.
Colombia	Supra-constitutional for human rights treaties.	Article 93 and 94 of the Constitution of Colombia.
Costa Rica	Sub-constitutional for treaties.	Article 7 of the Constitution of Costa Rica.
Dominican Republic	Treaties have constitutional status and can be directly applied.	Article 74 (3) of the Constitution of the Dominican Republic.
Ecuador	Sub-constitutional for treaties, supra-constitutional for human rights treaties and other cases of human rights that establish a better standard than the constitution.	Article 84, 424 and 425 of the Constitution of Ecuador.
El Salvador	Sub-constitutional for treaties.	Article 144 and 145 of the Constitution of El Salvador.
Guatemala	Supra-constitutional for human rights treaties.	Article 46 of the Constitution of Guatemala.
Honduras	Generally, treaties have sub-constitutional status. Although, when an international treaty affects a constitutional provision, it must be approved by the same process of constitutional amendment.	Article 16, 17 and 18 of the Constitution of Honduras.
Mexico	Constitutional for treaties in general.	Article 133 of the Constitution of Mexico.

State	Status	Norms
Nicaragua	Sub-constitutional for treaties in general.	Article 285 of the Constitution of Nicaragua.
Panama	Legislative equality for treaties in general. Exceptionally, can be constitutional for human rights treaties.	Article 4 and 159 (3) of the Constitution of Panama. Judgement 203-06 of the Supreme Court of Justice.
Paraguay	Sub-constitutional for treaties.	Article 137 and 141 of the Constitution of Paraguay.
Peru	Legislative equality for treaties in general, constitutional for human rights treaties.	Article 3 of the Constitution of Peru, Judgment of the Constitutional Court Exp. No. 047-2004-AI/TC.
Uruguay	Legislative equality for treaties. Although, human rights treaties have constitutional status.	Article 85 (7) and 72 of the Constitution of Uruguay.
Venezuela	Human rights treaties have constitutional status and can be directly applied.	Article 23 of the Constitution of Venezuela.

Considering the above, we can see that although there is no obligation to grant a certain placement or hierarchy to international treaties in general, or to specific treaties on human rights, there is a tendency towards granting supremacy to human rights treaties (Shelton, 2011, p. 5). The only requirement applicable to all states is the one provided by Article 27 of the Vienna Convention on the Law of Treaties of 1969, which lays down that states cannot invoke the provisions of their internal law as justification for not applying a treaty. This means that not even constitutional law provisions can be used to justify failure to comply with a treaty.

Finally, the treaty rules can be self-executing or non-self-executing once they are incorporated into domestic law (Sagüés, 1998, p. 51). Self-executing rules do not require additional provisions in order to become applicable (Bregaglio, 2012, p. 174). Non-self-executing or programmatic rules require a subsequent legal act after they enter into force to be incorporated at the domestic level (Henderson, 2004, p. 83).

Conducting a study on the implementation of international human rights standards of the IASHR is beyond the scope of this document. However, even in those cases where there is no provision that facilitates the effective implementation of an international norm, legal operators (judges and prosecutors) could still make its implementation effective. For example, the IACtHR demanded compliance from all state parties with Article 14<sup>189</sup> of the ACHR, even though the 'right of reply' can only be restricted 'under the conditions established by law' (Sagüés, 1998, p. 51).

<sup>189</sup> Article 14 of the ACHR: Right of Reply.

## 2. Defying the standards of the Inter-American System: amnesties and military jurisdiction

One of the major tensions faced by the IASHR in the development of national judicial bodies is linked to the enactment of amnesties, especially in cases involving serious violations of human rights, as well as the application of military jurisdiction. These two phenomena will be briefly analysed in the following section.

### a) Amnesties

One issue that produces an ongoing tension between the jurisprudence of the IACtHR and the American states' domestic law is the repetitive use of amnesties by the states, and the rejection of the legitimacy of this legislative procedure by the IACtHR. The jurisprudence of the IACtHR on this matter has become stronger through various judgments.

#### (1) Case of *Barrios Altos v. Peru*

In 1995, in the course of the criminal investigation against members of the so-called 'Colina Group' in the context of the *Barrios Altos* case,<sup>190</sup> the Congress of the Republic of Peru passed Amnesty Law No. 26479 on 14 June 1995, in which it exonerated the military, police, and civilians who committed violations of human rights or participated in such violations between 1980 and 1995. When the national judge in charge of the case tried to apply 'diffuse control' (disapply laws that contradict the Constitution) in order to deny the application of the amnesty laws, a second amnesty law was approved, law No. 26492. This law prevented any possibility of reviewing the amnesty and required its mandatory application.

In its judgement, the IACtHR stated that amnesties cannot be applied when their purpose is to prevent the investigation and punishment of those responsible for serious violations of human rights, such as torture, extrajudicial killings, arbitrary executions or forced disappearances (*Barrios Altos v. Peru*, 2001a, para. 1).

Finally, the IACtHR noted that the manifest incompatibility between the self-amnesty laws and the ACHR negates the legal effect of these laws, and therefore cannot be used to prevent investigation of human rights violations or the identification and punishment of those responsible in the *Barrios Altos* case, as well as in other cases. This last part of the judgment generated such impact that the IACHR filed a request for interpretation, to understand whether such incompatibility of amnesty laws was limited to the case in question or had general application.

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1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.

2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.

<sup>190</sup> This case is related to the extrajudicial execution of a group of people by the Colina Group (an intelligence group). The victims were killed during a social event because they were suspected to be members of Sendero Luminoso, a Maoist organisation, and to be hiding guns.

The IACtHR responded, in its judgment of interpretation, that the enactment of a law, which is manifestly contrary to the obligations assumed by a state party to the Convention, constitutes a violation *per se* and generates international responsibility of the state. The Court unanimously ruled that ‘given the nature of the violation resulting from amnesty laws No. 26479 and No. 26492, the judgement on the merits in the Barrios Altos case has general effects’ (*Barrios Altos v. Peru*, 2001c, para. VII (2)).

The pronouncement of the IACtHR in the *Barrios Altos* case should not be understood as a ‘concentrated control’ but as a natural effect resulting from the infringement of the principle of *pacta sunt servanda*, meaning that as the amnesty rule does not comply with the treaty, the state would be violating the treaty. Therefore, it must prevent the effects of such a rule in order to avoid international responsibility (Vásquez, 2013, p. 99).

## (2) Case of Almonacid Arellano v. Chile

The case of *Almonacid-Arellano et al. v. Chile* dealt with the alleged failure to investigate and punish the persons responsible for the extra-legal execution of Mr. Almonacid-Arellano as well as to the alleged lack of reparation in favour of his next of kin. Mr. Almonacid-Arellano was killed by Chilean policemen when he was leaving his house on 16 September 1973. Based on the amnesty law enacted in Chile by Decree Law No. 2.191 of 1978, amnesty was granted to all perpetrators or accomplices that committed criminal acts during the state of siege in force from 11 September 1973 to 10 March 1978.

The contentious issue was whether the Chilean state was able to maintain the validity of this Decree Law following ratification of the ACHR in 1990. In this context, the Court had to determine whether the continued application of such a law constituted a breach of the rights contained in Articles 8 and 25 of the ACHR.

The focus of the analysis in this judgment is related to the prohibition of the application of amnesty laws in ‘crime against humanity’ cases. The IACtHR concluded that crimes against humanity are, in themselves, serious violations of human rights, affecting all of mankind. It is for this reason that states should conduct thorough investigations of such crimes and punish those responsible, in order to achieve prevention and combat impunity.

The IACtHR also emphasised that states should not adopt legislation or undertake other measures that could undermine the international obligations they have assumed in regard to the identification, arrest, extradition and punishment of persons guilty of war crimes or crimes against humanity (*Almonacid-Arellano et al. v. Chile*, 2006).

Article 2 of the ACHR provides that state parties must complete the necessary amendments of their domestic law in order to ensure the implementation of their international obligations. The nature and extent of these amendments and measures depends on the standard and the circumstances of the situation in a particular American state. The IACtHR understands that this implies:

- (i) Repealing rules and practices of any nature involving violations of the guarantees provided for in the Convention or disregarding the rights enshrined therein or hampering the exercise of such rights.

- (ii) Issuing rules and developing practices aimed at effectively observing said guarantees. (*La Cantuta v. Peru*, 2006, para. 172)

The Court indicates that although the Chilean Congress did not reject the Decree Law, the state did take the necessary measures to suppress the effects that could have been generated by it. Furthermore, it is important to note that since the *Barrios Altos* judgment, amnesty laws have been declared incompatible with the ACHR with general effect.

(3) Case of *Gomes Lund et al. 'Guerrilha do Araguaia' v. Brazil*

In 2010, the IACtHR indicated in the case *Gomes Lund et al. 'Guerrilha do Araguaia' v. Brazil*, that Brazil had inappropriately applied an amnesty law. Again, and with reference to similar cases, the IACtHR declared that the Brazilian amnesty law was not admissible. In this sense, the Court extended its jurisprudence, determining that the formal origin of an amnesty law is irrelevant, whether it is a 'self-amnesty' or a 'political agreement'. What is relevant here is whether or not the amnesty law violates the right to judicial guarantees and judicial protection (*Gomes Lund et al. 'Guerrilha Do Araguaia' v. Brazil*).

Furthermore, the Court indicated that all internal authorities are obliged to ensure compliance with the ACHR. This means that the judiciary has the duty to exercise the 'conventionality control' *ex officio* between domestic norms and the ACHR in the framework of its competence. To that end, the application of the treaty alone is not enough; the interpretative pattern of the Court has to be followed as well (*Gomes Lund et al. 'Guerrilha Do Araguaia' v. Brazil*, 2010, para. 176).

(4) Case of *Gelman v. Uruguay*

One last notable case is that of *Gelman v. Uruguay* in 2011. In this judgment it was noted that the Expiration Law of 1986, which determined the expiration of the punitive rights of the state regarding crimes committed by the military and the police in exercise of their duties until 1 March 1985, violated the terms of the ACHR.

The Court indicated that the manifest incompatibility between the ACHR and the Expiration Law leaves the latter without any legal effect, regardless whether the amnesty law was issued by a democratic regime. It is also irrelevant if the population endorse the law, even in the case of a referendum or a plebiscite. This is due to the fact that the legitimacy of the population is limited by international obligations that protect human rights (*Gelman v. Uruguay*, 2011).

**b) The application of military jurisdiction<sup>191</sup>**

The ACHR does not contain explicit references restricting or prohibiting the jurisdiction of military courts over a case. This prohibition is only laid down in the 'Protocol to the American Convention on Human Rights to Abolish the Death Penalty', which allows states to reserve the application of the death penalty for 'extremely serious crimes of a military nature'. On the basis of Article 2 of this treaty, the states of Brazil and Chile have reserved the right to apply the death penalty to such violations during armed conflict.

<sup>191</sup> For more information see Salmón and Blanco (2012).

However, the 'Inter-American Convention on Forced Disappearance of Persons' contains two limitations in regard to military jurisdiction. Firstly, it states that the alleged perpetrators of the crime of forced disappearance cannot be tried under special jurisdiction, specifically not by military courts. Secondly, the Convention establishes that acts that constitute forced disappearance cannot be considered as acts committed in the exercise of military duties.

Regardless of these specific regulatory limitations, the IACtHR has assessed the institutional design of military courts and their application on the American continent, taking into consideration the integrity of the rights enshrined in the ACHR and other Inter-American treaties. While at first it did not question the administration of justice by military courts, it did question the way in which it was imposed (see *El Amparo v. Venezuela*, 1995; *El Amparo Case*, 1996; *El Amparo v. Venezuela*, 1997). Eventually, the IACtHR determined that military courts have often been used to formalise military impunity for serious human rights violations. As a result, the Court established clear material and subjective limitations to the exercise of military justice. The material limits relate to the lack of jurisdiction over cases involving human rights violations such as torture, forced disappearance, extrajudicial execution, rape and other human rights violations. This implies that military courts have the jurisdiction to try offenses related to purely military legal rights. With respect to subjective limitations, the IACtHR has determined that military courts cannot try civilians or retired military persons, but have jurisdiction over cases pertaining to the violation of military legal rights by active military personnel.

Finally, an important contribution of the IACtHR can be found in the consideration that establishes that the processes carried out by the military courts should ensure the rights to due process and a fair trial enshrined in the ACHR (*Palamara Iribarne v. Chile*, 2005, VII.15, para. 164).

### **C. The institutional perspective: Gaps, challenges and tensions within the Inter-American System**

The development of the IASHR is a controversial issue. Some Member States have criticised it for evolving beyond the normative framework of the ACHR and expanding its regulations and statutes, unauthorised by a sovereign act of the Member States. One example of this is the latest reform of the Rules of Procedure of the IACHR, adopted by Resolution No. 1/2013 on 18 March 2013. The origin of this reform process dates back to the 44th Extraordinary General Assembly of the OAS on 23 March 2013, where key issues regarding the strengthening of the IACHR were discussed. The formal process started in June 2011 with the creation of the Special Working Group, which drafted a report with 67 recommendations (53 addressed to the IACHR) (OEA, 2011).

The reform process attracted criticism, in particular from states of the Bolivarian Alliance for the People of the Americas (ALBA)<sup>192</sup>, such as Bolivia, Ecuador and Venezuela. The criticism surrounded the new regulation, which contained precautionary measures to be adopted by the Commission (the aforementioned states were opposed to the Commission having such competence), as well as the establishment of a Special Rapporteur for Freedom of Expression. These measures have been described

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<sup>192</sup> Members of ALBA are Antigua and Barbuda, Bolivia, Cuba, Dominica, Ecuador, Grenada, Nicaragua, Saint Kitts and Nevis, Saint Lucía, Saint Vincent and the Grenadines, Suriname and Venezuela.

by ALBA states as a new form of colonialism.<sup>193</sup> The Commission, however, reaffirmed that it had received the recommendations of the states in an open and constructive manner. Moreover, by adopting the said Resolution, the Commission amended its Rules of Procedure (Article 79), so that reform might only be carried out with prior public consultation.

In response to these criticisms, and through the reform process, the Commission sent out a dual message: Firstly, it reaffirmed itself as an autonomous body determining the provisions by which it is governed (rejecting influence from different states) and, secondly, it stated that only reforms aimed at strengthening the protection and promotion of fundamental rights would be admissible (and hence no politically motivated reforms could take place, such as the abolition of the Special Rapporteurship for Freedom of Expression).

The reform process is one example of where ‘tensions’ between the bodies of the IASHR and its Member States have arisen. In the following, such tensions will be discussed in more detail.

### 1. Member States which renounce the IASHR

Throughout their existence, the IASHR and the IACtHR have been rejected by several Member States, which have tried on several occasions to disengage from this latter body.

The mere membership of a state to the OAS or its status as a state party to the ACHR allows an individual to file a complaint before the IACHR, but not necessarily to take this complaint to the IACtHR. Only the IACHR is authorised to present a case before the IACtHR, and only with respect to states that have become party to the ACHR and declared that they recognise the jurisdiction of the IACtHR. Article 62 of the ACHR provides:

1. A state party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognises as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organisation, who shall transmit copies thereof to the other member states of the organization and to the Secretary of the Court.
3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the states parties to the case recognise or have recognised such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

The first time the IACtHR had the opportunity to discuss this clause was when Peru attempted to withdraw from the Court under the dictatorial regime of Alberto Fujimori (President of Peru, 1990-2000). At that time, the country had a high number of pending cases before the IACtHR for violations of

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<sup>193</sup> For more information see <https://cpj.org/2013/02/attacks-on-the-press-how-the-americas-failed-press.php>, <http://www.thedialogue.org/page.cfm?pageID=32&pubID=3282> accessed 10 May 2015.

the rule of law and excessive use of force committed by the armed forces in the course of the internal armed conflict (1990-2000). The response of the Court, in its judgments of competence, regarding the *Ivcher Bronstein Case* (2001) and the *Constitutional Court Case* (2001), was that the acceptance of the compulsory jurisdiction of the Court is an ironclad clause of the ACHR that does not allow limitations that are not expressly contained in Article 62.1 of the Convention. Therefore, unforeseen limitations that are invoked by state parties on the grounds of their domestic law are not admissible grounds for refusing the Court's jurisdiction. That is, the only means available for a state to withdraw from the jurisdiction of the Court, according to the ACHR, is to denounce the treaty as a whole. According to Article 78 of the ACHR, such a termination will become effective after a year.

After Peru's failed attempt to evade the jurisdiction of the IACtHR, the Venezuelan state announced its withdrawal from the ACHR on 12 September 2012. One year thereafter, Venezuela had withdrawn itself not only from the jurisdiction of the IACtHR but also from its obligations under the Convention. Of course, this situation does not affect the cases that were already pending before the Inter-American System, which continued to be reviewed by both the Commission and the Court.

More recently, on 4 November 2014, the Constitutional Court of the Dominican Republic issued a judgment (Sentencia TC/0256/14), declaring the acceptance of the IACtHR's jurisdiction – enacted by the Dominican Republic on 25 March 1999 – as unconstitutional. The decision of the Dominican Republic was certainly grounded in the country's opposition to the outcome of the October 2014 IACtHR judgment in the case of *Case of Expelled Dominicans and Haitians v. The Dominican Republic* (2014).

According to the Constitutional Court of the Dominican Republic, the acceptance of the compulsory jurisdiction of the IACtHR was not correctly subjected to the internal procedure described in its Constitution. While President Leonel Fernández signed the document of acceptance in February 1999, the National Congress – as required by the Constitution – did not ratify it. According to the Court, this would make the acceptance of the compulsory jurisdiction of the IACtHR 'unconstitutional' in terms of domestic law and 'a breach of the consent' under Article 46 of the Vienna Convention on the Law of Treaties of 1969.

## **2. Tensions with the Special Rapporteurship on Freedom of Expression**

The IACHR's Special Rapporteur for Freedom of Expression has been put under pressure by some states, particularly those from the ALBA group. In the Declaration of Guayaquil of 11 March 2013 (Consejo Político de ALBA, 2013), the state parties to the ACHR proposed that all rapporteurships should be considered as special and funding should be guaranteed for the proper fulfilment of their objectives. This proposal, supported from the outset by Venezuela, Ecuador and Bolivia, directly affects the Special Rapporteur for Freedom of Expression, which was, until then, the only rapporteurship in the category 'special'. Being classified as a 'Special Rapporteur' allows for a permanent office with its own operational structure and functional and economic independence; in other words, with the autonomy to obtain its own financing. To give that status to all rapporteurships, at the same time taking into consideration the limited resources available for financing the rapporteurships, implicates the deprivation of the special and autonomous character of the Special Rapporteurship for Freedom of Expression.

Recently, as part of the 44th General Assembly of the OAS, Ecuador – supported by other ALBA states – resumed the debate on a new reform of the IACHR, seeking to amend the statute in order to limit OAS autonomy and prevent the Special Rapporteur on Freedom of Expression from receiving enough funds to operate. Also, it contemplated the establishment of a Code of Conduct for the Rapporteurship, to prevent him or her from monitoring the situations in countries like Venezuela or Ecuador (see *El Comercio Mundo*, 2014).

Despite the efforts of these states, the last reform of the IACHR, that was carried out in March 2013, did not modify any provision relating to the rapporteurs, and so far there has not been any further discussion on the reform process. However, the opposition from Ecuador and the ALBA bloc – not only to this body but to the entire IASHR – is manifest and consistent, and is reflected in the denouncement of the ACHR by Venezuela.

### 3. Indirect judicialisation of ESCR and the problem of reparation jurisprudence<sup>194</sup>

After determining that a state party is accountable for an infringement of an individual's human rights, the IACtHR 'orders the state to make reparations to the victim. The court has ordered victim-centred reparations as well as reparations that will benefit specific communities or society as a whole' (Pasqualucci, 2010, p. 444).<sup>195</sup> The Member States of the IASHR find it difficult to comply with judgments of the latter category that order reparations involving measures regarding economic, social or cultural rights (ESCR), and that therefore often have implications on their public policies. Similarly, these so-called 'transformative remedies', which take into account structural dimensions which might have contributed to human rights violations, not only provide for restitution but also aim at having a corrective effect (*González et al. ("Cotton Field") v. Mexico*, para. 450; Uprimny-Yepes and Guzman-Rodríguez, 2010, pp. 241-243). They therefore often focus on addressing issues of structural discrimination (Abi-Mershed, 2010, p. 8). However, they create problems in identifying adequate measures and the correct course of action to achieve compliance.

Regarding the above, in several judgments the Court has ordered health and education compensation for victims and/or their families, even in cases where violations of the rights to health or education were not proven. However, in most cases where these measures were ordered the reparation was aimed at repairing the health effects caused by the facts of the case. For example, in *Barrios Altos v. Peru* and

<sup>194</sup> For further information see Bregaglio (2013, pp. 257-289).

<sup>195</sup> In the *Case of the Plan de Sánchez Massacre v. Guatemala* (2004), the IACtHR ordered the state to make collective reparations in communities of Plan de Sánchez, Chipuerta, Joya de Ramos, Raxjut, Volcanillo, Coxojabaj, Las Tunas, Las Minas, Las Ventanas, Ixchel, Chiac, Concul and Chichupac, which included: a) the study and dissemination of Maya Achi culture in the affected communities through the Guatemala Academy of Mayan Languages or a similar organisation; b) maintenance and improvement of the road systems between the said communities and the municipal capital of Rabinal; c) provision of sewage systems and a potable water supply; d) provision of teaching personnel trained in intercultural and bilingual teaching for primary and secondary schools in these communities, e) establishment of a health center in the village of Plan de Sánchez with adequate personnel and conditions.

In the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador* (2012), the IACtHR ordered the State to implement, within a reasonable time and with the relevant provision budget, programmes or courses that include modules on national and international human rights standards of indigenous peoples and communities, aimed at military and law enforcement officials and others whose duties involve a relationship with indigenous peoples.

*Durand and Ugarte v. Peru*,<sup>196</sup> reparations were determined by the expected scope of state provided public services (provided not because of victim status, but because the individual was a beneficiary of general public policy) (*Lori Berenson-Mejía v. Peru*, 2004, para. 238). More generally, in the cases of *Lori Berenson-Mejía v. Peru*, *García-Asto and Ramírez-Rojas v. Peru* (2005, para. 208), and *Gómez Palomino v. Peru*, the Court ordered medical and psychological care through health services, including the provision of free medicines, without specifying whether such provisions are limited to certain health conditions, or if they are applicable for life. In terms of reparations related to the right to education, a similar approach can be observed in *Barrios Altos v. Peru*, *Cantoral Benavides v. Peru* and *De la Cruz Flores v. Peru*, where the IACtHR ordered Peru to provide scholarships and ‘studying facilities’ to the children of missing persons or victims of extrajudicial executions. In *Barrios Altos*, even the provision of educational materials was granted, as well as donations of official textbooks for students of primary and secondary schools, and the making available of school uniforms and other school supplies (*Barrios Altos v. Peru*, 2001, para. 43).

The compliance with these measures has not been yet fulfilled. According to an unpublished study by the Institute of Democracy and Human Rights of the Pontifical Catholic University of Peru (IDEHPUCP), only 13% of the health-related measures ordered by the Court regarding the Peruvian state have been met. In response to the cases of *Lori Berenson*, *Gómez-Palomino* and *García-Asto*, the Peruvian state reported compliance with the health-related measures, specifying that the victims were admitted to different social security systems available in the state. The Court is still waiting for the comments of the victims and the IACHR regarding the reliability of the information provided by the state.

Nevertheless, these measures can pose several challenges. First, they lead to confusion between the reparation measures and the social benefits to which every citizen is entitled to under and in accordance with the conditions laid down in the domestic laws of each state. This clearly clashes with the nature of a measure of reparation, which seeks to address, in a specialised manner, the infringement of a right. In this sense, Laplante has noted the implications of confusing reparation measures in a strict sense with general public policies for fighting poverty and promoting social development (Laplante, 2007, p. 145). Similarly, Uprimny-Yepes and Guzman-Rodríguez distinguish that while the former are intended to compensate for damage caused by a violation of human rights, the latter seek to shorten gaps and overcome situations of inequality. So, while the beneficiary of the reparation is the victim, the beneficiaries of social policies are those individuals in situations of exclusion or poverty (Uprimny-Yepes and Guzman-Rodríguez, 2010, pp. 248-250). The Court itself, in its recent jurisprudence, has accepted this, establishing that, ‘[t]he social services that the state provides to individuals should not be confused with the reparations to which the victims of human rights violations are entitled, based on the specific

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<sup>196</sup> In *Barrios Altos v. Peru*, the agreement approved by the IACtHR established the commitment to cover, through the Ministry of Health, healthcare expenses of the beneficiaries of the reparations, providing free care from a healthcare facility at home and in a hospital or institution specialised in the fields of patient consultation, diagnostic support procedures, medicine, specialised care, diagnostic procedures, hospitalisation, surgery, childbirth, trauma rehabilitation and mental health (see *Barrios Altos v. Peru*, 2001b, para. 42). Similarly, in the case of *Durand and Ugarte v. Peru*, the reparations agreement stated that ‘the State undertook to cover, through the Ministry of Health, the costs associated with the health services that the corresponding healthcare centers provide to the beneficiaries, including the cost of medications. This obligation will endure for the life of the beneficiaries and take effect as of the date the agreement is signed’ (*Durand and Ugarte v. Peru*, 2000, para. 36).

damage caused by the violation' (*The Massacres of El Mozote and Nearby Places v. El Salvador*, 2012, para. 350; *González et al. ("Cotton Field") v. Mexico*, 2009, para. 529).

Only ensuring that one individual receives benefits or access to rights that all citizens are entitled to would lead to the conclusion that the victims identified in these judgments have a priority or preferential status in the satisfaction of social rights, compared to the rest of the citizens of a state, creating a situation of inequality between members of a community. This also generates the risk of encouraging a process of victimisation (it is better to be a victim), based on the understanding that only victims can access their rights.

In addition, a practical issue arises related to performance indicators or the implementation of reparation measures. Observing two similar experiences in El Salvador and Brazil, there are some identifiable difficulties that the Court might have in ordering measures related to ESCR:

- In the monitoring decision in *Contreras et al. v. El Salvador*,<sup>197</sup> the IACtHR considered that the reparation measure regarding health had not been satisfied because the representatives of the victims reported problems with the availability and delivery of materials and treatment prescribed by physicians. They also noted that several beneficiaries had been diagnosed with new health conditions that should be addressed (*Contreras et al. v. El Salvador*, 2013, para. 33).
- In the monitoring decision in *Ximenes Lopes v. Brazil*,<sup>198</sup> the state reported that training measures had been implemented for staff working with people with psychosocial disabilities (*Ximenes Lopes v. Brazil*, 2010, para. 14). However, representatives of the victims argued that these actions were not sufficient and did not prevent the recurrence of human rights violations in institutions caring for people with mental disabilities. They also requested the state to define the professions, workplaces and positions where training would be required. Finally, they noted that there remained 35,426 placements in psychiatric hospitals not covered by the training. In its decision on compliance, the IACtHR decided that the reparation measure would remain open, meaning that the case would continue under supervision.

While the observations of the representatives of the victims in both cases cannot be underestimated, the programmatic nature of certain obligations under the right to health should be taken into consideration. If the Court gave no further input on the scope of compliance with the measure, there are no objective parameters to evaluate the performance and efforts of the state's compliance with the said measure. Another option would be to accept that standards of compliance are built on a case-by-case basis in every judgment monitoring process. Furthermore, it should be noted that in Latin American realities, it is highly possible to encounter availability or quality problems within public health services. These problems, which in principle are generalisable to the entire population, would be resolved or

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<sup>197</sup> In this case, the IACtHR ordered the state to immediately provide medical and psychological or psychiatric treatment to the victims who required it.

<sup>198</sup> In this case, the Inter-American Court ordered the state to continue to develop a training programme for medical, psychiatric and psychological nurses and nursing assistants and to all persons related to mental health care according to the principles that should be applied during the treatment of people with mental disabilities.

partially resolved only for the victims of the judgments of the IACtHR, creating inequality among Peruvian citizens, as mentioned above.

On the other hand, in regard to transformative remedies (see *González et al. ("Cotton Field") v. Mexico*, para. 450; Uprimny-Yepes & Guzman-Rodríguez, 2010, pp. 241-243), and in relation to preventive public policies, it could be questioned whether the IACHR should assume the function of a governing body for social policies, without considering aspects such as escalation (progressiveness of ESCR), budget and performance indicators. This lack of tools/indicators generates concrete difficulties for the measurement of the compliance of the defendant or state with a reparation order.

#### 4. The difficulties of monitoring compliance<sup>199</sup>

The IASHR does not provide for a coercive mechanism to compel states to immediately implement the reparations ordered by the judgments. The only formal mechanism under the ACHR is established in Article 65: 'To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year.' However, in the structure of the Court there is neither a permanent organ in charge of monitoring the degree of compliance with the provisions of the decisions (for purposes of determining whether the case should be referred to the General Assembly), nor a protocol on how the Assembly should assess this information. The only formal mechanism of monitoring judgments is the report drafted as laid down in Article 65 of the ACHR (Corasaniti, 2009, p. 15). For example, in the case of *Benavides Cevallos v. Ecuador*, where the state was ordered to investigate, prosecute and punish all those responsible for human rights violations committed against Consuelo Benavides Cevallos, the Court decided to apply Article 65 by reporting to the General Assembly on the failure of Ecuador to fulfil its duty.<sup>200</sup> To date, there has not been a single new resolution on monitoring, so, in practice, the referral to the Assembly created a disincentive for the Court to continue to monitor the case.<sup>201</sup>

Given these shortcomings, a more appropriate way to exchange and assess information on compliance and non-compliance with the IACtHR's judgments would be to allow it to adopt resolutions on judgement monitoring, specifically dedicated to monitoring compliance with reparations or other decisions. This procedure, derived from a practice developed by the Court, but with no basis in the ACHR, was suspended in 2005 by a resolution of the Court itself (IACtHR, 2015). However, the practice was embraced and continued in an unofficial way, not in the body of the ACHR but in Article 69 of the Rules of Court. This practice, except on rare occasions, has usually been accepted by the states.<sup>202</sup> In

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<sup>199</sup> For more information see Bregaglio (2014, pp. 281-308).

<sup>200</sup> Similarly, in *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, the IACtHR decided that if the situation of non-compliance persists, it should be reported to the General Assembly of the OAS.

<sup>201</sup> More recently, the IACtHR decided to incorporate the case of *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela* (2012) into its next annual report, in order to inform the General Assembly of the OAS.

<sup>202</sup> In 2003, Panama objected to this practice on the occasion of *Baena-Ricardo et al. v. Panama*. Briefs submitted by the Panamanian government on 27 February 2003 and 30 July 2003. For more see IACtHR development, *Baena-Ricardo et al. v. Panama* (2003).

addition, there have been cases in which the Court – through its resolutions on judgement monitoring – has introduced changes to what it stated in its original judgments.<sup>203</sup>

Additionally, it should be noted that the IACtHR does not issue resolutions on judgment monitoring for all cases or does not have clear criteria for assessing when a case should be closed. While this difficulty is often caused by the nature of the reparation measure itself (an aspect that will be discussed later), imprecision also increases because, during the Court's assessment of a state's compliance with a judgement, some states claim to have fulfilled the ordered measure, but provide no information to substantiate their claim. In response to this situation, the Court decided to keep the judgment monitoring process open. Furthermore, as the resolutions on judgement monitoring are not issued each year for all cases, it is very possible that a state may have adopted other measures of reparation after the issuance of the last monitoring judgment, but that these are not public due to limitations on the access to such information.

## **D. The socio-political perspective: The contribution of NGOs in the Americas**

After decades of military dictatorships and authoritarian governments, Latin America has consolidated democratic political and institutional systems that have strengthened the regional system of human rights protection. However, as Gartner (2013, p. 31) points out, democracy is rarely a sufficient condition for national enforcement of human rights standards and the most important contribution of democratisation may actually be that it creates new opportunities for domestic civil society groups to operate freely, form transnational alliances, and leverage government action.

That is, the process of deepening the democracy generated in the last 40 years in the region must be supported by a process of opening the institutional systems to the participation of civil society, specifically a type of participation that raises the demands of the most disadvantaged social groups.

### **1. Human rights NGOs in Latin America.**

The discussion of the history of human rights NGOs in Latin America takes us to a very special regional situation that occurred in the late 1960s and the 1970s; it led to dynamics of confrontation, the armed uprising of insurgent groups and harsh repression by state forces in the countries of the Southern Cone, Central America and several Andean countries. An unintended consequence of this situation was the occurrence of grave violations of human rights and international humanitarian law in countries that were experiencing armed conflicts.<sup>204</sup>

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<sup>203</sup> In the case *Caballero-Delgado and Santana v. Colombia* the IACtHR determined that payments corresponding to the expenses of minors would be made on the establishment of a trust fund. In its resolution of compliance with the judgment, however, the Court authorised that the payment be effected by means of certificates of deposit. The reason for this decision was, in the opinion of the Court, to establish a procedure that more fully safeguarded the rights of victims (*Caballero-Delgado and Santana v. Colombia*, 1997, para. 61; *Caballero-Delgado and Santana v. Colombia*, 2001, para. 3 of the narrative).

<sup>204</sup> Note that this process of armed conflict is contextualised within a framework of social struggle for structural reforms, linked mainly to agricultural, educational and labour reforms; and secondly, the advent of a wave of military dictatorships in much of South America and Central America. Many of which inspired anti-communist rebellion practices, inspired by the School of the Americas, which led to 'the establishment of state terrorism and illegal repression' in the Southern Cone countries and the

A majority of Latin American human rights NGOs were formed in this context, with the original objective of seeking justice in cases of forced disappearance, arbitrary detention, unfair trials, torture and extrajudicial executions. Their agenda has been gradually expanded by adding demands from organisations defending the rights of women, indigenous peoples, children and socio-environmental rights, to name a few.

Each of these organisations exists in a particular national context and functions at a particular level:

1. The national level: in the internal processes of organisational and institutional development;
2. The regional level: developing transnational networks for acquiring knowledge on the use of the IASHR; and
3. The international level: linking its institutional work with international organisations that have formal spaces for participation.

These three levels allow organisations to deliver reports, open discussion sessions, organise expert committees, support advocacy, take advantage of mechanisms such as *in loco* visits and produce information about specific human rights violations, among others (Mayrhofer et al, 2014, pp. 31-34).

As noted by Elizabeth Salmón:

NGOs have the power to serve as intermediaries between governments and individuals (rights bearers) and to promote the mechanisms by which the duty bearers of international law (the states) can be held accountable. [...] [I]nternational civil society includes NGOs and other non-governmental actors which despite not being subjects of international law, carry out a number of important functions (2010, pp. 346-347).

Salmón adds:

NGOs are legitimate not because of their founders but because they advocate rights and values of individuals at the international level. NGOs can draw attention to the needs of people in ways which states cannot, either because the needy sector does not constitute a majority or because the state has a discriminatory policy (2010, p. 350).

In other words, within the international community NGOs play a key role as intermediary channels between subjects of international protection and those who have direct duties, such as states. Thus, '[t]hey offer government officials expertise on particular topics and facilitate negotiations by giving politicians access to competing ideas outside normal bureaucratic channels. NGOs also provide rapid feedback to governments as they try to secure ratification or implementation of new treaties' (2010, p. 352).

Today there is some support for the fact that NGOs contribute as key actors in the enforcement of international human rights law within states, improving human rights practices. This is a key issue in a

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radicalisation of political organisations who went down the path of armed struggle, such as those in Colombia or Peru. See also Jelin (2003).

scenario in which the mechanisms available to fulfil human rights duties are very limited. Gartner has identified three mechanisms used by these actors: 'First, transnational rights enforcement operates by overcoming international constraints to domestic enforcement. Second, transnational rights enforcement utilizes international norms and global frames to leverage domestic commitments and constitutional protections. Third, transnational rights enforcement reflects the diffusion of regional norms and the leveraging of regional treaty obligations and regional institutions' (Gartner, 2010, p. 33).

It is important to keep in mind that international organisations provide important mobilisation opportunities for civil society (Gartner, 2010, p. 15) and, in particular, allow domestic demands to be raised in environments other than national fora, where concerns are usually not heard or adequately dealt with. This dimension also has consequences for the importance given to the issues reported in local contexts, such as the following of international trials or expectations related to international reparations that also establish new standards, new jurisprudence and new responsibilities in the national societies.

## **2. Challenges for human rights NGOs in the Inter-American System**

In the specific case of the IASHR, it is important to note that there are two important parallel processes in which NGOs have played a leading role: the process of strengthening the IASHR and the process of reforming it. Between July 2011 and January 2012 the Permanent Council of the OAS created a 'Special Working Group to Reflect on the Workings of the IACHR with a view to Strengthening the Inter-American System for the Protection of Human Rights', in which NGOs actively participated, sending opinions and reports about the fundamental role that the IASHR played in defence of the human rights of Latin American citizens. Communications from human rights NGOs, sent either to the IACHR or to state representatives, as well as public opinion, highlighted the need to reflect on the functioning of the IASHR, with priority placed on how it could be strengthened.

The Working Group was established by the Permanent Assembly of the OAS and had as its main objective the development of recommendations for reform. It should further be noted that the formation of this committee responded to the controversy that began in April 2011 as a result of one of the cases presented to the Commission, linked to the construction of a hydroelectric dam on indigenous territories in Brazil (see OAS, 2015). The Brazilian state withdrew its ambassador from the OAS for several months and refused to pay its annual dues. This controversy strengthened the concern of other states that were struggling to obtain a review of the mechanisms of action of the IACHR, in particular regarding the mechanisms for obtaining precautionary measures regarding collective rights and communities (Amato, 2012, p. 45).

Despite this, strengthening the IASHR would also lead to greater protection of the rights of the petitioners. In relation to this, NGOs have played an important role in the reform process of the 'Statute of the Inter-American Commission on Human Rights', protecting the principle of impartiality during the appointment of a secretary general and promoting transparency practices in institutional processes (Zela, 2012, p. 50).

In particular, this has also caused the IACHR to develop an approach that includes information from NGO reports in the elaboration of periodic reports on the human rights situation in the region (Salazar, 2014, p. 19).

This has also been noted by Cassel, when he states that it was precisely this active role during reform attempts which made it possible for the actions submitted by the NGOs to play a key role in drawing regional attention to the risks of a possible weakening of the Commission (Cassel, 2014, p. 19)

In this same sense Ariel Dulitzky notes that:

Reflection should lead to strengthening the mechanisms that work efficiently for the purpose of promoting and protecting and enjoying broad support of the main actors in the system; consolidating successful areas of work of the commission and the court; identifying situations or groups not properly taken into account, and eventually eliminating, modifying or overcoming the dysfunctional aspects to the central objective of protecting human rights (Dulitzky, 2012, p. 11, translated from Spanish by the authors).<sup>205</sup>

This has also been highlighted by other specialists, who point out that any modification of the IASHR 'should be undertaken towards a better protection of the rights of potential victims of violations' (Salvioli, 1997, p. 48), a task in which human rights organisations have played a key role, through representing victims of serious human rights violations (Krsticevic, 2003, p. 410) and by consolidating knowledge and practices related to the IASHR and the defence of human rights in the region (Global Rights Partners for Justice, 2014, p. 5). It is noteworthy that in many cases these NGOs are the result of the organisation of relatives of victims, who unsuccessfully sought justice and reparation at a national level and are thus seeking the same in a regional setting (Krsticevic, 2003, p. 409). NGOs have therefore brought domestic injustices to the international stage, achieving public attention and change in the IASHR's own agenda, thus also raising awareness of the IASHR among the general public in Latin American states (Krsticevic, 2003, p. 411).

It is also necessary to take into account the de facto constraints faced by NGOs when doing their work. As noted by several specialists:

The decision to use the [IASHR] will depend, among other factors, on the situation of the national NGOs and their capacity to present their cases under the Inter-American System. The possibilities for action will depend on the political and legal context, and above all, the economic and human resources available to an organisation. The use of the Inter-American System is one option among many other options, but it is essential to note that the use of the system, especially through litigation before the Commission and the Court, is not possible without costs

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<sup>205</sup> The original quote reads as: 'La reflexión debe conducir a reforzar los mecanismos que funcionan eficientemente para los fines de promoción y protección y que gozan del amplio respaldo de los principales actores del sistema; consolidar aquellas áreas exitosas de trabajo de la Comisión y de la Corte; identificar las situaciones o grupos no debidamente atendidos y, finalmente, eliminar, modificar o superar los aspectos disfuncionales al objetivo central de protección de los derechos humanos.'

in terms of time, expense and the diversion of scarce resources away from other activities that may produce better results. Before bringing a case before the Inter-American System, NGOs should note that the process is onerous and expensive. In fact, the preparation of a petition requires an enormous effort. Because the applicants have the burden of proof, NGOs must compile evidence of the facts or situations denounced and provide detailed information about the place and date of the violations, the name of the victim and any public authority that has knowledge of the matter. As NGOs must meet eligibility requirements they must submit information on the steps taken to exhaust domestic remedies. As the hearings are particularly important in the development of a case, NGOs have to cover the costs of travelling to Washington, the headquarters of the Commission, or San José, the seat of the Court, and given that the proceedings before the Commission and then before the Court usually last years, NGOs have to sustain their efforts over a prolonged period (Global Rights Partners for Justice, 2014, pp. 77-78, translated from Spanish by the authors).<sup>206</sup>

Regarding procedural restrictions, the design of the IASHR itself requires that applicants are passed through multiple filters, and that they must wait a long time (in some cases 5 years) to finally access the jurisdictional space. This situation constitutes a big challenge for NGOs who serve as heads of organisations of victims; it generates high administrative and organisational costs for the NGOs (Krsticevic, 2003, p. 413). For this reason, NGOs sometimes ask for an amendment of the regulations to allow for direct access to the Court.

In this regard, it is important to recall that:

The Inter-American System has a growing potential for obtaining justice, redressing a serious situation of violations of human rights and strengthening the rule of law in the countries of the Americas. Its value is derived from this potential. Therefore, organisations of civil society should consider using the system to expand their capacity to operate in the defence of human rights (Global Rights Partners for Justice, 2014, p. 78).<sup>207</sup>

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<sup>206</sup> The original quote reads as: 'El uso del Sistema Interamericano es una opción entre muchas otras opciones, pero es imprescindible advertir que el uso del sistema, especialmente por medio del litigio ante la Comisión y la Corte, no se realiza sin costos en términos de tiempo, gastos y el desvío de recursos escasos de otras actividades que puedan producir mejores resultados. Antes de llevar un caso ante al Sistema Interamericano, las ONG deben tomar en cuenta que el proceso es dispendioso y oneroso. De hecho, la preparación de una petición en sí exige un enorme esfuerzo. Debido a que los peticionarios tienen la carga de la prueba, las ONG deben compilar las pruebas sobre el hecho o la situación denunciada y proveer información detallada sobre el lugar y la fecha de la violación, el nombre de la víctima y cualquier autoridad pública que haya tomado conocimiento del asunto. Como las ONG deben cumplir con los requisitos de la admisibilidad, deben presentar información sobre las gestiones emprendidas para agotar los recursos internos. Al ser las audiencias particularmente importantes en el desarrollo de un caso, las ONG deben incurrir en los costos de viajar a Washington, la sede de la CIDH, o a San José, la sede de la Corte, y dado que los procesos ante la CIDH y luego ante la Corte normalmente duran años, las ONG tienen que sostener sus esfuerzos durante un periodo prolongado.'

<sup>207</sup> The original quote reads as: 'El Sistema Interamericano posee una creciente potencialidad para obtener la justicia, rectificar una grave situación de violación de los derechos humanos y fortalecer el estado de derecho en los países de las Américas. Su valor se deriva de esta potencialidad. Por lo tanto, las organizaciones de la sociedad civil deben considerar el uso del sistema para ampliar su capacidad de accionar en defensa de los derechos humanos.'

It is therefore essential that ‘NGOs [...] choose paradigmatic cases that may have a significant impact on the domestic sphere’ (Global Rights Partners for Justice, 2014, p. 78). The challenges that the system is currently facing to improve structural conditions, to ensure the effectiveness of rights at the national level (Abramovich, 2012, p. 29) and to contribute to strengthening justice systems (Ibid) should also be taken into account.

Finally, it is worth mentioning that in light of all the important efforts of these civil society organisations to defend human rights in the Americas, they are being subjected to attacks and harassment in several countries in the region, both from state and private actors that are the subjects of investigations or complaints by local NGOs. This is a situation that is prevalent but not exclusive to situations of social conflict or corruption. This has already been documented in the paper ‘Report on the survey study on human rights violations in conflict-settings’ prepared by IDEHPUCP in April 2014, where it was noted that even the UN Human Rights Committee had expressed concern on this matter: ‘The Committee is concerned about the high number of human rights defenders, particularly campesino and indigenous defenders, who have been assaulted, attacked and killed’, and called on states to take measures to carry out comprehensive investigations (Human Rights Committee, 2013).

In addition, it has led the Inter-American system – through its General Assembly – to adopt two reports, one in 2006 and another in 2012, titled ‘Human Rights Defenders in the Americas’ (General Assembly of the OAS, 2000) where it called on the Permanent Council to promote the analysis of this situation.

## E. Conclusions

The IASHR presents a series of tensions. While every Member State of the OAS is subjected to the competence of the IACHR, not every state has accepted the jurisdiction of the IACtHR. Some states, having previously accepted its jurisdiction, have later renounced it, as in the case of Peru (which has since accepted it again) and Venezuela. On the other hand, there is a specific tension between the ALBA states and the Special Rapporteurship on Freedom of Expression, which has led to a series of attempts of the former to affect the work of the Rapporteurship. Nonetheless, none have been successful. There is also tension regarding indirect judicialisation of ESCR, especially through the transformative remedies that the Court has ordered in many cases. These reparations include the provision of medical services and scholarships. However, these remedies must not be confused with general public policies.

Finally, there are further challenges regarding monitoring compliance. First, there are no guidelines for the General Assembly on how to perform said monitoring. The IACtHR has adopted a practice of releasing resolutions analysing the compliance of states with Court ordered reparations. However, this practice also lacks specific guidelines on how to identify the criteria on which to decide whether or not a case should be closed, following the compliance of a state with all the measures that the Court has ordered. There is also the issue of the lack of consistency and resolve in the monitoring of the compliance of the states.

On the other hand, there are also tensions regarding regional human rights instruments. First, one must analyse the interaction between international law and the domestic law of the states. There is no single or correct approach via which Member States should incorporate the regional instruments into national

law. There is, however, a tendency towards adopting the monistic model of incorporation. Similarly, there is no consistent practice regarding the hierarchy of treaties in national law. The most important point is to respect the international principle that national law is not an excuse for the infringement of international law.

Amnesties and military jurisdiction create further tension within the IASHR. The IACtHR has been clear in stating that amnesties are a violation of the ACHR. The mere promulgation of said laws is an infringement of the principle of *pacta sunt servanda*, as they limit the possibility of prosecution of those responsible for grave violations of human rights, under said Convention, and are therefore inadmissible.

Regarding military jurisdiction, the IACtHR has established a series of limitations: military courts only have jurisdiction to try offenses related to purely military legal rights (objective limitations) and they cannot try civilians or retired military personnel, but have jurisdiction over infractions related to military rights violations perpetrated by active military personnel (subjective limitations). Also, military courts must observe the due process of law.

In respect to the role of NGOs, it is necessary to point out that they have played a fundamental role in the strengthening of the IASHR. This is not only because they represent the interests of victims of human rights violations, but also because of their contribution to the maintenance of the system itself at both a procedural and an institutional level. NGOs have contributed to protecting the necessary autonomy of the system and informing national networks about the intentions of some states and governments to weaken the IASHR. They have specifically emphasised that the purpose of the reform is not only to reach an effective and an efficient resolution of cases, but also to take the victims' claims into consideration in the judicial process.

This work is done under very precarious conditions because of the considerable costs that international advocacy incurs for NGOs. In this sense, it may be important to open more spaces for national dialogue between states and NGOs to prevent and solve legal conflicts related to human rights violations, and to maintain international protection mechanisms as a complementary (and not only subsidiary) justice system.

## Bibliography

### 1. Legal and policy instruments

Consejo Político de ALBA (2014), *Declaración de Guayaquil del XI Consejo Político del ALBA*, XII Cumbre – Guayaquil, Ecuador, 30 July 2013, available at <http://www.portalalba.org/index.php/2014-03-29-22-04-24/documentos/1322-2013-07-30-xii-cumbre-guayaquil-ecuador-anexo-1-declaracion-de-guayaquil-del-xi-consejo-politico-del-alba> accessed 23 March 2015.

General Assembly of the OAS (2000), *Resolution 1711 'Human Rights Defenders in the Americas: Support to the work carried out by individuals, groups and civil society for the promotion and protection of human rights in the Americas'*, AG/RES. 1842 (XXXII-O/02)

Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948.

Inter-American Court of Human Rights (2005), *Resolución de la Corte Interamericana de Derechos Humanos de 29 de junio de 2005 Supervisión de cumplimiento de sentenciASHR (Aplicabilidad del artículo 65 de la Convención Americana sobre Derechos Humanos)/ Resolution of the Inter-American Court of Human Rights, Monitoring of Compliance with Judgments (Applicability of Article 65 of the American Convention on Human Rights)*, available at [http://www.corteidh.or.cr/docs/supervisiones/general\\_29\\_06\\_05.pdf](http://www.corteidh.or.cr/docs/supervisiones/general_29_06_05.pdf) accessed 19 April 2015.

OAS (1994), *Inter-American Convention on Forced Disappearance of Persons*, 9 June 1994.

OAS (1990), *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, 8 June 1990, OAS Treaty Series, No 73.

Organization of American States (OAS) (1969), *American Convention on Human Rights, 'Pact of San Jose'*, Costa Rica, 22 November 1969.

United Nations (1969), *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations Treaty Series, vol. 1155, p. 331.

### 2. Case Law

*Almonacid-Arellano et al. v. Chile* (2006), Inter-American Court of Human Rights, Judgment of September 26, 2006 (Preliminary Objections, Merits, Reparations and Costs), Series C, No. 154.

*Apitz Barbera et al. ("First Court of Administrative Dispute") v. Venezuela* (2012), Order of the Inter-American Court of Human Rights of November 23, 2012, Monitoring Compliance with Judgment.

*Baena-Ricardo et al. v. Panama* (2003), Inter-American Court of Human Rights Judgment of November 28, 2003 (Competence), Series C, No. 104.

*Barrios Altos v. Peru* (2001a), Inter-American Court of Human Rights, Judgment of March 14, 2001 (Merits), Series C, No. 75.

*Barrios Altos v. Peru* (2001b), Inter-American Court of Human Rights, Judgment of November 30, 2001 (Reparations and Costs), Series C, No. 87.

*Barrios Altos v. Peru* (2001c), Inter-American Court of Human Rights, Judgment of March 14, 2001 (Interpretation of Merits), Series C, No. 83.

*Benavides Ceballos v. Ecuador* (2003), Inter-American Court of Human Rights, Monitoring of compliance. Judgment of November 27 of 2003.

*Caballero-Delgado and Santana v. Colombia* (2001), Monitoring Compliance with Judgment, Order of the Inter-American Court of Human Rights on September 4, 2001.

*Caballero-Delgado and Santana v. Colombia* (1997), Inter-American Court of Human Rights, Judgment of January 29, 1997 (Reparations and Costs), Series C, No. 31.

*Cantoral-Benavides v. Peru* (2000), Inter-American Court of Human Rights, Judgment of August 18, 2000 (Merits), Series C, No. 69.

*Case of Expelled Dominicans and Haitians v. The Dominican Republic* (2014), Inter-American Court of Human Rights, Judgment of August 28, 2014 (Preliminary objections, merits, reparations and costs), Series C, No. 282.

*Case of the Kichwa Indigenous People of Sarayaku v. Ecuador* (2012), Inter-American Court of Human Rights, Judgment of June 27, 2012 (Merits and reparations), Series C, No. 245.

*Case of the Plan de Sánchez Massacre v. Guatemala* (2004), Inter-American Court of Human Rights, Judgment of November 19, 2004 (Reparations), Series C, No. 116.

*Constitutional Court Case* (2001), Inter-American Court of Human Rights, Judgment of January 31, 2001, Series C, No. 71.

*Contreras et al. v. El Salvador* (2013), Order of the Inter-American Court of Human Rights of May 14, 2013, Monitoring Compliance with Judgment.

*De la Cruz Flores v. Peru* (2004), Inter-American Court of Human Rights, Judgment of November 18, 2004 (Merits, Reparations and Costs), Series C, No. 115.

*Durand and Ugarte v. Peru* (2000), Inter-American Court of Human Rights, Judgment of August 16, 2000 (Merits), Series C, No. 68.

*El Amparo Case* (1996), Judgment on the Reparations of September 14, 1996 Inter-American Court of Human Rights.

*El Amparo v. Venezuela* (1997), Inter-American Court of Human Rights, Order of the Court of April 16, 1997 (Interpretation of the Judgment of Reparations and Costs), Series C, No. 46.

*El Amparo v. Venezuela* (1995), Inter-American Court of Human Rights, Judgment of January 18, 1995 (Merits), Series C, No. 19.

*García-Asto and Ramírez-Rojas v. Peru* (2005), Inter-American Court of Human Rights, November 25, 2005 (Preliminary Objection, Merits, Reparations and Costs).

*Gelman v. Uruguay* (2011), Inter-American Court Of Human Rights, Judgment of February 24, 2011 (Merits and Reparations), Series C, No. 221.

*Genie-Lacayo v. Nicaragua* (1997), Inter-American Court of Human Rights, Judgment of January 29, 1997 (Merits, Reparations and Costs).

*Gomes Lund et al. 'Guerrilha Do Araguaia' v. Brazil* (2010), Inter-American Court Of Human Rights, Judgment of November 24, 2010 (Preliminary Objections, Merits, Reparations, and Costs), Series C, No. 219.

*Gómez-Palomino v. Peru* (2005), Order of the Inter-American Court of Human Rights, November 22, 2005 (Merits, Reparations and Costs), Series C, No. 136.

*González et al. ("Cotton Field") v. Mexico* (2009), Inter-American Court of Human Rights, Judgment of November 16, 2009 (Preliminary Objection, Merits, Reparations, and Costs).

*Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (2003) Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 27, 2003.

*Ivcher Bronstein Case* (2001), Inter-American Court of Human Rights, Judgment of February 6, 2001, Series C, No. 74.

*La Cantuta v. Perú* (2006), Inter-American Court of Human Rights, Judgment of November 29, 2006 (Merits, Reparations and Costs), Series C No. 162.

*Lori Berenson-Mejía v. Peru* (2004), Inter-American Court of Human Rights Judgment of November 25, 2004 (Merits, Reparations and Costs).

*Palamara Iribarne v. Chile* (2005), Inter-American Court Of Human Rights of November 22, 2005 (Merits, Reparations and Costs).

*Sentencia TC/0256/14* (2014), República Dominicana Tribunal Constitucional en Nombre de la República

*The Massacres Of El Mozote And Nearby Places v. El Salvador* (2012), Inter-American Court Of Human Rights, Judgment Of October 25, 2012 (Merits, reparations and costs).

*Ximenes Lopes v. Brazil* (2010), Order of the Inter-American Court of Human Rights of May 17, 2010, Monitoring Compliance with Judgment.

### 3. Literature

#### a) Books

Cohen, J. and Arato, A. (2001), *Sociedad Civil y Teoría Política*, México: Fondo de Cultura Económica.

Salmón, E. (2007), *El Derecho Internacional Humanitario y su relación con el Derecho interno de los Estados*, Lima: Palestra Editores S.A.C.

Salmón, E. & Blanco, C. (2012), *El derecho al debido proceso en la jurisprudencia de la Corte Interamericana de Derechos Humanos*, Lima: IDEHPUCP.

Shelton, D. (ed) (2011), *International law and domestic legal systems: incorporation, transformation and persuasion*, New York: Oxford University Press.

#### b) Book chapters

Bregaglio, R. (2014), 'Compliance with the judgments of the Inter-American Court of Human Rights issued against the Peruvian State', in Priori, G. (ed) *Process and Constitution. Effectiveness and*

*enforcement of judgments*, Papers from the Fourth International Seminar on Litigation: Process and Constitution. Lima: Palestra, pp. 281-308.

Bregaglio, R. (2013), '¿Verdadera indivisibilidad? Las consecuencias de la judicialización indirecta de los derechos económicos, sociales y culturales en el Sistema interamericano de derechos humanos', in *A Eficácia Nacional e Internacional dos Direitos Humanos*, Río de Janeiro: Lumen Juris, pp. 257-289.

Bregaglio, R. (2012), 'La implementación de las convenciones internacionales para la lucha contra la corrupción. Un análisis de las normas auto-ejecutivas en el derecho penal', in Montoya, Y. (ed) *Estudios críticos sobre los delitos de corrupción de funcionarios en Perú*, Lima: IDEHPUCP, pp. 165-184.

Pasqualucci, J. (2010), 'The Americas', in Moeckli, D., Shah, S. & Sivakumaran, S. (eds) *International Human Rights Law*, Oxford: Oxford University Press, pp. 433-453.

Sagüés, N. (1998), 'Mecanismos de Incorporación de los tratados internacionales sobre derechos humanos, al Derecho interno', in *Presente y futuro de los derechos humanos. Ensayos en honor a Fernando Volio Jiménez*, San José: IIDH, pp. 297-314.

Salmón, E. (2010), 'Indirect power: a critical look at civil society in the new Human Rights Council', in Danchin, P. and Fischer, H. (eds) *United Nations reform and the new collective security*, Cambridge: Cambridge University Press, pp. 343-364.

### c) *Journal Articles*

Abramovich, V. (2012), 'De las violaciones masivas a los patrones estructurales: nuevos enfoques y clásicas tensiones en el sistema interamericano de derechos humanos', *Revista Aportes DPLF*, vol. 6 (11), pp. 7-39.

Acevedo, D. (1992), 'Relación entre el Derecho Internacional y el Derecho Interno', *IIDH*, vol. 16 (2/2), pp. 133-161.

Amato, V. (2012), 'Una mirada al proceso de reflexión sobre el funcionamiento de la Comisión Interamericana de Derechos Humanos', *Aportes DPLF*, no. 6, year 5, pp. 4-9.

Cassel, D. (2014) 'La "tormenta perfecta": cuenta y balance', *Revista Aportes DPLF*, no. 19, year 7, pp. 20-24.

Corasanti, V. (2009), 'Implementation of judgments and decisions of the Inter-American Court of Human Rights: a necessary debate', *IJHR*, vol. 49.

Dulitzky, A. (2012), '20 puntos de reflexión sobre el proceso de reflexión', *Revista Aportes DPLF*, no. 6, year 5, pp. 11-14.

Felstiner, W., Abel, R. and Sarat, A. (1980/81), 'The emergence and transformation of disputes: naming, blaming, claiming...', *Law & Society Review*, vol. 15 (3/4), pp. 631-654.

Gartner, D. (2013), 'Transnational rights enforcement', *Berkeley Journal of International Law*, Vol. 31 (1), pp. 1-39.

Henderson, H. (2004), 'Los tratados internacionales de derechos humanos en el orden interno: la importancia del principio pro homine', *IIDH*, vol. 39, pp. 71-99.

Krsticevic, V. (2003), 'El papel de las ONGs en el sistema interamericano de protección de derechos humanos. Trámite de los casos ante la corte interamericana de derechos humanos', pp. 407-423, available at <http://biblio.juridicas.unam.mx/libros/5/2454/27.pdf> accessed 6 July 2015.

Jerez, A. & Revilla, M. (1998), 'El tercer sector. Una revisión introductoria a un concepto polémico', *Revista Sociedade em Debate*, pelotas, vol. 4 (1), pp. 3-22.

Laplante, L. (2007), 'On the indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development', *Yale Human Rights and Development Law Journal*, vol. X, pp. 141-177, available at <http://www.law.yale.edu/documents/pdf/LawJournals/laplante.pdf> accessed 6 July 2015.

Salazar, K. (2014), 'Entre la realidad y las apariencias', *Revista Aportes DPLF*, no. 19, year 7, pp. 16-19.

Salmón, E. (2003), 'Los aspectos internacionales en la reforma de la Constitución', *Pensamiento Constitucional*, year IX, no. 9, pp. 149-184.

Uprimny-Yepes, R. & Guzman-Rodríguez, D.E. (2010), 'En búsqueda de un concepto transformador y participativo para las reparaciones en contextos transicionales', *International Law: Revista Colombiana de Derecho Internacional*, no. 17, pp. 231-286, available at [http://www.scielo.org.co/scielo.php?pid=S1692-81562010000200007&script=sci\\_arttext](http://www.scielo.org.co/scielo.php?pid=S1692-81562010000200007&script=sci_arttext) accessed 17 April 2015.

Vásquez, P. (2013) 'La accidentada ruta constitucional de la jerarquía de los tratados en el derecho interno', *Themis Revista de Derecho*, no. 63, pp. 89-108.

Yasuaki, O. (2009), 'A Transcivilizational Perspective on International Law: Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century', *Recueil des Cours*, vol. 342, pp. 341-410.

Zela, H. (2012), 'La OEA y los derechos humanos: participación de las organizaciones de la sociedad civil', *Revista Aportes DPLF*, no. 6, year 5, pp. 48-49.

#### **d) Policy and other reports**

Abi-Mershed, E. (2010), *Notes from the Inter-American System for the Panel Discussion on Reparations for Women Subjected to Violence*, available at [http://www2.ohchr.org/english/issues/women/rapporteur/docs/side\\_event\\_june2010/ElizabethAbiMershed.pdf](http://www2.ohchr.org/english/issues/women/rapporteur/docs/side_event_june2010/ElizabethAbiMershed.pdf) accessed 11 March 2015.

Contreras, M. Á. (undated), *Las organizaciones no gubernamentales. Realidad y Reto*, available at <http://www.juridicas.unam.mx/publica/librev/rev/derhum/cont/28/pr/pr32.pdf> accessed 10 July 2015.

El Comercio Mundo (2014) *Correa busca debilitar con reformas a la CIDH*, available at <http://elcomercio.pe/mundo/latinoamerica/correa-busca-debilitar-reformas-cidh-noticia-1733791> accessed 15 April 2015.

Global rights Partners for Justice (2014), *Uso del sistema interamericano de los derechos humanos. Guía práctica para organizaciones no gubernamentales*, available at <http://www.portalsida.org/repos/USO%20SISTEMA%20INTERAMERICANO%20DE%20LOS%20DERECHOS%20HUMANOS.pdf> accessed 10 July 2015.

Human Rights Committee (2013), *Concluding Observations on Paraguay's third periodic report*, approved by the Committee in its 107<sup>th</sup> session (11-28 March 2013), CCPR/C/PRY/CO/3.

Jelin, E. (2003), *Los derechos humanos y la memoria de la violencia política y la represión: la construcción de un campo nuevo en las ciencias sociales*, Cuadernos del Ides 2 Buenos Aires: Instituto de Desarrollo Económico y Social, available at <http://www.plataformademocratica.org/Publicaciones/2357.pdf> accessed 10 July 2015.

Mayrhofer, M. et al (2014), *Report on the mapping study on relevant actors in human rights protection*, FRAME, Work Package No. 4 – Deliverable No. 4.1, available at <http://www.fp7-frame.eu/wp-content/materiale/reports/02-Deliverable-4.1.pdf> accessed 27 July 2015.

OAS (2015) *Indigenous Communities of the Xingu River Basin, Pará, Brazil*, Precautionary Measures, PM 382/10, available at <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp> accessed 6 July 2015.

OAS (2011), Consejo Permanente de la Organización de los Estados Americanos, Grupo de Trabajo Especial de Reflexión sobre el Funcionamiento de la CIDH para el Fortalecimiento del SIDH, *Informe del Grupo de Trabajo Especial de Reflexión sobre el Funcionamiento de la Comisión Interamericana de Derechos Humanos para el Fortalecimiento de Sistema Interamericano de Derechos Humanos para la Consideración del Consejo Permanente*, OEA/Ser.G, GT/SIDH-13/11 rev. 2, 13 December 2011, available at [http://scm.oas.org/doc\\_public/SPANISH/HIST\\_11/CP27754S04.doc](http://scm.oas.org/doc_public/SPANISH/HIST_11/CP27754S04.doc) accessed 23 March 2015.

Salvioli, F. (1997), 'Derechos, acceso y rol de las víctimas' in Méndez, J. E. & Cox, F. (eds) *El futuro del sistema interamericano de protección de los derechos humanos*, San José: IIDH, available at <http://www.oda-alc.org/documentos/1374531407.pdf> accessed 6 July 2015.

## IX. ASEAN human rights protection system<sup>208</sup>

### A. Introduction

The Association of Southeast Asian Nations (ASEAN) Intergovernmental Commission on Human Rights (AICHR) was set up as the overarching body to promote and protect human rights in the ASEAN region. ASEAN is a representative regional organisation with vast contrasts among its Member States, reflecting the diversity of the Asian continent. Asia has never been a tightly united association of nations but has always been characterised by diversity in geopolitics, traditions, legal systems, religion and economic developments. It is of great difficulty for Asia to establish a universal mechanism to protect and promote human rights because of the weak human rights tradition and background in the region. As a consequence, the AICHR has been controversial and much-criticised ever since its establishment (see e.g. Munro, 2011; Narine, 2012; Tan, 2011). The operation and development of the AICHR has become a paradigm for considering the possibility and feasibility of an Asian human rights mechanism. Since the very beginning of the preparations for the AICHR's inauguration, it received extensive attention from around the world. The ASEAN regional human rights mechanism might help to point out the difficulties and limitations of establishing an Asia-wide human rights mechanism.

The establishment of an ASEAN sub-regional human rights mechanism has to take the political structure of the region into consideration. Admittedly, ASEAN already has a functioning political co-operation framework and a working model, which are relatively stable and reliable. Furthermore, there also exists a shared colonial history in this region, similar characteristics of economic development, a utilitarian approach to state action and a consensus of national spirit and social trends. However, the region is also characterised by a high degree of cultural, political and social diversity and heterogeneity and ASEAN member states adhere to the principle of 'non-interference', established in paragraph C of Article II of 'The Treaty of Amity and Cooperation in Southeast Asia'. In addition, the so-called 'Asian Values-Debate' which refers to the assumption that there are specific 'Asian values' such as the priority of the community over the individual or the importance of stability and economic development (see Ciociari, 2012, pp. 700-702) are seen as a challenge to the establishment of human rights.

This report will cover the performance of the sub-regional human rights system, the drafting process and the contents of the 'ASEAN Human Rights Declaration' (AHRD), and the establishment and shortcomings of the AICHR and its engagement with civil society organisations (CSOs). As most of the information and documents relevant to this topic are not made publicly available, the main sources of information used in this report come from news reports and observations from CSOs.

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## B. Gaps, tensions and contradictions with regard to regional instruments

The main focus of the AICHR in its first five-year plan was to draft the AHRD,<sup>209</sup> previously called the 'ASEAN Human Rights Charter', which is also the most important output since the AICHR's establishment.

The AHRD has been widely criticised by the international community and by CSOs, both during its drafting and following its adoption on 18 November 2012, with requests for review and revision. The AHRD contains human rights provisions that fall far below the standards of international human rights law and the document is considered to be a major disappointment and a setback for human rights in the region (Shiwey 2012, p. viii). Governing the AICHR and ASEAN as a whole, the typical 'ASEAN-style' consensus-based decision-making routine ensures that the lowest common denominator is the basis of any decision.

The discussions on the drafting of the AHRD started in September 2010, but the terms of reference of the drafting group<sup>210</sup> have never officially been published. It is reported that there is no information available on details concerning the preparation, debates and discussions during these drafting meetings, a consequence of the AICHR's lack of transparency. There has also been very limited engagement with CSOs during the process, despite the CSOs' strong will to co-operate and despite repeated requests for dialogue from inside and outside the region. CSOs have called for full transparency since the beginning of the drafting process, but no official and adequate response was made and the drafting was undertaken in total secrecy throughout 2011 and well into 2012. CSOs have denounced the AHRD as a 'declaration of government powers disguised as a declaration of human rights' (Shiwey, 2012, p. 37). They remarked that the final text failed to incorporate the recommendations and amendments proposed by CSOs.<sup>211</sup>

The AHRD balances the enjoyment of fundamental rights with government-imposed duties on individuals, emphasises that states shall refer to regional and national contexts when considering the realisation of human rights, and points out that the enjoyment of human rights and fundamental freedoms shall also be subject to national laws, falling far below international human rights standards. The provisions of the declaration introduced broad limitations on rights and fundamental freedoms; it even limits rights that, according to international human rights law, should never be restricted. The declaration also fails to mention vulnerable groups that should be particularly considered, such as women, children, elderly people, indigenous peoples, minorities, migrant workers, LGBTI persons or the disabled. The declaration also omits some basic prohibited grounds of discrimination, such as sexual

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<sup>209</sup> As outlined in FRAME report D 4.1, the AHRD is the first comprehensive human rights declaration of the region. However, ASEAN previously adopted specific human rights instruments such as the 2007 'ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers', the 2004 'ASEAN Declaration against Trafficking in Persons Particularly Women and Children' and the 2004 'ASEAN Declaration on the Elimination of Violence against Women in the ASEAN Region'.

<sup>210</sup> According to the Terms of Reference of the AICHR, the AICHR itself was responsible for drafting the Declaration. However, the actual drafting was done by a drafting group of human rights experts appointed by the AICHR (Renshaw, 2013, p. 558).

<sup>211</sup> For a list of NGOs that submitted recommendations to the AICHR including links to their proposals see Shiwey (2012, pp. 36-37).

orientation and gender identity, and some important civil and political rights, such as the right to freedom of association and the right to be free from enforced disappearance (ibid, p. 38).

Other regional human rights instruments, such as the 'ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers' and the 'ASEAN Declaration on the Elimination of Violence against Women', among others, also include several problems in terms of protecting human rights in practice.

Although all 10 ASEAN Member States signed the 'ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers' in 2007, there is still no consensus on the specific criteria against which the protection of migrant workers can be measured. For the purposes of avoiding conflict between ASEAN countries, this instrument is not binding and, moreover, there are no plans to remedy this shortcoming (Rafendi, 2013).

On 13 June 2004, the 'Declaration on the Elimination of Violence against Women in the ASEAN Region' was adopted, establishing a more comprehensive regional mechanism to eliminate violence against women. The purpose of the Declaration is to strengthen co-operation among governments, non-governmental organisations (NGOs), civil society and other organisations for women (Human Rights Herald, 2005, pp. 253-254). However, the Declaration seems to be held back by the ASEAN approach to human rights, which is not coherent with international human rights practise. It contains provisions that allow regional and national contexts to be taken into consideration, bearing in mind the different historical, political, socio-cultural, religious, legal and economic backgrounds in the region (Singh and Chung, 2014; see also 'Declaration on the Elimination of Violence against Women in the ASEAN Region').

Another important regional human rights instrument is the 'ASEAN Declaration against Trafficking in Persons Particularly Women and Children', adopted at the 10th ASEAN Summit. It affirms ASEAN's unwavering desire to embrace the spirit of international agreements against trafficking, such as the 'United Nations Convention against Transnational Organized Crime' and its associated 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children'. However, the ASEAN Declaration contains no inclusive definition of trafficking in persons and a monitoring process to protect the rights of trafficked persons has not been established. ASEAN Member States are expected to complete the first reading of the draft ASEAN Convention on Trafficking in Persons (ACTIP), but the due date has not been disclosed to the public (Joint NGO statement, 2014).

## **C. Gaps, tensions and contradictions with regard to regional institutions**

### **1. Establishment**

Considerable differences exist among ASEAN countries, not only in terms of political systems, size of population and levels of economic development, but also with regard to the concept of human rights and the approaches to human rights protection. Those countries that had actively proposed to establish an ASEAN human rights mechanism are those same countries, which had already set up a national human rights institution (Renshaw, 2010, pp. 14-15). During the preparatory process, Indonesia, the

Philippines and Thailand had hoped that the forthcoming ASEAN human rights mechanism would have the power to receive and investigate individual complaints and the power to carry out a periodic review (Cerna, 2009, p. 1162), as all ASEAN Member States performed well during the first cycle of the Universal Periodic Review (UPR) conducted by the United Nations (UN) Human Rights Council. However, this proposal did not receive positive feedback.

The ASEAN Charter, adopted on 20 November 2007, resulted in considerable progress towards the building of a political-security community among the ten ASEAN countries. It is the ASEAN Charter that included the first proposal to establish an ASEAN sub-regional human rights body. The preamble of the ASEAN Charter states that ASEAN countries will obey the principles of democracy, the rule of law and good governance to promote and protect human rights and fundamental freedoms. The objectives of ASEAN laid down in the Charter emphasise again that it is the duty of Member States to promote and protect human rights and fundamental freedoms (ASEAN Charter, Article 1). The basic principles in chapter II, Article 2 of the ASEAN Charter define that all Member States should uphold the UN Charter and international law, respect fundamental freedoms, the promotion and protection of human rights and the fostering of social justice. Chapter IV, Article 14 lays down the legal basis for establishing an ASEAN human rights mechanism: 'In conformity with the purpose and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body which operates in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting' (ASEAN Charter, Article 14).

After the ASEAN Charter came into force, the establishment of the ASEAN human rights mechanism was put on the agenda. On 20 July 2009, the 42nd ASEAN Foreign Ministers' Meeting was held in Phuket, Thailand, where the TOR were signed and adopted. The 15th ASEAN Summit, which was held from 23-25 October 2009, marked the official announcement of the establishment of the AICHR. The establishment of the AICHR was well received by people from the ASEAN region because they hoped that it would provide an avenue to address national and cross-border human rights issues in the area.

## 2. General information

The purpose of the AICHR is to promote and protect the human rights and fundamental freedoms of the people of the ASEAN region, to uphold the right to live in peace, dignity and prosperity, to promote human rights in a regional context, to keep national and regional particularities in mind, to promote mutual respect for different historical, cultural and religious backgrounds and to maintain the balance between rights and responsibilities (TOR, 2009, Article 1).

Article 2 of the TOR lays down a range of principles,<sup>212</sup> which appear frequently in many other ASEAN documents, indicating that ASEAN still strives for doing things 'the ASEAN way'<sup>213</sup> when dealing with

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<sup>212</sup> Article 2 of the TOR states that the AICHR shall be guided by the following principles: respect for the independence, sovereignty, equality, territorial integrity and national identity of and non-interference in the internal affairs of ASEAN Member States; adherence to the rule of law, good governance, the principles of democracy and constitutional government; respect for the right of every Member State to function free from external interference, subversion and coercion; respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice; upholding the UN Charter and international law, including international humanitarian law; and respect for different cultures, languages and religions of the

human rights issues, and thereby always emphasises the sovereignty of states and the principle of non-interference in the context of implementing human rights. Compared with international human rights conventions and other regional human rights covenants, the conception of human rights norms in ASEAN is quite unique. However, this does not mean that ASEAN denies international human rights norms. Instead, before understanding ASEAN's unique conceptualisation of human rights norms, it is important to recall the three basic dimensions of ASEAN, concerning human rights issues: cultural differences, primacy of economic development and the so-called 'Asian values'. The basic principles of the AICHR reveal the importance of sovereignty, independence and non-interference for ASEAN Member States (Termsak, 2010). The 'ASEAN way' does not favour the 'naming and shaming' of countries who have failed to protect human rights within their jurisdictions, instead, this approach involves persuasion, negotiation or trying to reach a consensus via peer pressure to push relevant countries to correct themselves at the domestic level (Kelsall, 2009, p. 2).<sup>214</sup>

#### *a) Membership and mandates*

The AICHR Committee consists of ten representatives – one from each ASEAN Member State – who each serve a term of three years and may be consecutively re-appointed for one additional term (TOR, 2009, Article 5). When appointing a representative to the AICHR, Member States shall give due consideration to gender equality, integrity and competence in the field of human rights (ibid, Article 5(3)). Member States should consult, if required by their respective internal processes, with appropriate stakeholders in the appointment of their representatives to the AICHR (TOR, 2009, Article 5.4).

Once a member of ASEAN joins the AICHR, it means that the government of that country accepts its supervision. It further implies that any violation of human rights or the infringement of relevant international laws and commitments will directly affect the country's international image and international relationship with other countries, and will even have a negative impact on economic interests. All of these factors forced the governments that joined the AICHR to embrace international human rights standards. Firstly, in the political arena, the AICHR acted as a guide for the development of the states' own human rights culture and, secondly, government action taken in accordance with the AICHR promoted public acceptance of the universality of human rights in the ASEAN region, both by the government and the people, thus narrowing the gap between polarised views. Joining the AICHR, and accepting its supervision, has so far had a positive effect on institutionalising human rights in the ASEAN region.

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peoples of ASEAN, whilst emphasising their common values in the spirit of unity in diversity (TOR, 2009, Article 2a-2g). The AICHR is further obliged to respect international human rights principles, including the universality, indivisibility, interdependence and inter-relatedness of all human rights and fundamental freedoms, as well as impartiality, objectivity, non-selectivity, non-discrimination and the avoidance of double standards. Articles 2.3 and 2.4 of the TOR point out that the primary responsibility to promote and protect human rights and fundamental freedoms rests with each Member State. Article 2.4 further states that the AICHR shall pursue a 'constructive and non-confrontational approach and co-operation to enhance promotion and protection of human rights' and shall adopt 'an evolutionary approach that would contribute to the development of human rights norms and standards in ASEAN'.

<sup>213</sup> The so-called 'ASEAN way' refers to a certain way of international cooperation which is based on the principles of non-interference, non-use of force and consensus decision-making (Weber, 2014, p. 3).

<sup>214</sup> Recently, several scholars have pointed out that ASEAN has started to deviate from the 'ASEAN way' in several cases (see e.g. Goh, 2003; Weber, 2014).

According to the ASEAN Charter, the purpose of the AICHR is to promote and protect the human rights of the people in the ASEAN region, to advance education and to provide advisory services to government authorities. It aims to enhance public awareness of human rights, to promote capacity building, to encourage ASEAN member states to join and ratify international human rights instruments, to provide advisory services and technical assistance and to engage in dialogues and consultations with other ASEAN bodies. The AICHR should publish an annual report of its activities and submit a 'Work Plan' and a 'Work Summary' every five years.

Compared with other regional human rights mechanisms, the AICHR's functions are limited to consultation rather than receiving or examining individual complaints, let alone direct intervention and sanctions on gross national violations of human rights. Due to its lack of competence of issuing binding decisions, or the 'institutional clout', that other human rights mechanisms have, many experts and scholars doubt that the AICHR could eventually become a tool by which ASEAN countries protect human rights; it will rather remain 'a toothless tiger' (Aljazeera, 2009).

The current inability of the AICHR to investigate individual complaints does not mean that it will never have such competence. Although the functions of the AICHR are strictly limited by the TOR, the ambiguity of these terms still leaves sufficient room for it to transform into an effective international human rights dispute settlement mechanism. Interpreted broadly, the inclusion in the AICHR's mandate for the preparation of a strategic development plan can be seen as an opportunity to expand its scope. Thus, the AICHR has the potential to go beyond its prescribed functions and become a more effective human rights mechanism. As the AICHR was to some extent responsible for drafting the AHRD, it can also be considered to be involved in the legislative process, but has not yet been entitled to any substantial competences related to legislation. In addition, it is not yet clear which institutional form the dispute settlement mechanism might assume, which means that it is not limited to the establishment of a regional human rights court. Establishing a regional human rights court is not the only efficient way to settle human rights disputes in the region; there could be other solutions. Even if the ADHR is not legally binding and cannot establish a regional human rights court, it does not necessarily follow that the AICHR cannot set up a dispute settlement mechanism to receive and investigate individual complaints. All human rights practices in the region, including consultations, negotiations and their outcomes, can be regarded in a similar way to case law; practical experience which can be applied to future human rights issues.

### 3. Major defects

#### *a) Step-by-step mode of operation*

The TOR stress that the AICHR should adopt a gradual approach to the expansion of human rights protection in the ASEAN region. However, many experts, scholars, politicians and non-governmental organisations hold different views about these principles and thus the TOR are, and shall, remain open to question.

To understand the operational mode of the AICHR, it should be emphasised that setting up effective human rights mechanisms in regions with complicated social situations is a valuable institutional innovation, that will help to fulfil the basic commitment of ASEAN – to establish a ‘people-oriented’, regional human rights mechanism.

In order to adopt various legal cultures, especially their human rights culture, voluntarily and constantly, the best practice for ASEAN Member States is to adopt a gradual approach. It is also important to focus on systems and ideas which reflect the orientation of local historical traditions and contemporary social practices, in order to reduce the possibility of resistance when introducing new human rights instruments.

Considering the historical practice of the region and the impact of international politics, ASEAN and the AICHR both value the principles of non-interference, of consensus in decision-making and of non-confrontation. This incremental mode of human rights protection - protecting human rights ‘step-by-step’ - includes deliberative approaches such as making a resolution and reaching a consensus that is in line with the ASEAN countries’ political demands. Considering the national interests and the political demands of these countries, to uphold these principles can effectively prevent political interference from non-ASEAN states and certain ASEAN countries that have already achieved advanced levels of domestic human rights protection.

Meanwhile, when gross violations of human rights take place, such as massacres or genocide, international human rights law requires the governments to respond immediately and it demands that the international community take effective measures to intervene in a timely manner. Once a certain government is challenged regarding human rights violations, it might utilise the aforementioned ‘step-by-step’ working mode to try to escape responsibility. This approach could, therefore, protect relevant governments from international supervision and may further suggest that ASEAN tolerates governments with a problematic situation of human rights protection, allowing each of the ASEAN countries to maintain their different understandings and practices, despite international human rights norms being codified into the domestic law of each Member States.

#### *b) Vague definition of the role and mandate of the AICHR*

The TOR have been regarded as a product of negotiation and compromise, making it more likely a political document than a regulation or terms of reference of a human rights mechanism (Tanda, 2009, pp. 14-15). The definition of the role and mandate of the AICHR given by the TOR is quite vague. Most of the other existing regional human rights mechanisms are authorised with supranational jurisdiction to coordinate the interests of individuals and governments on human rights issues. The TOR deviate from

this maxim by confirming the principle of non-interference and national sovereignty – it appears that the human rights approach in the ASEAN region is more about ‘promoting’ rather than ‘protecting’ human rights. In this regard, the actual mandates and potential influences of the AICHR are dramatically different from other existing regional human rights mechanisms. Until now, the AICHR’s progress has been slow regarding the implementation of its mandates and functions, such as the advisory role to ASEAN and its Member States, the undertaking of thematic studies and the consideration of individual complaints.

The most disappointing record of the AICHR is its total silence on key incidents of human rights violations in the region, thus failing a basic test of its integrity as a human rights body. Following the disappearance of a prominent activist, Sombath Somphone, from Lao PDR in December 2012, a number of petitions were sent to the AICHR after domestic remedies had been exhausted, but the AICHR did not issue any public response to urgent calls from CSOs and ASEAN dialogue partners to investigate the case (Somera et al, 2014, p. 13). Furthermore, ‘in July 2013, the Jakarta-based Legal Aid Centre for the Press requested the AICHR to urge the government of Indonesia to exercise due diligence in investigating the 1996 murder of journalist Fuad Muhammad Syafruddin’ (Ibid). Again, in December 2013, in order to stop coercion and intimidation of the Ahmadiyya Muslim community, the AICHR was requested by the Makassar Legal Aid Institute to ask the Indonesian government to safeguard the security and rights of this community, as well as other religious minorities in Indonesia (Ibid). The AICHR remained silent in all the above-mentioned cases.

The ‘Guidelines on the Operations of AICHR’, adopted on 12 March 2012, further restrict the AICHR’s mandate. According to the Guidelines, funding and other resources from non-ASEAN states shall, in accordance with Article 8.6 of the TOR, be used only for human rights promotion, capacity building and educational purposes (Guidelines, Article 13). This aims to prevent the AICHR from gaining the capacity to receive individual complaints and supervise national policy.

Moreover, the TOR include several provisions that contain logical contradictions, increase the uncertainty of the contents and leave considerable space for ASEAN countries to select provisions and interpretations in their own favour. Hence, they also hamper the coordination and unification of standards of regional human rights protection and hinder the development of further negotiations and cooperation. For example, Article 5.2 of the TOR states that representatives to the AICHR shall be accountable to the appointing government, while Article 5.7 states that each representative, in the discharge of his or her duties, shall act impartially in accordance with the ASEAN Charter and the TOR. Furthermore, if standards of evaluation are uncertain, it is hard to define state liability and serious violation of human rights. Thus, Member States can choose provisions which allow them to avoid their obligations and protect their own political interests, and human rights monitoring mechanisms will tend to be politicised.

The contradictions of the TOR raised expectations that the AICHR would clarify its mandate, roles and functions during the five-year review of its work and during the drafting process of the AHRD. Unfortunately, such expectations have been dashed, as has been mentioned above. The availability of official information on the review of the TOR, a part of the five-year-review of the AICHR, is limited. The

AICHR's website only contains two articles about the TOR review (AICHR, 2013), thus leaving it unclear as to how ASEAN would undertake the revising process, and whether the review would lead to a positive amendment to the TOR.

### *c) Weak enforcement mechanism*

As mentioned above, the principle of consensus renders the ASEAN supervision system relatively weak and there are no supplementary measures in place that can be deployed when human rights violations occur. The politically binding nature of the AICHR's resolutions comes primarily from pressure from within ASEAN and political negotiation among its Member States. Any potential sanctions for human rights violations arising in the region are distributed at the discretion of the heads of the Member States, instead of the AICHR (Munro, 2011, pp. 1193-1194).

Because of its weak enforcement mechanism,<sup>215</sup> the AICHR cannot prevent the suffering of those vulnerable to human rights violations. Some experts believe that the intention of introducing a mechanism responsible for international human rights obligations was economically and geopolitically motivated. Such a weak mechanism will help avoid confrontation, punishment or political tensions between the Member States, between the AICHR and a specific Member State or between ASEAN and its Member States.

According to the Guidelines, the AICHR may establish working groups or task forces to facilitate its work in respect to any specific issues or matters defined by the AICHR (Article 8.1) and the terms of reference for such groups have to be approved by all representatives by consensus (Article 8.2), while the purposes, mandates and duration shall be determined by the representatives (Article 8). These temporary working groups operate quite differently from human rights special procedures and investigation procedures created by the UN. Limited by its existing mandate, the AICHR cannot establish temporary working groups to investigate the violation of human rights. Furthermore, these working groups are strictly controlled by the AICHR and it is very hard to set up an independent working group, which would have the power to conduct objective and fair investigations.

### *d) Dependent and non-professional representatives*

Article 5(3) of the TOR states that when appointing their representatives to the AICHR, Member States shall give due consideration to gender equality, integrity and competence in the field of human rights. In practice, the appointed representatives are generally diplomats, considering human rights issues from a political perspective instead of an international human rights law perspective.

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<sup>215</sup> According to the relevant provisions of the Guidelines, the AICHR may invite other persons to attend its meetings, with the consensus of its representatives and on a case-by-case basis (Article 1.4); the revision of agendas shall be adopted by all the Member States (Article 2.3); the results of conferences and meetings shall be published only when consensus has been reached (Article 7.1); and the contents of any publication shall be agreed upon by all representatives (Article 7.2). Any written or verbal statements and comments made either by any AICHR representative or by the Chairperson shall be approved by all the representatives (Article 7.4). Moreover, the amendments and revisions of the Guidelines will not come into force unless all representatives have reached agreement (Article 15.1); any disagreement arising from the interpretation of the Guidelines shall be settled by consultation and consensus in accordance with the AICHR's TOR (Article 15.2).

In addition, as an intergovernmental commission of ASEAN, the AICHR's representatives cannot exclude political intervention while performing their functions, because of their government-appointed status. Thus, they might become the spokesperson of their own countries on human rights issues. The nature of the AICHR as an intergovernmental commission has affected the effectiveness of its daily work and decision-making process. Article 5.6 of the TOR stipulates that the appointing government may decide, at its discretion, to replace its representative. There is reason to fear that this clause might be used by Member States to remove critical commissioners or 'as a form of punishment for critical reports emanating from the AICHR' (Renshaw, 2010, p. 12).

By the end of 2012, when the first group of commissioners of the AICHR ended their first term, the appointment and replacement procedures existed on paper only. In 2011, Vietnam and Brunei suddenly replaced their representatives without any prior announcement. Laos, Singapore, Indonesia and some other countries did not appoint new representatives in time and provided no explanations for this. Most of the current delegates to the AICHR are current or former senior administrative officers in their own countries and do not have human rights backgrounds. The Myanmar representative, Kyaw Tint Swe, once worked as the vice-president of the Burma National Human Rights Commission. The Burma National Human Rights Commission is an NHRI that does not meet the standards of the Paris Principles: it concealed and denied massive human rights violations, such as massacres, rape and torture by the military, at international-level dialogues and conferences.

#### *e) Working in Secrecy*

In Article 7.4 of the Guidelines, a lack of transparency is established as a rule. This was a big setback because the TOR had formerly claimed that the AICHR should ensure public access to information and guarantee public participation. According to the Guidelines, any representative can prevent documents and the results of meetings from being made public (Guidelines, Article 7.4). Only the secretariat and the permanent bodies of ASEAN have the right to acquire the minutes of the meetings and the ASEAN Foreign Ministers Meeting decides whether reports submitted by the AICHR will be released or not (Guidelines, Article 9.3). In addition, the Guidelines also allow the AICHR to keep its related reports, meeting minutes and public procedure confidential.

The research available on the AICHR is mainly derived from limited official documents, reports from CSOs cooperating with the AICHR and media reports. By the end of 2012, the AICHR has promised to disclose 18 official documents, but 15 of them have been kept hidden until now. Since its establishment three years ago, the AICHR has released one small brochure, which only includes limited basic information (Somera, 2014, p. 13). The financial reports of the AICHR have also not been released to the public.<sup>216</sup>

### **D. Gaps, tensions and contradictions with regard to regional NGOs**

The AICHR cooperates with other ASEAN bodies, such as the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children and the ASEAN Committee on Migrant Workers.

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<sup>216</sup> E.g. the annual budget bills from 2010 to 2012, the dedicated budget for protocol and subscription of the AHRD, the budgets for research and training workshops, and the fund operation regulations of the AICHR are all shrouded in secrecy.

However, it seems that the AICHR is still reluctant to engage with CSOs and NGOs at regional and national levels.

Until 2010, the AICHR's conference agendas, meeting results and resolutions, including those regarding issues of public interest or regional co-operation, were all kept secret, without any public discussion or participation. The AICHR has conducted hardly any constructive consultations or dialogues with CSOs and other stakeholders, and has refused to participate in or organise any regional human rights negotiations.

During its presidency in 2011, Indonesia improved the reputation and prospects of the AICHR. CSOs widely consider the political nature of the AICHR to have silenced it about the expansion and promotion of its functions throughout this period. CSOs have constantly urged ASEAN and the AICHR to step up its efforts to strengthen human rights dialogues as soon as possible.

One of the major concerns of CSOs is their difficulty in accessing the AICHR, due to a lack of details disclosed by the Commission during public consultations. This has constrained the work of CSOs. Meetings of the AICHR and CSO representatives should be organised regularly so that CSOs can voice their concerns and provide input on relevant issues to further enhance the effectiveness and functioning of the AICHR.

Although failing in their engagement with regional and national CSOs, the AICHR performs better with regard to dialogues with international CSOs and organisations. The Commission met with European Union bodies and institutions and other international organisations during its study tour of Europe in May 2011 (European External Action Service, 2011).

In 2012, the AICHR invited only some regional human rights organisations to participate and supervise the drafting process of the AHRD. Apart from this, the AICHR has invited some international organisations to participate in training programs, including the Office of the High Commissioner for Human Rights, the United Nations Development Programme, the Office of the United Nations High Commissioner for Refugees, the United Nations Children's Fund, UN Women, the Committee on the Rights of the Child and the United Nations Independent Expert on Human Rights.

In a report on the performance of the ASEAN human rights mechanism in 2013, Forum-Asia stated the following:

As for AICHR, the process for developing the guidelines on engagement with CSOs appears to have stalled, after initial discussions in 2012 indicated that the process would be fast tracked. In reality, guidelines drafting process appears to have been used by AICHR as a smokescreen to avoid engagement with CSOs. The existence of such guidelines relations with CSOs could have served as a critical indicator of AICHR's accountability to the ASEAN community (Somera, 2014, p. 28).

At present however, the AICHR's Guidelines only provide for a limited and arbitrary opportunity to engage with CSOs and other entities: 'The AICHR may engage in dialogue and consultation with entities

associated with ASEAN, including accredited CSOs and other stakeholders, as provided for in chapter V of the ASEAN Charter, pursuant to Article 4.8 of the AICHR's TOR' (Guidelines, Article 11.1).

However, the 4 February 2014 annual consultation held at the Institute of Research and Development for Public Enterprises, in Bangkok, Thailand, included consultation with CSOs in the draft guidelines of the AICHR's relations with CSOs. The revised draft guidelines, which incorporated national inputs, were proposed by Thailand at the AICHR meeting in November 2013. The draft guidelines were submitted for deliberation by the AICHR in the 2014 February meeting in Yangon and, at the time of writing, were expected to be adopted before the end of 2014 (AICHR, 2014).

## E. Conclusions

The period between October 2009 and March 2014 revealed that the main problems of the AICHR, regarding the fulfilment of its mandate and of the Heads of States' aspirations, are issues such as a lack of capacity, independence, ability to balance its role between political body and human rights commission, ability to engage with its stakeholders, the setting of work priorities and the AICHR's problematic self-perception (Wahyuningrum, 2014). However, continuous criticism from NGOs and CSOs suggests that stakeholders have not yet given up their expectations for the future development of the AICHR.

The widespread establishment of national human rights institutions (NHRIs) in the region has greatly helped to promote the development of domestic human rights mechanisms and legal systems.<sup>217</sup>

The TOR specified that the AICHR can adjust its focus every five years, based on a performance review. The performance review of its first five years, at the end of 2014, should include the amendment of its inconsistent clauses and words, which obscure understanding. In addition, the AICHR should consider expanding its function to respond to gross violations of human rights in ASEAN Member States. Due to the good performance of ASEAN countries in the UPR, there also exists a possibility for the AICHR to create a report-and-review system, modelled after the UPR process, which could interact with the UN UPR.

For now, the AICHR's priorities regarding co-operation focus on maintaining international communication and co-operation, promoting conversation with ASEAN Member States, government organisations, ASEAN committees and departments as well as regional and international organisations. It is impossible to establish a regional human rights court until ASEAN has universally accepted and adopted the universal idea of human rights, thus it will be more important to rely on the AICHR to contribute to the regional development of human rights standards.

In terms of the existing functions of the AICHR, it is possible for it to take the first step further, by putting pressure on relevant governments and proceeding with constructive dialogues and co-operation, which could help to settle human rights issues diplomatically. The AICHR also suffers from a

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<sup>217</sup> Out of the ten ASEAN Member States, the NHRIs of Indonesia, Malaysia, the Phillipines and Thailand were accredited an A status by the International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights. This means that those NHRIs are in full compliance with the Paris Principles.

lack of legitimacy concerning the protection of human rights and a lack of financial and technical support from inside the region. Apart from communicating with NGOs and CSOs, it is also important to suggest that the AICHR focus on strengthening co-operation with national human rights institutions in the ASEAN region.

## Bibliography

### 1. Legal and policy instruments

*ASEAN Charter* (2007), Charter of the Association of Southeast Asian Nations.

*ASEAN Declaration Against Trafficking in Persons Particularly Women and Children* (2004).

*ASEAN Declaration on the Elimination of Violence against Women* (2004).

*ASEAN Declaration on the Protection and Promotion of the Migrant Workers Rights* (2007).

EEAS (2011), *Programme Study Tour AICHR 22-27 May 2011*, Brussels, Strasbourg, Vienna, available at [http://eeas.europa.eu/asean/docs/201105\\_aichr\\_studytour\\_en.pdf](http://eeas.europa.eu/asean/docs/201105_aichr_studytour_en.pdf) accessed 11 February 2015.

*Guidelines on the Operation of the ASEAN Intergovernmental Commission on Human Rights* (2012).

*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2000), Supplementing the United Nations Convention against Transnational Organized Crime.

*The Treaty of Amity and Cooperation in Southeast Asia* (1976).

TOR (2009), *Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights*, Jakarta, October 2009.

*Vienna Declaration and Programme of Action* (1993), adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

### 2. Literature

#### a) Books

Baik, T. U. (2012), *Emerging regional human rights systems in Asia*, Cambridge: University Press.

Tan, H.-L. (2011), *The ASEAN Intergovernmental Commission on Human Rights: Institutionalizing Human Rights in Southeast Asia*, Cambridge: Cambridge University Press.

#### b) Journal articles

Cerna, C. M. (2009), 'Introductory Note to the Terms of Reference for the Establishment of the ASEAN Intergovernmental Commission on Human Rights', *International Legal Materials*, vol. 48 (5), pp. 1161-1164.

Goh, G. (2003), 'The 'ASEAN Way' Non-Intervention and ASEAN's Role in Conflict Management', *Stanford Journal of East Asian Affairs*, vol. 3 (1), pp. 113-118.

Kelsall, M. S. (2009), 'The New ASEAN Intergovernmental Commission on Human Rights: Toothless Tiger or Tentative First Step?', *AsiaPacific Issues*, No. 90, pp. 1-8.

Munro, J. (2009), 'Why states create international human rights mechanisms: The ASEAN Intergovernmental Commission on Human Rights and democratic lock-in theory', *Asia-Pac. J. on Hum. Rts. & L.*, vol. 10 (1), pp. 1-26.

Narine, S. (2012), 'Human Rights Norms and the Evolution of ASEAN: Moving without Moving in a Changing Regional Environment', *Contemporary Southeast Asia*, vol. 34 (3), pp. 365-388.

Phan, H. D. (2009), 'Institutions for the protection of human rights in Southeast Asia: A SURVEY REPORT. Contemporary Southeast Asia', *A Journal of International and Strategic Affairs*, vol. 31 (3), pp. 468-501.

Renshaw, C. S. (2013), 'The ASEAN Human Rights Declaration 2012', *Human Rights Law Review*, vol. 13 (3), pp. 557-579.

Weber, K. (2014), 'The EU, China and Southeast Asia: Divergent Views of Dealing with Human Security in Burma/Myanmar', *The Jean Monnet/Robert Schuman Paper Series*, vol. 14 (8), pp. 1-22.

### c) Policy and other reports

AICHR (2014), *Annual Consultation between Representative of Thailand to the AICHR and Representatives of Civil Society Organizations (CSOs)*, available at <http://aichr.org/press-release/annual-consultation-between-representative-of-thailand-to-the-aichr-and-representatives-of-civil-society-organisations/> accessed 16 December 2014.

AICHR (2013), *Meeting with Representatives from the Thai Civil Society Organizations (CSOs) organized by the Ministry of Foreign Affairs of the Kingdom of Thailand*, available at <http://aichr.org/report/meeting-with-representatives-from-the-thai-civil-society-organisations-csos-organised-by-the-ministry-of-foreign-affairs-of-the-kingdom-of-thailand/> accessed 12 November 2014.

Aljazeera (2009), *ASEAN defends human rights body*, available at <http://www.aljazeera.com/news/asia-pacific/2009/07/200972121831490591.html> accessed 15 November 2014.

Atnike, S. (2011), *A Commission Shrouded in Secrecy: A Performance Report on the ASEAN Intergovernmental Commission on Human Rights 2010-2011*, the Solidarity for Asian Peoples' Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), FORUM-ASIA, available at <http://www.forum-asia.org/?p=12507> accessed 10 November 2014.

Binay, J. C. (2013), *ASEAN Intergovernmental Commission on Human Rights (AICHR) Regional Workshop on Human Rights-Based Approach to Combat Trafficking in Persons, Especially Women and Children*, available at <file:///Users/ylyloop101/Downloads/Keynote%20Address%20of%20the%20Vice%20President%20of%20the%20Philippines.pdf> accessed 18 March 2015.

Chalermphanupap, T. (1993), *10 Facts about ASEAN Human Rights Cooperation*, available at <http://www.aseansec.org/HLP-OtherDoc> accessed 12 February 2015.

Djamin, R. (2013), *AICHR needs to work on protecting migrant workers' civil liberties*, Quratul-Ain Bandial, The Brunei Times, available at <http://www.bt.com.bn/2013/02/07/aichr-needs-work-protecting-migrant-workers-civil-liberties> accessed 18 March 2015.

Drummond, C. (2010), *The ASEAN Intergovernmental Commission on Human Rights (AICHR) and the Responsibility to Protect: Development and Potential*, Working Paper on ASEAN and R2P (No. 1).

Haris, A. et al (2010), *Hiding Behind Its Limits: A Performance Report on the first year of the ASEAN Intergovernmental Commission on Human Rights 2009-2010*, the Solidarity for Asian Peoples' Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), FORUM-ASIA, available at <http://www.forum-asia.org/?p=13098> accessed 4 January 2014.

Human Rights Herald (2005), *ASEAN adopts action plan to protect women's and children's rights*, June 2005, available at [http://www.aseanhrmech.org/downloads/Human\\_Rights\\_Herald\\_Issue2.pdf](http://www.aseanhrmech.org/downloads/Human_Rights_Herald_Issue2.pdf) accessed 18 March 2015.

Indonesia Ministry of Foreign Affairs, *Reply Letter From Indonesia MFA on Review of AICHR's TOR*, available at <http://www.hrwg.org/scope-of-works/asean/aichr/item/242-reply-letter-from-indonesia-mfa-on-review-aichr-s-tor> accessed 14 December 2014.

Joint NGO statement (2014), *10 years on from the ASEAN Declaration Against Trafficking in Persons: Civil Society expects progress in the forthcoming ASEAN Convention on Trafficking in Persons*, available at <http://www.gaatw.org/resources/statements/794-10-years-on-from-the-asean-declaration-against-trafficking-in-persons-civil-society-expects-progress-in-the-forthcoming-asean-convention-on-trafficking-in-persons> accessed 19 March 2015.

Medina, C. P. (2002), *Working Group for an ASEAN Human Rights Mechanism*, available at <http://www.thinkcentre.org/article.cfm?ArticleID=1797> accessed 7 December 2013.

Muntarbhorn, V. (2012), *Development of the ASEAN Human Rights Mechanism. Directorate-General for External Policies of the Union Directorate B, Policy Department*, available at <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN> accessed 12 February 2015.

Poole, A. (2010), *Rights or rhetoric: Does ASEAN's new human rights body' matter*, 4th Oceanic Conference in International Studies, Auckland, available at [http://apsa2010.com.au/full-papers/pdf/APSA2010\\_0181.pdf](http://apsa2010.com.au/full-papers/pdf/APSA2010_0181.pdf) accessed 5 December 2013.

Renshaw, C. (2010), *Understanding the new ASEAN Intergovernmental Commission on Human Rights: the limits and potential of theory*, University of New South Wales Faculty of Law Research Series.

Shiwei, Y. (2012), *Still Window-Dressing: A Performance Report on the ASEAN Intergovernmental Commission on Human Rights 2011-2012*, the Solidarity for Asian Peoples' Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), FORUM-ASIA, available at <http://www.forum-asia.org/?p=16296> accessed 10 November 2014.

Singh, S. & Chung, Y. R. (2014), *A look at ASEAN Declaration on Violence against Women and Violence Against Children*, Women's caucus on ASEAN, available at <https://womenscaucusonasean.wordpress.com/2014/02/05/a-look-at-asean-declaration-on-violence-against-women-and-violence-against-children/> accessed 19 March 2015.

Somera, N. et al (2014), *Four Years On and Still Treading Water: A Report on the Performance of the ASEAN Human Rights Mechanism in 2013*, by the Solidarity for Asian Peoples' Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), FORUM-ASIA, available at <http://www.forum-asia.org/?p=17962> accessed 12 November 2014.

Tanada, W. (2009), *The Operationalization of the AHRB's Promotion and Protection Functions: An Outlook*, Eighth Workshop on the ASEAN Regional Mechanism on Human Rights', available at <http://www.aseanhrmech.org/downloads/Mr.%20Wigberto%20E.%20Ta%F1ada.pdf> accessed 15 November 2014.

Termsak, C. (2010), *ASEAN-10: Meeting the Challenges*, available at <http://www.aseansec.org/2833.htm> accessed 12 September 2013.

Wahyuningrum, Y. (2014), *The Role of Civil Society to AICHR TOR Review & Amendment*, available at <http://aseanpeople.org/wp-content/uploads/2014/01/CSOtoReviewTORAICHR-Yangon-ACSC-APF2014.pdf> accessed 12 February 2015.

## X. Gaps and deviances in the human rights protection system of the South Asian Association for Regional Cooperation<sup>218</sup>

### A. Introduction

The South Asian Association for Regional Cooperation (SAARC) provides the basic regional legal and institutional framework for cooperation among its Member States, through the adoption of the SAARC Charter.<sup>219</sup> The SAARC Charter postulates ‘peace, stability and progress in the region’. It also provides for mechanisms to initiate cooperation among Member States to strengthen the socio-economic fabric of South Asia. The evolution and functioning of SAARC in the last three decades, with the SAARC Charter as its constituent instrument, has resulted in the adoption of various binding and non-binding human rights instruments, reflecting existing global human rights norms. These instruments, though seeking to reflect global human rights standards, primarily focus on regional realities. Furthermore, the standards which make up the SAARC human rights protection system are in a process of evolution and are still mainly couched in soft law instruments, such as the ‘SAARC Social Charter’, the ‘SAARC Charter of Democracy’ (hereinafter Democracy Charter) and the SAARC initiatives relating to poverty alleviation, health, gender and the creation of a food bank. These initiatives take the form of ministerial declarations and arrangements and can thus be regarded as soft law approaches to specific and unique South Asian problems. Incorporating global human rights standards into such soft law instruments is acceptable to the majority of the countries of South Asia as it requires less cumbersome implementation mechanisms and takes into account the respective social and economic situations within the different countries.

Although there is, as yet, no comprehensive regional human rights instrument that seeks to bind all the South Asian countries,<sup>220</sup> SAARC Member States have adopted two binding regional human rights instruments. One relates to the prevention and combating of human trafficking in women and children and the other seeks to outline arrangements for the promotion of child welfare in South Asia. The ‘SAARC Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution’ (hereinafter SAARC Convention on Trafficking), concluded in 2002, was necessitated as a specific urgent measure to deal with a serious regional problem (see e.g. UNODC, 2012). The SAARC Convention on Trafficking incorporates and refers to global human rights standards such as the ‘Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others’ (CSTPEP) of 1949.<sup>221</sup> It should be noted that, besides the ‘Council of Europe Convention on

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<sup>219</sup> Member States of the SAARC are Afghanistan, Bhutan, Bangladesh, India, Maldives, Nepal, Pakistan and Sri Lanka. SAARC was constituted through the adoption of SAARC Charter on 8 December 1985.

<sup>220</sup> The only other human rights instrument in the regional context is the Declaration adopted by the Member States of the Association of South East Asian Nations (ASEAN) (see Chapter IX).

<sup>221</sup> Besides referring to CSTPEP, 1949 the SAARC Convention on Trafficking in its preamble referred to Convention on the Elimination of all Forms of Discrimination against Women, 1979; International Convention on Civil and Political Rights, 1966; and the Convention on the Rights of the Child, 1989. It did not, however, refer to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted on 15 November 2000 and opened for signature in December 2000 in Palermo, Italy (known as ‘Palermo Convention’).

Action against Trafficking in Human Beings’ and the ‘ASEAN Declaration against Trafficking in Persons, particularly Women and Children’, the SAARC Convention on Trafficking is the only other regional legal instrument on this issue. The ‘SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia’ (hereinafter SAARC Convention on Child Welfare), also concluded in 2002, makes specific references to the 1989 United Nations (UN) ‘Convention on the Rights of the Child’ (CRC) and the ‘Declaration of the World Summit for Children’ (SAARC Convention on Child Welfare, preamble).<sup>222</sup>

The following section will, firstly, provide a brief overview of the SAARC Charter and SAARC soft law instruments and programmes with a specific focus on the the Democracy Charter, as they invoke some global human rights values and standards. The SAARC Charter is the basic constituent instrument of SAARC itself and, for that reason, its references to human rights standards and values are important and provide an insight into the approach of the Member States to human rights. It also creates an obligation on the Member States to incorporate some of these standards into their national laws. The Democracy Charter, on the other hand, reflects the aspirational aspect of the Member States to take into account and implement some of the existing global human rights standards. In this regard, Member States seem to understand the limitations of their own system in completely incorporating these values and standards and, for that reason, the Democracy Charter has been formulated in the form of a declaration. However, it also provides an insight into the approach of the Member States towards these norms and standards and, therefore, it is important to discuss it in the following study.

Secondly, this chapter will examine both of the core SAARC human rights instruments, namely, the SAARC Convention on Trafficking and the SAARC Convention on Child Welfare, and will identify whether the norms and standards incorporated in these two instruments deviate from the existing international and regional standards. The chapter will also map the desired or potential human rights performance of the political and administrative institutions in the region. Before concluding, the chapter will present a brief survey of experts in the field, to assess and understand the status of the legal and institutional structure of the SAARC, as related to human rights. The conclusions will sum up the most important insights regarding SAARC instruments and human rights

Both the SAARC Charter and the Democracy Charter refer to several basic global human rights standards, such as to ‘provide all individuals the opportunity to live in dignity and to realise their full potentials’ (SAARC Charter, Article 1 (b)). The Universal Declaration of Human Rights (UDHR) refers to the ‘inherent dignity and (...) equal and inalienable rights of all members of the human family’ (UDHR, preamble).<sup>223</sup> It should be noted, however, that the SAARC Charter and the Democracy Charter both refer to the rights of their peoples and communities, while global human rights standards address primarily the rights of individuals.

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<sup>222</sup> The Declaration is officially called ‘World Declaration on the Survival, Protection and Development of Children’ and was agreed on at the World Summit for Children in New York City on 30 September 1990.

<sup>223</sup> SAARC has also adopted from time to time Ministerial Declarations relating to the global economic crisis, the ‘Colombo Statement on Children of South Asia’, regarding cooperation in combating terrorism, health, common environment programme, common position on climate change, the ‘Rawalpindi Resolution on Children of South Asia’, and the ‘New Delhi Declaration on Environment and Declaration by Commerce Ministers’.

## B. SAARC instruments and human rights

### 1. SAARC Charter

The SAARC Charter, as mentioned above, provides the basis for the organisation's legal and institutional framework.<sup>224</sup> It states that Member States are 'desirous of promoting peace, stability, amity and progress in the region through strict adherence to the principles of the United Nations Charter' (SAARC Charter, Article 1). A close reading of the SAARC Charter also provides a glimpse of the socio-economic policies pursued by the Member States of the region and the mechanism available to deal with associated issues. In that sense, the SAARC Charter itself is a distinctive legal instrument, incorporating certain human rights values and standards. In other words, the broad human rights canvas in the context of the UN is incorporated into the SAARC Charter.

From the general gamut of basic obligations laid out by the UN Charter,<sup>225</sup> the SAARC Charter moves on to more specific regional issues, stating that the countries of the region are 'bound by ties of history and culture'. There is also reference to 'common problems, interests and aspirations' of the peoples of South Asia and the need for joint action within their respective political and economic systems and cultural traditions. The SAARC Charter recognises such action as mutually beneficial, desirable and necessary for promoting the welfare and improving the quality of life of the people of the region. It also notes that 'economic, social and technical cooperation among the countries of South Asia would contribute significantly to national and collective self-reliance' (SAARC Charter, Article 5).

The objective of the SAARC Charter is two-fold. Firstly, it seeks to promote the welfare of the peoples of South Asia and, secondly, to improve their quality of life, with economic growth, social progress and cultural development forming the foundation of these objectives (SAARC Charter, Article I). All of this, it is noted, should provide 'individuals [with] the opportunity to live in dignity and to realise their full potentials'. This language reflects the goals and aspirations of the UDHR and the 1966 International Covenants.

Bangladesh, India, Nepal and Sri Lanka are parties to both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>226</sup> The ICESCR provides for several basic rights of individuals, including the preservation of the 'inherent dignity' of the human being. Besides that it also refers to the right to 'self-determination' (the right of peoples to freely pursue their economic, social and cultural development and to freely dispose of their natural wealth without prejudice to their obligations relating to international economic co-operation), the right to work and gain one's living in just and favourable working conditions and the right to form trade unions. It further recognises the protection of the family, the right to be free from hunger, the right to the highest attainable standard of mental and physical health (which also includes

<sup>224</sup> The SAARC Charter was adopted formally by the Heads of States on 8 December 1985, thereby constituting the SAARC as a regional organisation.

<sup>225</sup> These are principles of the UN Charter that have been incorporated in the preamble of the SAARC Charter. These principles are: 'sovereign equality, territorial integrity, national independence and non-use of force, non-interference in the internal affairs of other states and peaceful settlement of disputes' (SAARC Charter, Article 1).

<sup>226</sup> Bhutan, Maldives and Pakistan are not parties to the ICCPR or ICSECR.

the right to medical facilities), the right of everyone to an education, the right to take part in cultural life and to enjoy the benefits of scientific progress and the right of men and women to enjoy these rights without discrimination.

The SAARC Charter does not provide for all of these rights. It broadly identifies and seeks to promote the social, economic and cultural aspects of the peoples of South Asia. As mentioned above, there is a general reference in the preamble to the regional cooperation among the countries of South Asia as '[...] mutually beneficial, desirable and necessary for promoting welfare and improving the quality of life of the peoples of the region.' It further provides that '[...] economic, social and technical cooperation among the countries of South Asia would contribute significantly to national and collective self-reliance.' It also seeks to 'promote active collaboration and mutual assistance in the economic, social, cultural, technical and scientific fields'.

The above narratives on various socio-economic and cultural rights, as found both in the ICCPR and ICSECR have been broadly reflected within the SAARC Charter. The right to education, the right to self-determination, the right to freedom from hunger, the right to medical assistance and a host of other rights do not find a specific mention within the Charter. However, there are several other soft law instruments that have been adopted to give effect to these rights. Some countries in the region, like India, have provided for some of these rights through legislative mechanisms.<sup>227</sup>

## **2. SAARC soft law instruments and programmes with a specific focus on the SAARC Charter of Democracy**

SAARC has launched and adopted several programmes and soft law instruments which are important concerning the protection of human rights in the region. The SAARC Social Charter was signed at the tenth Summit of the Heads of States in Colombo (Sri Lanka) in 1996. The Charter is based on the idea as embodied in its preamble, that the countries of South Asia are '[...] linked by age-old cultural, social and historical traditions and that these have enriched the interaction of ideas, values, cultures and philosophy among the peoples and the States and that these commonalities constitute solid foundation for regional cooperation'. The Social Charter of the SAARC had two important institutional aspects: implementation through National Coordination Committees in all Member States and a National Plan of Action to be outlined in each of the Member States. The principal goal of the SAARC Social Charter was incorporated in 21 different principles, goals and objectives and some of them could be summarised as follows: to promote welfare of peoples of South Asia; to improve their quality of life; to accelerate economic growth, social development and cultural development; and to provide all individuals the opportunity to live in dignity and to realise their full potential.

Another field of action of SAARC is the fight against poverty. Under its poverty alleviation programme, SAARC has undertaken a regional poverty profile. This is one of the important policy initiatives taken by

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<sup>227</sup> India, for example, has passed legislation relating to the 'Right to Education Act' of 2009 and 'National Food Security Act', 2013, guaranteeing the right to food. The right to form trade unions and the right to access medical facilities are provided through constitutional guarantees in Article 21, which provides for right to life. Since these rights involve economic resources, each country has its own limitations while implementing them.

the SAARC. Along with this, social development is also on the agenda of the SAARC. It has taken several initiatives with regard to the right to health since 1992.

Cooperation in the field of health has taken place via occasional Health Ministers Conferences. One such emergency meeting of Health Ministers took place in April 2003, to take stock of the infectious health hazard concerning Severe Acute Respiratory Syndrome (SARS). The Health Ministers meeting decided to develop a regional strategy concerning these health issues. The Malé Declaration (Maldives) of Health Ministers in November 2003 referred to the following issues that were important to SAARC region: emphasis on traditional system of medicine; inter-country cooperation regarding emerging and re-emerging diseases; develop and strengthen mechanism for surveillance, reporting and management by exchange of expertise and sharing of infrastructural facilities; common regional strategy to combat HIV/AIDS, TB and other deadly communicable disease; setting up of SAARC Surveillance Centres; and SAARC Rapid Deployment Health Response System. The Second Meeting of the SAARC Health Ministers (July 16, 2005) in Islamabad, Pakistan, adopted the 'Islamabad Declaration on Health and Population'. Under this Declaration, SAARC countries agreed to do the following: to set up a regional institutional mechanism and establish national focal points within the Ministries of Health and Population; to share experiences, technical expertise and services; and to complement the region's efforts in achieving the Millennium Developmental Goals (MDGs) and other priority and population issues. The Dhaka Declaration, passed by the Health Ministers of the region in April 2005 agreed on the following priorities: issues of reproductive health; guidelines for basic health services, nutrition, safe water and sanitation, particularly to rural areas; production of affordable medicines and traditional medicines. The Fourth Meeting of the SAARC Health Ministers, held in Malé (Maldives) in April 2012, besides reiterating the above agenda, primarily continued to emphasis on communicable diseases such as HIV/ AIDs and Tuberculosis, addressed common challenges of sanitation and access to safe drinking water and outlined mechanisms to reduce malnutrition.

SAARC is also active in the field of gender. In 1986, it has established the Technical Committee on Women in Development. This was followed by the Technical Committee on Social Development and, along with it, a SAARC Integrated Programme of Action (SIPA), created in January 2000. A Technical Committee on Women, Youth and Children was created in January 2004 to deal with some of the crucial inter-related issues.

The 'Agreement Establishing SAARC Food Bank' was signed on 3 April 2007. This agreement supersedes the earlier 'Agreement Establishing the SAARC Food Security Reserve'. The primary purposes of the food bank in the SAARC region were the following: regional and sub-regional collective self-reliance with respect to food security as a means of combating the adverse effects of natural and man-made calamities; establishing a regional food reserve by member countries based on the principle of collective self-reliance to improve their food security; to have and build up a food security reserve so that some could be used during normal time food shortages and emergencies; and to solve regional food shortages through collective action.

The Democracy Charter<sup>228</sup> seeks to provide for the incorporation of several human rights values and standards into the flexible operational framework of the Member States. Its twin objectives are as follows: (a) to provide all individuals with the opportunity to live in dignity, and (b) to provide all individuals with the opportunity to realise their full potential as enshrined in the SAARC Charter. While its general objective is to promote peace, freedom and social justice, it further seeks to achieve shared commitment to the rule of law, liberty and the equal rights of all citizens.

Further, it reaffirms faith in fundamental human rights and the dignity of the human person as enunciated in the UDHR and as enshrined in the respective constitutions of the SAARC Member States. More importantly, it provides for a link between the global human rights standards and the constitutional framework of its Member States. This link is shown in the preamble of the Democracy Charter when it states that ‘recognizing the inclusive policies, including constitutional protection developed in keeping with the wishes of the people, is essential for developing trust and understanding between and among communities’. It should be noted that although the constitutions of SAARC countries provide for the recognition and implementation of basic human rights of all individuals,<sup>229</sup> this is not a basic precondition for the membership of SAARC.

The Charter also reflects the complexities of referring to and incorporating these global human rights standards in the unique and diverse contexts of South Asia. These complexities include constitutional change of governments, respect for democracy and democratic institutions, including the legislature, the executive and the judiciary. In some of the South Asian countries, these constitutional bodies were under severe strain at different times. Therefore, the Democracy Charter had to refer to the strengthening of these institutions and sought commitment from its Member States. However, there is no mechanism to initiate action against members that violate the Democracy Charter’s standards. In the context of SAARC, these standards therefore refer to ‘inclusive policies’ that have been developed by respective constitutional protection frameworks with a view to further developing trust and understanding between and among communities.

In the context of SAARC, these are ‘policies’ not ‘rights’, as there is no effective remedy available to enforce these standards at a regional level. At the level of countries, some of these policies have been given the status of rights and can be enforced either through human rights committees or through regular judicial enforcement mechanisms. Participation of people in the process of development and governance, especially in the elimination of extreme poverty, has been regarded as essential to the promotion and consolidation of democracy. This linkage to development and elimination of poverty is crucial in the context of South Asia. Elimination of poverty has a direct correlation to the effective operation and implementation of human rights standards. As mentioned above, the SAARC Charter and Democracy Charter put more emphasis on community rights and obligations that should be undertaken

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<sup>228</sup> Adopted in February 2011 at the 33<sup>rd</sup> meeting of the Council of Ministers in Thimpu (Bhutan).

<sup>229</sup> The basic human rights standards broadly include, the right to life (Article 6 of ICCPR), the right to liberty and security of person (Article 9 of ICCPR), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Article 7 ICCPR), the right to freedom of movement (Article 12 ICCPR), the right to freedom of thought, conscience and religion (Article 18), the right of the family and child (Article 24, ICCPR) and the rights of minorities (Article 27).

by the Member States, rather than on individual rights and the remedies that should be made available upon violation of those rights. Article 2 of the ICCPR provides for such a remedy in case of violations. The SAARC approach to human rights standards is more policy-oriented than rights-based.

Taking into account the realities of South Asia, the Charter refers to ‘tolerance and diversity’ as critical for creating ‘effective foundations for a pluralistic democratic society’.<sup>230</sup> Furthermore, narratives of these social and political realities within the South Asian context are reflected when the Charter points out that ‘undemocratic and unrepresentative governments weaken national institutions, undermine the Constitution and the rule of law and threaten social cohesion and stability in the long-run’. While noting these realities, the Charter seeks to ensure the strengthening of democratic institutions, the reinforcing of democratic practices, checks and balances among the legislature, the executive and the judiciary and guaranteeing the independence of the judiciary and the primacy of the rule of law. Besides these, there is a specific reaffirmation of adherence to the UN Charter and other international instruments to which Member States of SAARC are parties. The Democracy Charter also seeks to recognise the role of political parties and civil society in a democracy and renounces unequivocally any unconstitutional change of elected governments in a Member State.<sup>231</sup>

### **3. SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution**

The decision to explore the possibilities for concluding a SAARC convention on trafficking was taken at the 1997 SAARC Summit. Pursuant to this decision, and after several rounds of negotiations, SAARC Member States concluded this Convention in 2002. For SAARC Member States, it addressed one of the most key and grave cross-border issues.

A key concern of SAARC Member States relates to their countries being used as sending, receiving and transit points in the trafficking of persons. Thus, the Convention sought to establish effective regional cooperation for preventing trafficking for prostitution and for the investigation, detection, interdiction, prosecution and punishment of those responsible for such trafficking. The SAARC Convention on Trafficking regards trafficking in persons as ‘incompatible with the dignity and honour of human beings’ and ‘in violation of basic human rights’.

The SAARC Convention on Trafficking seeks to specifically prevent and combat trafficking in women and children. CSTPEP, on the other hand, has a broader scope as it refers to trafficking in ‘persons and the exploitation of the prostitution of others’. The basic tenets of this SAARC Convention were primarily

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<sup>230</sup> The ‘realities of South Asia comprise, *inter alia*, of a complex set of socio-economic indicators such as, for example, diverse population with religious and language minorities, poverty, strengthening of democracy and democratic institutions.’

<sup>231</sup> The Charter also seeks to achieve these goals through linkage of development of democracy, promotion of sustainable development and alleviation of poverty through good governance, equitable and participatory process, promoting equality of opportunity, equality of access and equality of treatment at the national level, in keeping with the respective constitutional provisions, as safeguards against social injustices and stratification, to inculcate democratic values in society through education and awareness building, to ensure gender mainstreaming in government and society, to uphold participatory democracy characterised by free, fair and credible elections and elected legislatures and local bodies, encourage all democratic forces in South Asia, including elected representatives of the people, to unite against any unconstitutional change in government in any South Asian country, and work towards the restoration of democracy in keeping with SAARC Charter.

drawn from CSTPEP.<sup>232</sup> The recommendations of various bodies and conferences, including the 1995 Fourth World Conference on Women, in Beijing, have also been incorporated into this Convention.

When it comes to implementation, regional cooperation is the key element of the Convention, taking into account the diversities and complexities involved in the legal and administrative mechanisms of the Member States. In fact, the Convention goes a step further by extending regional cooperation to the provision of assistance, rehabilitation and repatriation to victims of trafficking for prostitution.

#### *a) Definition of trafficking*

There is a clear distinction between the definition of trafficking in the SAARC Convention on Trafficking and the CSTPEP. Reference will also be made to the 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime' adopted in December 2000 in Palermo, Italy (known as the 'Palermo Convention').<sup>233</sup>

The SAARC Convention definition purports to take into account the context of its own regional realities. According to Article I of the SAARC Convention on Trafficking 'trafficking' is the 'moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking'. The definition of 'prostitution' is the sexual exploitation or abuse of persons for commercial purposes. 'Traffickers' 'include persons, agencies or institutions engaged in any form of trafficking'.

The suppression of slavery and trafficking in persons has a long history, which the CSTPEP briefly chronicles in its preamble by reference to several international conventions and agreements.<sup>234</sup> Article 1 of CSTPEP, states that 'a trafficker' is 'any person who, to gratify the passions of another: (1) procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) exploits the prostitution of another person, even with the consent of that person'. The scope of the definition also extends to anybody who 'keeps or manages or knowingly finances or takes part in the financing of a brothel' and 'knowingly lets or rents a building or other places or any part thereof for the purpose of the prostitution of others' (CSTPEP, Article 2).

<sup>232</sup> Six of the eight countries of the SAARC Member States are parties to the CSTPEP. These States are: Afghanistan (May 1985), Bangladesh (January 1985), India (January 1953), Nepal (December 2002), Pakistan (July 1952) and Sri Lanka (April 1958).

<sup>233</sup> India and Sri Lanka have signed the Protocol only in 2002 and 2000 respectively (ratification on 5 May 2011 (India) and 15 June 2015 (Sri Lanka)). All other Member States of the SAARC are not parties to this Protocol. The majority of the Member States of the SAARC are parties to the United Nations Convention against Transnational Organized Crime. These are: Afghanistan (23 September 2003), Bangladesh (13 July 2011), India (5 May 2011), Maldives (4 February 2013), Nepal (23 December 2011), Pakistan (13 January 2010), Sri Lanka (22 September 2006).

<sup>234</sup> These are: International Agreement of 18 May 1904 for the Suppression of the White Slave Traffic as amended by the Protocol approved by the General Assembly of the United Nations on 3 December 1948; International Convention of 4 May 1910 for the Suppression of the White Slave Traffic; International Convention of 30 September 1921 for the Suppression of the Traffic in Women and Children, as amended by the Protocol approved by the General Assembly of the United Nations on 20 October 1947; International Convention of 11 October 1933 for the Suppression of Traffic in Women of Full Age, as amended by the Protocol approved by the General Assembly of the United Nations on 20 October 1947.

In the SAARC Convention on Trafficking, the emphasis is on ‘buying and selling’ and ‘moving’ for monetary and other considerations. The CSTPEP does not refer to these aspects, and the monetary and other considerations do not form part of the definition. However, the element of ‘consent’ is common in both conventions. The SAARC Convention also refers to the persons subjected to trafficking as those ‘women and children victimised or forced into prostitution by the traffickers by deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage or any other unlawful means’ (Article I (5)).

The broadest and more inclusive definition is provided in the Trafficking Protocol to the Palermo Convention which, in Article 3 (a) defines ‘trafficking in persons’ as ‘the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person for the purpose of exploitation.’ It further provides the definition of ‘exploitation’ as to ‘include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour, or services, slavery or practices similar to slavery, servitude or the removal of the organs’.

#### ***b) Scope and application***

Repatriation and rehabilitation form an integral part of the SAARC Trafficking Convention. The Convention seeks to promote cooperation among Member States ‘so that they may effectively deal with the various aspects of prevention, interdiction and suppression of trafficking in women and children’ (SAARC Convention on Trafficking, Article II). The phrase ‘may effectively deal with’ should be highlighted, as it does not create mandatory obligations for the SAARC Member States. The SAARC Convention on Trafficking, as with the CSTPEP, seeks to criminalise the act of trafficking for any person who keeps, maintains, manages, knowingly finances or takes part in the financing of a place used for the purpose of trafficking and knowingly lets or rents a building or takes part in the financing of a place used for the purpose of trafficking (Article III).<sup>235</sup> The standards set in the Trafficking Protocol to the Palermo Convention are legally binding as they provide that ‘Each State Party shall adopt such legislative and other measures as may be necessary’ (Article 5, Trafficking Protocol to the Palermo Convention).

The SAARC Trafficking Convention makes clear that courts in Member States should take into consideration the ‘factual circumstances which make the commission of such offences particularly grave’, such as the involvement of the offender in an organised criminal group or the transnational nature of trafficking in persons (Article IV).<sup>236</sup> Further aggravating circumstances are where violence or arms were used by the offender, where the offender held public office (and the offence was committed as a misuse of that office), where children are the victims of the trafficking and where the offence is committed in, or in the vicinity of, a custodial, educational or social institution that children and

<sup>235</sup> Even letting out a part of the place or any building for the purpose of trafficking would amount to a crime. It also includes any attempt or abetment to commit any crime of this nature.

<sup>236</sup> Reference has also been made to the International Convention against Transnational Organized Crime – with an additional Protocol to Prevent, Suppress and Punish Trafficking in Persons.

students visit for educational, sports, social and cultural activities.<sup>237</sup> These specific details relating to aggravating circumstances are not provided for in the CSTPEP.<sup>238</sup> The Trafficking Protocol of the Palermo Convention, on the other hand, seeks to criminalise the offence of trafficking and obliges the state parties to take measures to assist and protect victims<sup>239</sup>.

Extradition and prosecution of traffickers form part of both the SAARC Convention and the CSTPEP (SAARC Convention on Trafficking, Article VIII; CSTPEP, Article 7-9). The SAARC Trafficking Convention obliges state parties to cooperate effectively by providing for sufficient means, training and assistance to their respective authorities, sensitising their enforcement agencies and judicial authorities and establishing regional task forces consisting of officials of the Member States to facilitate the implementation of the Convention. It also provides for periodic reviews of the implementation of the Convention. Regular exchange of information relating to agencies, institutions and individuals who are involved in trafficking in the region is also provided for. Repatriation and rehabilitation of victims are also part of the obligations under the SAARC Convention. Similar, yet more detailed, provisions have been incorporated into the Trafficking Protocol of the Palermo Convention. In fact, a major feature of the Protocol is that, while criminalising the offence of trafficking (to link it to transnational organised crime), emphasis is placed on the victims and their rehabilitation and repatriation.

#### **4. SAARC Convention relating to Regional Arrangements for the Promotion of Child Welfare in South Asia**

The SAARC Convention on Child Welfare was concluded in 2002. Besides this Convention, SAARC had concluded two other arrangements dealing with the welfare of children within South Asia. Issues relating to children and their welfare have, in fact, dominated the agenda of the SAARC meetings and summits over the last three decades. In fact, the development and wellbeing of children was one of several areas of cooperation identified by SAARC Member States when they initiated their consultations on the establishment of SAARC in early 1981.<sup>240</sup>

Following these initiatives, at the third Ministerial Conference on Children held at Rawalpindi, Pakistan, the SAARC Member States adopted the 'Rawalpindi Resolution on Children of South Asia'. This Resolution reaffirmed the 'SAARC's adherence to the Declaration of the World Summit for Children and its commitment to the UN Convention on the Rights of the Child'. The SAARC's initiative on children, while referring to various evolving global human rights standards relating to children, was rooted in an

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<sup>237</sup> Article V of the SAARC Convention on Trafficking places specific obligation of confidentiality and also provides for appropriate counselling.

<sup>238</sup> The SAARC Convention on Trafficking provides for an elaborate provision relating to mutual legal assistance under its Article VI while the 1949 UN Convention leaves these details to domestic legal requirements as per its Article 13 (which outlines these measures as well).

<sup>239</sup> Part II of the Trafficking Protocol to the Palermo Convention provides in detail (Articles 6-11) various measures protect and assist victims, including protecting their privacy and identity.

<sup>240</sup> SAARC was formally launched in 1985. Following this, two Ministerial Conferences were held – first in New Delhi (1986) and the second in Colombo (1992) to reach a regional consensus on sustainable measures to realise the rights of children to survival, development, protection and participation; this was followed up by several initiatives relating to child welfare within the region. These were: to observe 1990 as the 'SAARC Year of the Girl Child'; 1991-2000 as the SAARC Decade of the Girl Child (see Rawalpindi Resolution on Children in South Asia).

outlining and appreciation of regional concerns such as malnutrition in children, enrolment in primary education, health, nutrition, gender and equality.<sup>241</sup>

The Rawalpindi Resolution of 1996 was followed by the adoption of the formal and binding 2002 SAARC Convention on Child Welfare. This Convention could be regarded as giving effect to the provisions and standards set in the CRC.<sup>242</sup> The SAARC Convention on Child Welfare also reflects the regional realities when it mentions that ‘a quarter of the world’s children live in South Asia and many of them require assistance and protection to secure and fully enjoy their rights, and to develop to their full potential and lead a responsible life in family and society’ (SAARC Convention on Child Welfare, preamble). The CRC, however, refers to a larger world in its preamble when it speaks of ‘the inherent dignity and of the equal and inalienable rights of all members of the human family’. The SAARC Convention on Child Welfare, on the other hand, while recognising the standards set out in the CRC, refers more specifically to regional issues, but also seeks to cover the international standards in its implementation. For example, it refers in its preamble to ‘the development of the full potential of the South Asian child’. It also refers to ‘regional solidarity and cooperation through sharing of experience, expertise, information and resources [...] in galvanizing the efforts of the South Asian nations to fulfil and protect the rights of the Children’.

In the following discussion, we will examine various provisions of the SAARC Convention on Child Welfare and relate it to the CRC and related human rights instruments and standards. This is an attempt to examine to what extent universally accepted human rights standards have been incorporated into the SAARC Convention on Child Welfare.

#### *a) Definition of ‘child’*

We begin with the definition of ‘child’. According to the CRC, ‘a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’ (CRC, Article 1). A similar definition of the child appears in the SAARC Convention on Child Welfare, also taking 18 as the age below which an individual is considered a child. The latter goes one step further, stating that the ‘rights of the child’ ‘shall mean the rights of the children embodied in the UN Convention on the Rights of the Child’. It is, therefore, clear that the SAARC Convention on Child Welfare closely follows the standards set out in the CRC. The purposes and objectives laid out in the SAARC Convention on Child Welfare make this point amply clear.<sup>243</sup>

<sup>241</sup> SAARC Member States provided collective positions on many of these issues at the negotiations of various multilateral conventions such as United Nations Conference on Environment and Development, 1992, International Conference on Population and Development, 1994, World Summit on Social Development, 1995, Fourth World Conference on Women, 1995, Habitat-II, 1996.

<sup>242</sup> All the Member States of the SAARC are parties to the UN Convention on the Rights of the Child.

<sup>243</sup> Article II of the SAARC Convention on Child Welfare sums up this idea and states that, ‘[t]he Purpose and Objectives of the present Convention shall be to: 1. Unite the States Parties in their determination of redeeming the promises made by them to the South Asian Child at the World Summit for Children and at various other national and international conferences and successive SAARC Summits; 2. Work together with commitment and diligence, to facilitate and help in the development and protection of the full potential of the South Asian Child, with understanding of the rights, duties and responsibilities as well as that of others; 3. Set up appropriate regional arrangements to assist the Member States in facilitating, fulfilling and protecting the rights of the Child taking into account the changing needs of the child’.

### ***b) Regional priorities***

The SAARC Convention on Child Welfare places emphasis on regional priorities and arrangements (Article IV). While fully recognising the rights and obligations under the CRC and other international and national instruments, it requires its Member States to ‘place special emphasis on the important areas for child development and well-being as regional priorities that can benefit immensely from bilateral and regional cooperation’ (Article IV (1)). These regional priorities are vital to South Asia as they include such basic services as education, healthcare, prevention of disease and malnutrition (Article IV (2)). These priorities also extend to legal and administrative mechanisms to protect the child from any form of discrimination, abuse, neglect, exploitation, torture or degrading treatment, trafficking and violence.<sup>244</sup>

The SAARC instrument also provides for regional cooperation in the field of child rights and development by way of appropriate bilateral and multilateral sharing of information, experience and expertise. Formulation of regional strategies and measures for the prevention of inter-country abuse and exploitation of the child, including trafficking of children for sexual, economic and other purposes is also provided for. The CRC also places the obligation on states parties to cooperate and requires them to ‘take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form’ (CRC, Article 25).

### ***c) Implementation issues***

The SAARC Convention on Child Welfare provides that ‘Nothing in the Convention shall affect any provisions which are more conducive to the realisation of the rights of the South Asian child and which may be contained in national laws or international instruments that are in force’ (SAARC Convention on Child Welfare, Article VII). It also recognises the role of non-government bodies, especially community-based organisations, in implementing the provisions.<sup>245</sup> The CRC also covers the implementation and the application of those provisions that might be more conducive to the realisation of the rights of the child. These provisions, the CRC states, might be provided in the law of one of the parties to the Convention or international law in force for that state. Therefore, the CRC also recognises and provides for the possibility of more extensive implementation within a regional arrangement.

### ***d) Institutional mechanisms***

The SAARC Convention does not provide for any formal institutional mechanism. Since it is operating within a regional framework, the institutional mechanism is located within the SAARC Ministerial Conference, as the policy-making body, followed by the SAARC Secretariat, as its executive body. The

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<sup>244</sup> These include elimination of child labour, promotion of child’s sense of dignity and child’s reintegration into the family and society, compulsory civil registration of births, marriages and deaths; also to encourage and support administrative and judicial institutions to arrange for suitable mechanisms at appropriate levels and in accordance with local customs and traditions.

<sup>245</sup> Article VIII of the SAARC Convention on Child Welfare provides that ‘State Parties, while implementing the provisions of the Convention, may encourage and support the participation of non-Governmental bodies including community-based organisations’. There is a specific provision in the SAARC Convention, which seeks to encourage its States Parties to co-operate with the UN and other international agencies; see Article IX, Cooperation with UN Agencies and Other International Agencies.

CRC, on the other hand, established a Committee on the Rights of the Child (CRC, Article 43).<sup>246</sup> The primary purpose of this Committee is to periodically monitor the progress made by state parties in achieving the realisation of the obligations undertaken. State parties to the CRC have an obligation to submit their periodic reports to the Committee indicating factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the Convention (CRC, Article 44).<sup>247</sup> In addition, the Optional Protocol on a communications procedure, which allows individual children to submit complaints regarding specific violations of their rights, entered into force on 14 April 2014. This Protocol seeks to complement national and regional mechanisms, allowing children to submit complaints for violations of their rights. It also seeks to encourage states parties to develop appropriate mechanisms to enable a child whose rights have been violated to access effective remedies at a domestic level. The communication procedure that has been developed seeks to further enhance the implementation of the CRC. Until now, no South Asian countries have ratified or acceded to this Optional Protocol.

### **C. Findings of a survey on human rights norms and instruments in South Asia**

This chapter concludes with a summary of a very brief and focused survey that was undertaken to seek information on the awareness and implementation of human rights norms and instruments within South Asia, as secondary sources and related material on human rights issues, the implementation and effectiveness of human rights instruments in the context of South Asia are scarce. Fifteen human rights experts and academics from the region were approached with three specific questions, ten of whom responded to the request. These questions also formed the basis of the analysis undertaken in this report. These questions and the summary of responses are summarised below.

The first question of the survey related to knowledge of the existence of regional South Asian human rights instruments. Academics, and some experts working in civil society, could identify some of the instruments. Others had very little knowledge of these instruments. According to one expert, human rights issues relating to women, youth and children arose during the early days of SAARC on account of female prime ministers who led four major SAARC countries, namely Bangladesh, India, Pakistan and Sri Lanka. Nobody surveyed had any idea as to how SAARC instruments on human rights worked and knowledge of their effectiveness was limited to few government officials. The role of SAARC in implementing the SAARC Trafficking Convention and SAARC Convention on Child Welfare was not known to any of the surveyed experts, with one or two exceptions. This exhibits a lack of public or professional awareness and participation within the SAARC countries, surrounding a regional framework on human rights.

The second question related to the deviation, if any, of these SAARC instruments from the existing international human rights standards. The responses to this question were very general. A majority of

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<sup>246</sup> This Committee consists of ten experts of high moral standing and recognised competence in the field covered by the Convention; these experts are elected by States Parties and will be there in their personal capacity; consideration will also be given to an equitable geographical representation and the representation of all principal legal systems.

<sup>247</sup> The Committee can cooperate and seek information and expert advice from other relevant international organisations for implementation purposes.

those surveyed were unable to answer the question, as it required some specialised knowledge of the functioning of the SAARC regional framework. Some were aware of the work done by the SAARC in alleviating poverty, health and related areas. The nature of SAARC human rights values and standards were not clear to many.

There were some general views expressed with regard to a question on the performance of political and administrative institutions within South Asia. Some of those surveyed advocated a comprehensive human rights instrument in the context of SAARC. They also referred to ASEAN and the Organisation of the Islamic Conference's 'Cairo Declaration on Human Rights in Islam'. It was noted that SAARC had no such instrument, despite adopting the Social Charter and Democracy Charter. Some respondents also referred to the need for input from civil society organisations and concerned citizens in formulating human rights instruments. It was also noted that, as yet, no such forum exists within the SAARC context.

Furthermore, some expert respondents noted the developments that had been taking place within the SAARC region. References were made to FORUM-Asia that was created subsequent to the sub-regional consultations held in Kathmandu, Nepal, in 2010 and 2011. This Forum was a collaborative platform of civil society and individuals from the region, committed to the cause of furthering human rights and peace. The mission of the Forum was to advocate for, and help create an environment conducive to, the establishment of a South Asian human rights mechanism.

One respondent also referred to a statement made by former United Nations High Commissioner for Human Rights, Navaneethem Pillay, when she spoke at the Maldives National University on 23 November 2011, advocating for a SAARC human rights instrument. The former High Commissioner stated that

the region has great diversities – from the highest point on earth to its lowest lying atolls. From some of the world's most populous countries, to some of its most sparsely populated. Societies that have been shaped by the great religions of Islam, Hinduism, Buddhism, and Christianity, and divided by a myriad of ethnic minorities, indigenous peoples and caste groups.

But within this diversity, run important bonds, not least of which is a common aspiration for democracy, the rule of law, and human rights. The leaders of freedom movements in the sub-continent have inspired a generation of struggles against colonialism, injustice and apartheid. The constitutions of SAARC Member States contain strong chapters on human rights and have been reinforced by a healthy rate of ratification of international human rights treaties.

Now for the first time in decades, all eight members of SAARC enjoy democratically elected governments, breaking the cycle of military coups and royal prerogatives. Most countries share common legal and parliamentary traditions and despite many challenges, their judiciaries produce some of the most progressive jurisprudence in the world. Six SAARC States now have national human rights institutions, although only three have been assessed as fully compliant with international standards and we must work together on that. (Office of the High Commissioner for Human Rights, 2011)

There was a proposal by one respondent to develop a regional petition system as a mechanism to provide an effective remedy for the SAARC people against human rights violations. Such a petition system could mean that individuals and groups affected by violations of human rights in any of the countries of the region could approach a body that could assess and remedy those violations. A high level expert committee could be put in place to examine these petitions with regard to human rights violations in the region. However, to develop such a system, SAARC would have to enter a new level of understanding and harmony.

#### **D. Conclusions**

The human rights framework within the SAARC regional system is in the process of evolution. The SAARC Charter, that provides the basis for the existence of SAARC and its mandate, refers to certain human rights values and standards. The basic approach to human rights in the SAARC context emerges from the idea of preservation of 'inherent dignity' of everyone – a phrase which appears in the UDHR, the ICCPR and the ICESCR. As outlined in this report, the SAARC regional framework works within complex social, economic and cultural contexts. Although there is a common identity within the region, the social and political complexities that exist between the societies of the SAARC Member States present unique challenges to agreement on a system of human rights standards and protection.

As noted in the report, there appears to be no uniform approach to ratification of the international human rights treaties. Not all SAARC Member States, as pointed out above, are parties to both the ICCPR and ICESCR, although there is a greater acceptance of the UDHR. However, the accessibility and effectiveness of these international standards is not uniform in all countries. The effective implementation of human rights is further linked to the social and economic indicators within each region. Guaranteeing human rights values and standards without proper and effective remedy is of no consequence and issues of implementation pose a major challenge to SAARC Member States.

The incorporation of global human rights standards into the SAARC instruments on human rights is the primary focus of this study. It is clear from the above analysis that there are gaps and deviances from the existing global human rights norms and standards. South Asia is no exception and it also has its own priorities. For that reason, SAARC concluded two human rights Conventions, namely, the SAARC Trafficking Convention and the SAARC Convention on Child Welfare. Both of these Conventions are crucial for the region and they seek to suitably incorporate the existing global human rights standards and values in the areas that they seek to regulate.

As noted in the study, there are other soft law instruments, besides the SAARC Charter, in the form of the SAARC Social Charter and SAARC Democracy Charter. Both of these instruments are soft law instruments, incorporating a number of human rights values and standards. The narratives of these instruments are more aspirational, as they leave effective remedy and its implementation to domestic legal systems. Comparing these human rights values and standards with the provisions of the international covenants, one could assert that there are perceptible gaps and deviances in implementation. Some of the SAARC Member States, however, seek to address these issues through their domestic legal systems with particular reference to the constitutional guarantees extended through their judicial system for effective implementation.



## Bibliography

### 1. Legal and policy instruments

ASEAN (2012), *ASEAN Human Rights Declaration*, 18 November 2012, available at <http://www-asean.org/news/asean-statement-communiques> accessed 24 May 2015.

ASEAN (2004), *ASEAN Declaration against Trafficking in Persons particularly Women and Children*, available at <http://www.asean.org/communities/asean-political> accessed 24 May 2015.

South Asian Association for Regional Cooperation (SAARC) (2009), *Colombo Statement on Children of South Asia*, Colombo, 10 July 2009, available at <http://www.saarc-sec.org/uploads/cmsfiles/file/color> accessed 24 May 2015.

SAARC (2002), *SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*, 1 May 2002, available at <http://www.saarc-sec.org/userfiles/conv-traffiking.pdf> accessed 16 April 2015.

SAARC (2002), *SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia*, available at <http://www.saarc-sec.org/userfiles/conv-children.pdf> accessed 24 May 2015.

SAARC (1996), *Rawalpindi Resolution on Children in South Asia*, 22 August 1996, available at <http://www.saarc-sec.org/SAARC-Conventions> accessed 16 April 2015.

SAARC (1985), *SAARC Charter*, Dhaka, 8 December 1985, available at <http://www.saarc-sec.org/SAARC-Charter/5/> accessed 24 May 2015.

SAARC (1988), *SAARC Charter of Democracy*, 22 August 1988, available at <http://www.saarc-sec.org/SAARC-Charter-of-Democracy/88/> accessed 24 May 2015.

UN General Assembly (2000), *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, available at <http://www.ohchr.org/EN/ProfessionalInterest/pages> accessed 24 May 2015.

UN General Assembly (1989), *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at <http://www.ohchr.org/en/professionalInterest/pages> accessed 24 May 2015.

UN General Assembly (1966), *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at <http://www.ohchr.org/en/professionalInterest/pages/ccpr.aspx> accessed 24 May 2015.

UN General Assembly (1966), *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at <http://www.ohchr.org/en/professionalInterest/pages> accessed 24 May 2015.

UN General Assembly (1949), *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, A/RES/317, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx> accessed 24 May 2015.

UN General Assembly (1948), *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at <http://www.un.org/en/documents/udhr/index.shtml> accessed 24 May 2015.

UN Human Rights Council (2011), *Optional Protocol to Convention on the Rights of the Child on a Communications Procedure*: resolution/ adopted by the Human Rights Council, 14 July 2011, A/HRC/RES/17/18, available at <http://www.humanium.org/en/convention/protocol-3/optional-protocol-crc-communications-procedure/> accessed 24 May 2015.

## 2. Literature

### a) Books

Banerjee, S. (ed) (1999), *Shrinking Space: Minority Rights in South Asia*, Kathmandu: South Asia Forum for Human Rights.

Boyle, K. & Sheen, J. (eds) (1997), *Freedom of Religion and Belief – A World Report*, London: Routledge.

Manchanda, R. (1999), *The No Nonsense Guide to Minority Rights in South Asia*, New Delhi: Sage.

### b) Journal articles

Jones, S. (1996), 'Regional Institutions for Protecting Human Rights in Asia', *Australian Journal of International Affairs*, vol. 50 (3), pp. 269-277.

Muntarhorn, A. (1998), 'Asia, Human Rights and the New Millennium: Time for a Regional Human Rights Charter', *Transnational Law and Contemporary Problems*, vol. 8, pp. 407-420.

Oommen, T. K. (1990), 'State and Religion in Multi-Religious Nation-States: The Case of South Asia', *South Asia Journal*, vol. 4 (1), pp. 17-33.

Visweswaran, K. (2004), 'Gendered States: Rethinking Culture as a Site of South Asian Human Rights Work', *Human Rights Quarterly*, vol. 26 (2), pp. 483-511.

### c) Policy and other reports

Office of the High Commissioner for Human Rights (2011), *"The Case for a SAARC regional human rights mechanism": Statement by the United Nations High Commissioner for Human Rights*, 23 November 2011, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11639&LangID=E> accessed 9 July 2015.

UNODC (2012), *Global Report on Trafficking in Persons 2012*, available at [https://www.unodc.org/documents/data-and-analysis/glotip/Trafficking\\_in\\_Persons\\_2012\\_web.pdf](https://www.unodc.org/documents/data-and-analysis/glotip/Trafficking_in_Persons_2012_web.pdf) accessed 9 July 2015.

## PART 3: Conclusions

## **XI. Conclusions<sup>248</sup>**

All human rights are universal, indivisible and interdependent and interrelated. (Vienna Declaration, 1993, Article 5)

I want to suggest, at the outset, that we must approach all claims of universality with caution and trepidation. [...] Second, I want to suggest that all truths are local – they are contextual, cultural, historical, and time-bound. (Mutua, 2004, p. 51)

This report set out to identify gaps, tensions and contradictions in the regional and global human rights protection governance system. In order to be able to appropriately approach this huge task the research concentrated especially on the regional levels and, with regard to the European context, with a specific focus on the European Union (EU). In respect to the complexity of the European context, the contributions to this report aimed at shining spotlights on different aspects by concentrating on different sources and research material and by bringing together legal as well as political and social science approaches. Despite the claim of being universal and indivisible (see above), regional human rights legal and institutional frameworks are very diverse and shaped by their respective regional and political context. In the following paragraphs, some comparative observations concerning gaps, tensions and contradictions of human rights institutions and instruments across the different regions will be made.

### **A. Human rights instruments**

The present report, as well as the preceding report D 4.1 ‘Report on the mapping study on relevant actors in human rights protection’, reveal specific human rights instruments have been developed in all regions during the last century. Some of them date back as early as the 1948 ‘American Declaration on the Rights and Duties of Man’ or the ‘European Convention for the Protection of Human Rights and Fundamental Freedoms’ (ECHR) adopted in 1950, while others are of more recent origin, such as the 2012 ‘ASEAN Human Rights Declaration’. However, despite diverse historical development and marked differences concerning set-up and scope of the regional systems, a new wave of standard-setting can be observed in all regions over the last decade, thus, not only in those regions with a comparatively short history of regional human rights instruments but also in those with a longer human rights tradition such as Europe or the Americas. Examples include the ‘Charter of Fundamental Rights of the European Union’ (CFREU) in Europe, the 2013 ‘Inter-American Convention Against All Forms of Discrimination and Intolerance’ (not yet into force) or the 2006 ‘African Youth Charter’. Looking at the different continents, it is striking that the specific instruments adopted are reflecting specific historical developments, regional contexts and political priorities and constraints.

The European human rights framework is commonly regarded as one that offers a high level of protection to its citizens, with the ECHR as one of the most important regional instruments. It is a refined but at the same time complex system evolving not only in the context of the Council of Europe

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(CoE) but also increasingly in the context of the EU. The EU human rights standards have made considerable progress with regard to the development of human rights instruments – notably the CFREU – however, there are still gaps and tensions to be considered. Regarding the interaction of these different instruments, chapter II revealed that the legal relationships between the ECHR, the CFREU and national constitutions are complicated, which will remain also a challenge in the future. In addition, there exists a huge range of CoE instruments which codify advanced standards in many human rights areas, however, their supervisory mechanisms are comparatively weak. The most important shortcomings with respect to EU human rights standards were defined as: fragmented legal framework for the protection of fundamental rights in the Union and the subordinate role of economic, social and cultural rights, which is reflected, for example, in the CFREU (see chapter II and III). Furthermore, there are serious human rights gaps concerning the protection of migrants (chapter III) including, for example, the difficulties for migrant children to access basic services or the fact that European migration and asylum law are shaped by a strong ‘migration-control’ spirit and the fundamental rights of persons affected are only taken inadequately into account (e.g. Return Directive). The lack of coherence of human rights norms on various levels (e.g. horizontal, vertical) and a lack of internal-external coherence or even the existence of double standards was found to be a particularly serious gap (chapter IV and V). In addition, the complexity of the European human rights system, as such, with a multitude of different instruments codifying different rights with different scopes and fields of applications was identified to be a challenge (e.g. anti-discrimination law and policies (chapter IV)). Although the EU human rights system has seen a shift from a passive, court-focused approach to a more pro-active approach, the concept of positive duties is still unevenly reflected in EU policy documents and a majority of EU policy and legal documents refer to human rights on a very general and abstract level (chapter V).

Concerning the adoption and implementation of international human rights instruments in EU Member States, there is not only a lack of ratification of specific human rights instruments – the most salient one being the ‘International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families’ – but also a lack of, or inadequate, implementation of these instruments into national law. Other gaps (i.e. violation or inadequate protection) were identified concerning the following human rights issues: the rights of the child, women’s rights, rights of national minorities, rights of migrants and racial discrimination (chapter VI).

The African Union (AU) has developed a considerable body of human rights instruments that are distinguished by taking into consideration all generations of rights, but also by putting emphasis on duties as well as collective rights. A considerable amount of AU instruments are ‘norm-imitating’ (chapter VII) as they reflect international human rights standards, although they also accommodate specific African challenges and circumstances. As a result, some of them offer wider protection (‘African Charter on Rights and Welfare of the Child’), but some of them leave out key human rights issues (‘Maputo Protocol’). The AU has also distinguished itself by setting new human rights standards, going beyond the international human rights instruments, and thus offering probably the most extensive human rights norms of any region. Examples for such new standard-setting instruments are the ‘Convention for the Protection and Assistance of Internally Displaced Persons in Africa’, the ‘African Charter on Democracy, Elections and Governance’ and the ‘African Youth Charter’ (chapter VII). The

most problematic gaps, however, were identified not in field of standard-setting, but rather in the field of implementation of these sometimes far-reaching instruments. They are reported to be inadequately implemented by state parties.

The Inter-American Human Rights System (IASHR) also adopted various regional human rights instruments, the most important of which are the 'American Convention on Human Rights' and the 'American Declaration of the Rights and Duties of Man'. The two most important tensions were identified as the various ways Member States incorporate the regional instruments into national law, on the one hand, and the repeated overruling of human rights standards of the IAHRs through military jurisdiction and amnesties, on the other hand (chapter VIII).

Only recently have two international organisations in Asia started to advance regional human rights protection. The first, the Association of Southeast Asian Nations (ASEAN), adopted its 'ASEAN Human Rights Declaration' in 2012. The instrument is criticised for falling far below international human rights standards and for balancing the guarantee of fundamental rights with government-imposed duties on the individuals. Other limitations are the emphasis on the regional and national contexts and the stipulation that human rights are also subject to national laws (chapter IX). The second organisation, the South Asian Association of Regional Cooperation (SAARC) has rather relied on soft-law human rights instruments, with two notable exceptions: the 'SAARC Convention on Trafficking' and the 'SAARC Convention on Child Welfare'. Although aiming to meet international human rights standards, both binding Conventions, as well as the soft-law instruments, reflect the 'regional realities' and priorities and thus try to take into consideration the complex social, economic and political complexities of the region (chapter X).

## **B. Human rights institutions and implementation**

Looking at all of the different regions scrutinised in this report, it is striking that the implementation of human rights seems to be a universal challenge. Human rights institutions entrusted with the task to interpret, monitor and observe the implementation and enforcement of human rights law are, if established at all, very often inadequately equipped with resources and staff, very often constrained by political interference or by being politically and legally toothless bodies, or hampered by a limited mandate. It is also conspicuous that in all regions, although states rather readily endorse and sign human rights instruments, they either create legal loopholes that enable them to withdraw from their commitments whenever it seems politically advantageous, completely withdraw from their obligations, or do not take them seriously. However, these conclusions can be drawn only on a very general level: when looking at the regional systems in detail, the problems related to implementation of human rights instruments vary considerably from region to region.

Although it is complex and differentiated – and by no means toothless –, the European human rights institutional framework has also many limitations. Some of the most important shortcomings have their roots in the complexity of the system but are also paradoxically a result of the successful and dynamic development of the regional framework, especially with regard to the CoE and the European Court of Human Rights (ECtHR). They refer, for example, to the work overload of the ECtHR and the resulting need for reform, as well as the weakness of the supervisory bodies of some of the many CoE

instruments, such as the European Social Charter (see chapter II and III), which suffer from a lack of resources, insufficient follow-up procedures and sometimes also from a lack of commitment by Contracting States.

Although having made significant progress in the field of human rights, the EU is still said to be ‘a global actor but without a comprehensive human rights regime’ which becomes evident, for example, from the lack of an internal monitoring and complaint mechanism (chapter II) or the lack of a comprehensive and overarching EU internal human rights policy (chapter V). Other tensions and gaps arise from the unique political system of the EU, which hampers institutional coherence and obscures competences and political responsibilities. Especially the tensions between the Member States and the EU are a problematic and disconcerting force when it comes to human and fundamental rights protection. The specific political system of the EU allows Member States to safeguard – to a certain extent – their national political interests which are – in some cases – at odds with the human rights values laid down in the Treaties. The problem of incoherence (as mentioned above) is also striking with regard to EU institutions (Council, European Parliament, European Commission). Especially the dimension of external-internal coherence is a problematic factor in each of those institutions (chapter IV). In addition, there seems to be a lack of knowledge about EU human and fundamental rights competences, not only among EU citizens but also among policy makers, which is exacerbated by the fact that there is no genuine ‘European public’ and only limited possibilities for communication between EU bodies and EU citizens. The human rights performance of EU Member States, as scrutinised by the UPR, is found to be underwhelming in specific fields (women’s rights, migrants rights, children’s rights, rights of national minorities, racial discrimination) (see above and chapter VI).

The AU has, as has been pointed out above, adopted a broad range of far-reaching and, in part, quite progressive human rights instruments. Although the institutions set up by these instruments have contributed to the enhancement of human rights, they also have serious flaws which have therefore hampered progress. The African Commission on Human and Peoples’ rights, for example, is undermined by resource constraints and by the lack of a mandate to recruit its own staff, which compromises its independence, the lack of an efficient system to deal with communications and – in some occasions – the influence of the political organs of the AU. As the African Court on Human and Peoples’ rights is a rather new institution, so far few judgments have been delivered. Criticism has been voiced concerning the election of judges as well as the delay in finalising applications to the court. In general, there is a gap between the extensive African human rights framework and implementation on the ground. African states are said to be quick in signing and ratifying international and human rights instruments but their implementation is rather unsatisfactory. This is traced back, not only to a rather weak and ineffective institutional framework, but also to African states failing to take the institutions, and their obligations, seriously (chapter VII).

The IASHR has not only faced criticism for evolving beyond the legal competences authorised by the Member States, but has also been repeatedly rejected by several Member States. In doing so, these states have not only evaded, but have also withdrawn from, the jurisdiction of the IACtHR. In addition, tensions have been reported with regard to resources provided for Rapporteurships, namely the Special Rapporteurship on Freedom of Expression. Other problematic areas are indirect judicialisation of

economic, social and cultural rights (ESCR) and reparation jurisprudence. State parties have difficulties to comply with judgments that involve measures regarding ESCR and that therefore frequently have consequences for their public policies. There are also problems with the monitoring of compliance with judgements as there is no specific permanent body in charge of monitoring such compliance, and because there are no guidelines for the General Assembly, the institution responsible for this task, on how to perform the monitoring (chapter VIII).

In the ASEAN context, the AICHR is the main body entrusted, among others, with the task of promoting and protecting the human rights of the people in the ASEAN region. However, the AICHR's functions are limited to consultation and it is not mandated to investigate individual complaints. Its work is based on the principles of non-interference, consensus-seeking and non-confrontation. In addition, the body's role and mandate is blurred and it has a record of being silent on serious human rights violations in the region. Due to its weak enforcement mechanism, the AICHR is quite a toothless body. This is exacerbated by the fact that AICHR'S representatives are not necessarily experts in the field of human rights and are very often politically dependent on their sending state (chapter IX). The SAARC relies largely on soft law when it comes to regional human rights instruments. The two binding instruments, the 'SAARC Convention on Trafficking' and the 'SAARC Convention on Child Welfare' have not established any formal institutional monitoring mechanisms, but rather rely on consultation between Member States (chapter X).

In summary, human rights instruments and institutions are diverse and complex. Their development and contents are very much influenced by regional priorities and political, social and economic contexts. A particular challenge in all regions constitutes the development of adequate institutions in order to enhance and ensure adequate human rights protection. This is particularly important as states in all regions very often endorse and support human rights standards, but then frequently try to withdraw from, and/or do not take seriously, their human rights commitments.

## Bibliography

### 1. Legal and policy instruments

Vienna Declaration (1993), *Vienna Declaration and Programme of Action*, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> accessed 5 June 2015.

### 2. Literature

Mutua, M. (2004), 'The Complexity of Universalism in Human Rights', in Sajó, A. (ed) *Human Rights with Modesty: The Problem of Universalism*, Dordrecht: Springer.