



# EU engagement with other European regional organisations

Anna-Luise Chané, Agata Hauser, Jakub Jaraczewski,  
Władysław Józwicki, Zdzisław Kędzia, Michaela Anna Šimáková,  
Hanna Suchocka, Stuart Wallace



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<b>Authors</b>	<b>Anna-Luise Chané, Agata Hauser, Jakub Jaraczewski, Władysław Józwicki, Zdzisław Kędzia, Michaela Anna Šimáková, Hanna Suchocka, Stuart Wallace</b>

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## Executive Summary

This deliverable of Work Package 5 presents the outcome of the analysis and critical assessment of EU human rights engagement with other European regional organisations.

Cooperation between the European Union and the Council of Europe has become more systematic, in particular in the framework of the Memorandum of Understanding signed in 2007. This document *inter alia* identifies shared priorities and focal areas of cooperation among which are listed human rights and fundamental freedoms; rule of law and legal co-operation; democracy and good governance; democratic stability; intercultural dialogue and cultural diversity; education, youth and promotion of human contacts; and social cohesion. In the light of the Lisbon Treaty, including the new legal status of the Charter of Fundamental Rights and the commitment to ratify the European Convention on Human Rights, cooperation between the EU and the system of human rights protection established within the CoE should be significantly enhanced. However, the road leading up to the accession to the European Convention may be more difficult than expected as has been indicated by the Opinion 2/13 of the CJEU on the Draft Accession Agreement, adopted on 18 December 2014.

In the case of the OSCE, although the role of the EU has never been formally defined in details, the EU participation in the work of OSCE bodies has been recognized by the established practice and formalised by the Rules of Procedure of the organisation adopted in 2006. The EU attaches particular importance to co-operation with the OSCE on security-related matters and conflict prevention in Europe.

The report consists of four chapters.

The first chapter presents the aims of the report as well as methodology of the research. It also explains the basic conceptual framework of the deliverable.

The second chapter is devoted to the cooperation of the European Union with the Council of Europe. In particular, the authors of the report analyse the Memorandum of Understanding between the European Union and the Council of Europe, EU's policy documents and the issue of the rapprochement of the human rights protection systems of these two organisations. It also tackles the issue of common human rights standards.

The third chapter presents the issue of the European Union's cooperation with the Organisation for Security and Cooperation in Europe. It explains the position of the EU vis-à-vis the OSCE and it presents the EU's substantive human rights goals and objectives. The authors of the report have also analysed the issue of common human rights standards and the EU's engagement in and support for the OSCE human rights activities.

The report is supplemented by four case studies related to: 1. The role of Venice Commission 'Democracy through Law' and its cooperation with the European Union; 2. The legal influence of the ECHR on the EU in case of the right to an effective remedy and right to fair trial; 3. Joint Programme – Peer to Peer II, and 4. The EU's external human rights policy in view of crisis at the EU's doorstep: towards a gradual division of labour between EU-OSCE in Ukraine.

The fourth and final chapter presents the conclusions of the research. The report seeks not only to advance existing scholarship on the topic, but also to create a broad knowledge base for future research.

## List of abbreviations

AL	Arab League
AMU	Adam Mickiewicz University
AP	Action Plan
APT	Association for the Prevention of Torture
Art.	Article
AS/Jur	Committee on Legal Affairs and Human Rights
ASEAN	Association of Southeast Asian Nations
AU	African Union
CDDH	Steering Committee for Human Rights
CDMSI	Steering Committee on Media and Information Society
CEE	Central and Eastern Europe
CF	FRONTEX Consultative Forum on Fundamental Rights
CFI	Court of First Instance
CFREU	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
Ch	Chapter
CIA	Central Intelligence Agency
CiO	Chairperson-in-Office
CIVEX	Commission for Citizenship, Governance, Institutional and External Affairs
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COHOM	Working Party for Human Rights of the Council of the European Union
CoM	Committee of Ministers
CONUN	Working Party for United Nations of the Council of the European Union
CoR	Committee of Regions
COREPER	Permanent Representatives Committee
COSCE	Working Party for CoE and OSCE of the Council of the European Union
CPT	Committee for Prevention of Torture
CRPD	UN Convention on the rights of persons with disabilities
CSCE	Conference for Security and Co-operation in Europe
CSDP	Common Security and Defence Policy
CSO	Civil society organisation
CSR	Corporate Social Responsibility
DAA	Draft Accession Agreement
DCI-ASIE	Investment facility for Central Asia
DCI-ENV	Technical Assistance Facility for the 'Sustainable energy for all' Initiative
DCI-NSA	Technical Assistance Facility for Non-State Actors
DG DEVCO	Directorate-General for International Cooperation and Development
DG EAC	Directorate-General for Education and Culture
DG EMPL	Directorate-General for Employment, Social Affairs & Inclusion
DG ENLARG	Directorate-General for Enlargement
DG HOME	Directorate-General for Migration and Home Affairs

DG IND	Directorate-General for Enterprise and Industry
DG JUST	Directorate-General for Justice and Consumers
DG NEAR	Directorate-General for Neighbourhood and Enlargement Negotiations
DG RELEX	Directorate-General for External Relations
DiO	Directorate of Internal Oversight
Doc	Document
DoP	Declaration of Principles for International Election Observations
DROI	European Parliament Subcommittee on Human Rights
EaP	Eastern Partnership
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECRI	European Commission against Racism and Intolerance
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
Ed/eds	Editor/editors
EEA	European Economic Area
EEAS	European External Action Service
EEC	European Economic Community
EIDHR	European Instrument for Democracy and Human Rights
ENP	European Neighbourhood Policy
ENPI	European Neighbourhood and Partnership Instrument
EP	European Parliament
ESC	European Social Charter
ESCR	Economic, Social and Cultural Rights
ESDP	European Security and Defense Policy
ESS	European Security Strategy
EU	European Union
EUAM	European Union Advisory Mission Ukraine
EUDEL	European Union Delegation
EULEX	EU Rule of Law Mission to Kosovo
EUMC	European Monitoring Centre on Racism and Xenophobia
EUSR	EU Special Representative for Human Rights
FAA	Framework Administrative Agreement
FAC	Foreign Affairs Council
fn	Footnote
FRA	EU Agency for Fundamental Rights
FRAME	Fostering Human Rights Among European (Internal and External) Policies
FREMP	Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons of the Council of the European Union
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders
FSC	Forum for Security Co-operation
FYROM	'Former Yugoslav Republic of Macedonia'
GGS	Leuven Centre for Global Governance Studies

GRECO	Group of States against corruption
GRETA	Group of Experts on Action against Trafficking in Human Beings
GREVIO	Group of experts on action against violence against women and domestic violence
HCNM	High Commissioner on National Minorities
HDIM	Human Dimension Implementation Meeting
HFA	Helsinki Final Act
HoDs	Heads of Delegations
HoMs	Heads of Missions
HR/VP	High Representative for Foreign Affairs and Security Policy/Vice-President of the European Commission
HRAM	OSCE/ODIHR Human Rights Assessment Mission
HRC	Human Rights Council
HRD	Human Rights Defenders
IACL	International Association of Constitutional Law
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IcSP	Instrument contributing to Stability and Peace
IFS	Instrument for Stability
IMAP	Independent Medical Advisory Panel
IOEM	OSCE International Electoral Observer Mission
IPA	Instrument for Pre-Accession Assistance
JHA	Justice and Home Affairs Council
JP	Joint Programmes
KUL	Katholieke Universiteit Leuven
LAS	League of Arab States
LGBTI	Lesbian, gay, bisexual, transgender and intersex
Mio	Million
MoFA	Minister/Ministry of Foreign Affairs
MoU	Memorandum of Understanding
MS	Member State/States
No.	Number
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
NHRI	National Human Rights Institution
NHRS	National Human Rights Structures
NPM	National Preventive Mechanism
ODGP	Office of the Directorate General of Programmes
ODIHR	OSCE Office for Democratic Institutions and Human Rights
OHCHR	Office of the High Commissioner for Human Rights
OMIK	
OP	Optional Protocol
OPCAT	Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
OSCE	Organisation for Security and Co-operation in Europe

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OSCE PA	Parliamentary Assembly of Organisation for Security and Co-operation in Europe
OUP	Oxford University Press
PACE	Parliamentary Assembly of Council of Europe
Para	Paragraph
PCF	Programmatic Cooperation Framework
PFM	Public Finance Management
PIF	Pacific Islands Forum
PSC	Political and Security Committee
RFOM	Representative on Freedom of the Media
RG	Rapporteur Groups
RSIF	Regular Selective Information Flow
SAARC	South Asian Association for Regional Cooperation
SF	Strategic Framework on Human Rights and Democracy
SG	Secretary General
SMM	OSCE Special Monitoring Mission
SoI	Statement of Intent
SPT	UN Subcommittee on Prevention of Torture
TCG	Trilateral Contact Group
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TL	Treaty of Lisbon
ToR	Terms of Reference
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNMIK	United Nations Mission in Kosovo
UNOTT	University of Nottingham
UNSC	United Nations Security Council
US	United States
VAT	Value Added Tax
VC	European Commission for Democracy through Law (Venice Commission)



## Table of Contents

Acknowledgements.....	i
Executive Summary.....	ii
List of abbreviations.....	iii
Tables and Figures .....	xiv
Authors.....	xv
I. Introduction .....	1
A. Aim .....	1
B. Conceptual framework .....	2
1. General considerations.....	2
1. Coherence, consistency, effectiveness .....	4
2. Leadership and mutual influence .....	5
C. Methodology.....	6
D. Structure .....	7
II. Cooperation with the Council of Europe .....	8
A. Mapping the CoE.....	8
1. Introduction .....	8
2. Council of Europe – General Information .....	8
3. Legal instruments of the CoE human rights system .....	10
4. Parliamentary Assembly of the Council of Europe .....	13
5. The Committee of Ministers .....	14
6. The European Court of Human Rights .....	15
7. The Commissioner for Human Rights .....	18
8. Other CoE institutions and structures .....	19
a) The European Commission for Democracy through Law (Venice Commission).....	19
b) European Commission against Racism and Intolerance (ECRI) .....	20
c) The Steering Committee for Human Rights (CDDH) .....	20
9. Conclusions .....	21
B. Mapping the EU: Major EU Human Rights Stakeholders involved directly or indirectly with the Council of Europe.....	22
1. Introduction .....	22
2. European Council .....	22
3. Council of the European Union.....	22
4. EU High Representative for Foreign Affairs and Security Policy/Vice President of the Commission.....	23

5.	European External Action Service .....	23
6.	EU Special Representative for Human Rights .....	24
7.	European Commission .....	24
8.	European Parliament .....	24
9.	Court of Justice of the European Union.....	25
10.	Fundamental Rights Agency.....	25
11.	Committee of the Regions .....	26
C.	The CoE-EU Memorandum of Understanding .....	26
1.	Introduction .....	26
2.	History of the MoU .....	27
3.	Nature of the MoU.....	29
4.	The MoU from the perspective of human rights .....	29
5.	Conclusions .....	33
D.	Substantive Human Rights goals and objectives of the EU vis-à-vis the CoE .....	34
1.	Introduction .....	34
2.	Thematic priorities .....	35
a)	Respect of European human rights standards.....	36
b)	Freedom of expression .....	37
c)	National minorities (Roma/religious minorities/freedom of religion or belief) .....	37
d)	Rights of the child .....	38
e)	Rights of LGBTI persons .....	39
f)	Women’s rights .....	39
g)	Trafficking in human beings .....	40
h)	Torture and ill-treatment; death penalty .....	40
i)	Socio-economic rights.....	41
j)	Discrimination, racism, xenophobia and intolerance .....	42
3.	Country-specific priorities.....	42
4.	Conclusions .....	42
E.	Rapprochement of the human rights protection systems of the CoE and the EU .....	43
1.	The impact of the Council of Europe on EU human rights law and policy.....	43
a)	Introduction .....	43
b)	Assessing inter-institutional impact.....	44
c)	Legal instruments.....	47
(1)	The impact of Council of Europe human rights instruments on the EU .....	47
(2)	The role of the ECHR and of the European Social Charter in the EU legal order.....	52

d)	A new momentum for ratification? .....	55
e)	Information exchange .....	56
f)	Conclusions .....	57
2.	The EU and the European Convention on Human Rights - the legal commitments.....	58
a)	Introduction .....	58
b)	Background .....	59
(1)	The EU .....	59
(2)	The CoE .....	61
(3)	The EU and the CoE.....	62
c)	Legal basis for the Accession and the status of the Convention in the EU law .....	63
(1)	The EU – legal basis for the accession .....	63
(a)	The Treaty of Lisbon.....	63
(b)	Protocol no. 8.....	63
(c)	Declaration no. 2.....	64
(d)	Summary .....	65
(2)	The EU – current status of the Convention in the EU law .....	65
(3)	The CoE – legal basis for the accession.....	68
d)	Summary .....	68
3.	Negotiations concerning the Draft Accession Agreement and the CJEU opinion 2/13 and their perspectives .....	69
a)	Negotiations on the EU’s Accession to the ECHR .....	69
(1)	Background and Preparations for the Negotiations .....	69
(2)	The Negotiations.....	71
b)	The Draft Accession Agreement .....	73
c)	Opinion 2/13 of the CJEU on the Draft Accession Agreement .....	74
d)	Summary and prospects for the future.....	77
F.	The Issue of Common Human Rights Standards.....	80
1.	The Centrality of the European Convention on Human Rights.....	81
2.	A Complex Relationship .....	83
3.	Ratione Personae .....	84
4.	Bosphorus v Ireland .....	85
5.	A Messy Compromise .....	86
6.	Opinion 2/13 .....	88
7.	Divergences are Common.....	89
8.	The Scope of EU Law .....	92

9.	A Race to the Bottom in EU Law? .....	93
G.	Joint programmes .....	97
1.	Introduction .....	97
2.	History and Development of Joint Programmes.....	97
3.	Statistical information.....	101
4.	JP Modalities .....	103
5.	Conclusions .....	104
H.	Chances and opportunities .....	105
	Appendix I – case studies .....	109
1.	The role of Venice Commission ‘Democracy through Law’ and its cooperation with the European Union .....	109
a)	The legal status and nature of the Venice Commission.....	109
b)	The main tasks of the Venice Commission .....	111
c)	Points of reference for Venice Commission’s opinions .....	112
d)	The status of the EU within the Venice Commission and the normative framework of cooperation between them .....	114
e)	Conclusions .....	119
2.	Legal influence of the European Convention on Human Rights on the European Union – right to an effective remedy and right to a fair trial .....	120
a)	Introduction .....	120
b)	Right to a fair trial and right to an effective remedy in the European Convention on Human Rights.....	121
c)	Recognition of the right to fair trial and related rights by the Court of Justice.....	121
d)	Charter of Fundamental Rights of the European Union .....	125
e)	Post-Charter references to the ECHR in the case-law of the CJEU .....	126
f)	Conclusions .....	127
3.	Joint Programme – Peer to Peer II .....	129
a)	The Outline of the ‘Peer-to-Peer II’ JP .....	129
(1)	General aim of the Joint Programme.....	129
(2)	Objectives of the JP – the evolving perspective.....	129
(a)	First phase: networking and strengthening of NHRIs (JP ‘Peer Project’ 2008-2009)	129
(b)	Second phase: continuation and expansion - focus on National Preventive Mechanisms against Torture (JP ‘Peer to Peer II’ 2010-12).....	130
(3)	Target groups, methodology and format of activities .....	130
(4)	Partners at the national level.....	130

(5)	International partners.....	131
(6)	Financing .....	132
(7)	Management, monitoring, and evaluation .....	132
b)	Implementation of the ‘Peer-to-Peer’ II JP .....	132
(1)	Types of activities.....	132
(a)	Activities related to the establishing new NHRI/NPM .....	133
(b)	Activities related to supporting existing NHRI/NPM.....	133
(c)	Activities related to promotion of networking .....	134
(d)	Activities related to awareness raising .....	135
(2)	Evaluation of Impact .....	135
c)	Conclusions .....	136
III.	Cooperation with the Organisation of Security and Cooperation in Europe.....	138
A.	Mapping the Organisation of Security and Co-operation in Europe .....	138
1.	Introduction .....	138
2.	Organisation for Security and Co-operation in Europe – General Information.....	139
3.	Political situation within the OSCE.....	141
4.	Instruments of the OSCE human dimension system .....	142
5.	Parliamentary Assembly of the Organisation for Security and Co-operation in Europe ....	145
6.	The OSCE Summits, the Ministerial Council and the Permanent Council.....	145
7.	The Office for Democratic Institutions and Human Rights .....	146
8.	Other OSCE institutions and structures .....	148
a)	The OSCE Representative on Freedom of the Media .....	148
b)	The High Commissioner on National Minorities .....	148
9.	Conclusions .....	149
B.	Mapping the EU: Major EU Human Rights Stakeholders involved directly or indirectly with the OSCE.....	150
C.	The position of the EU vis-à-vis the OSCE .....	151
1.	Introduction .....	151
2.	Profile of the EU .....	152
3.	Profile of the OSCE .....	153
4.	Normative frameworks for co-operation.....	154
a)	The EU .....	154
b)	The OSCE .....	155
c)	Mutual agreements.....	156
D.	Substantive Human Rights goals and objectives of the EU vis-à-vis the OSCE .....	156

1.	Introduction .....	156
2.	Thematic priorities.....	158
a)	Full implementation of human dimension (human rights).....	159
b)	Strengthening the OSCE (Helsinki+40) process.....	159
c)	Support for OSCE autonomous institutions and field missions .....	159
d)	Democracy & Elections .....	160
e)	Human Rights of LGBTI persons.....	160
f)	Torture and ill-treatment.....	161
g)	Freedom of expression and freedom of the media .....	162
h)	Freedom of religion or belief .....	163
i)	Children.....	163
j)	Civil society and Human Rights Defenders .....	163
k)	Other .....	164
3.	Country-specific priorities.....	164
4.	Conclusions .....	164
E.	Common EU-OSCE Human Rights Standards.....	165
1.	Introduction .....	165
2.	OSCE Political Commitments .....	166
3.	Common human rights reference points for EU and OSCE .....	169
4.	Substantive lacunae between the OSCE and EU human rights standards .....	172
5.	Conclusions .....	175
F.	EU engagement in and support for OSCE human rights activities.....	176
1.	Introduction .....	176
2.	High-level engagement between the EU and the OSCE .....	177
3.	Co-operation in the geographic context.....	178
4.	Co-operation in thematic fields .....	183
G.	Chances and opportunities .....	184
	Appendix II – case study.....	187
1.	Introduction .....	187
2.	Motives of the EU’s external human rights policy.....	187
3.	Uneven EU engagement with Ukraine.....	188
4.	EU and OSCE in Ukraine today: Story of an (almost) perfect couple?.....	189
a)	Axis Brussels – Kyiv – Vienna: diplomatic and political dimension.....	191
b)	‘EUDEL’ in Vienna: raising its voice and EU ‘activism’.....	191
c)	Ukraine: EU-OSCE informal and ad hoc cooperation.....	194

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5. Conclusions .....	196
IV. Conclusions .....	198
Bibliography .....	202
A. Legal and policy instruments .....	202
1. International treaties and agreements .....	202
2. UN resolutions .....	203
3. Other documents issued by international organisations.....	203
4. EU treaties, legislation and policy.....	203
a) EU treaties.....	203
b) EU legislation.....	203
c) Council documents.....	205
d) Commission communications .....	206
e) EU Annual Reports on Human Rights.....	207
f) Other documents .....	207
5. CoE conventions, legislation and policy.....	208
a) CoE conventions.....	208
b) CoE Committee of Ministers documents .....	209
c) Venice Commission documents .....	210
d) Other CoE documents .....	210
6. OSCE political commitments and other documents .....	212
a) Political commitments .....	212
b) Other OSCE documents.....	214
7. Other documents .....	215
B. Case law .....	216
1. EU Courts .....	216
2. European Court of Human Rights .....	218
C. Literature .....	220
1. Books.....	220
2. Book chapters .....	221
3. Journal articles .....	224
4. Working papers and policy reports.....	228
D. Other sources.....	230
1. Internet websites .....	230
2. Statements, newspaper articles and press releases.....	232

## Tables and Figures

Table 1 Optional Protocols to the ECHR - ratification.....	11
Table 2 Overview of EU thematic priorities for cooperation with the Council of Europe.....	35
Table 3 List of Council of Europe legal instruments with particular human rights relevance which are open to the EU .....	49
Table 4 Articles of the CFREU which draw on the ESC.....	53
Table 5 Overview of EU thematic priorities for cooperation with the OSCE.....	158
Table 6 Substance of Political Commitments .....	167
Table 7 Ratification of UN human rights treaties among OSCE Participating states .....	169
Table 8 The arrangement regarding activities in the field of election observation and follow-up between the EU and the OSCE.....	178
Table 9 2015 OSCE electoral observation missions and follow-up activities where the EU or its Member States were engaged.....	179
Table 10 Active OSCE field ops in the areas where the EU has established its Delegations and other forms of local presence.....	180
Table 11 EU statements in the OSCE Permanent Council (2014 – March 2016) .....	192
Figure 1 Channels of influence of the CoE on EU human rights law and policy .....	47
Figure 2 EU/CoE Contributions to Joint Programmes 2006-2014 .....	102
Figure 3 Distribution of JP financing by EU instruments/budget lines .....	103



## Authors

The report has been prepared by a research team composed of:

Anna-Luise Chané (GGS)

Agata Hauser (AMU)

Jakub Jaraczewski (AMU)

Władysław Józwicki (AMU)

Zdzisław Kędzia (AMU)

Michaela Anna Šimáková (College of Europe)

Hanna Suchocka (AMU)

Stuart Wallace (UNOTT)

## I. Introduction

### A. Aim

The purpose of this report is to analyse the EU's engagement with other European regional organisations acting in the area of human rights. Europe is a continent with the most complex set up of regional systems of the protection of human rights, which is a result of historical developments. The oldest one was established by the Council of Europe which in its Statute, adopted in 1949, declared that it will pursue the aim of greater unity of its members based on their common heritage of ideals and principles 'in the maintenance and further realisation of human rights and fundamental freedoms.'<sup>1</sup> Initially, this system covered only Western European countries which were joined by Central and Eastern European members only after the end of the Cold War. It has developed a human rights treaty framework with a variety of implementation mechanisms. Chronologically, the next system was a product of the evolving Helsinki process launched in 1975 that led to the establishment of the Organisation on Security and Cooperation in Europe in 1995. Despite its mainly European character, it also reaches out to USA and Canada, as well as to some countries of Central Asia which emerged after the dissolution of the Soviet Union. Its 'Human Dimension'<sup>2</sup> is focused on various aspects of human rights and democratisation. Finally, the European Union as an international organisation *sui generis* has also established its own system of the protection of human (fundamental) rights which could be seen as sub-regional. In addition, members of the EU are members of the other organisations and their protection systems and, moreover, according to the Lisbon Treaty the EU itself is on its way to become a party of the 1950 European Convention on Human Rights concluded under the Council of Europe.

This complex organisational and, as a consequence, institutional set-up in Europe<sup>3</sup> creates several challenges to the EU policies which will be subject to a detailed analysis in this report. They are related *inter alia* to the need for an all-European approach to human rights, which is unquestionable if an equal enjoyment of human rights by people across the continent should be achieved. The report should serve a better understanding of the role of the EU as an essential human rights actor at the European scene, allow for the identification of major factors which shape the EU policies, provide a basis for the assessment of these policies from the point of view of their coherence, consistency and effectiveness, and finally offer a general outlook of and proposals for their further development.

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<sup>1</sup> Statute of the Council of Europe, 5 May 1949, CETS no. 1.

<sup>2</sup> This is the so called Third Dimension of the OSCE while the two others are dedicated to security issues (First Dimension) and economic and environmental cooperation (Second Dimension).

<sup>3</sup> Compare also: Monika Mayrhofer, Carmela Chavez, Venkatachala Hegde, Magnus Killander, Joris Larik, Bright Nkrumah, Elizabeth Salmón, Kristine Yigen, 'Report on the mapping study on relevant actors in human rights protection' (2015) FP7-FRAME Work Package No. 4 – Deliverable No. 4.1.

## B. Conceptual framework

### 1. General considerations<sup>4</sup>

The Vienna Declaration and Programme of Action adopted at the Second World Conference on Human Rights in 1993 states that 'Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. The World Conference on Human Rights endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities.'<sup>5</sup> This assessment of the role of such regional arrangements (systems of protection) has been regularly reiterated in the relevant resolutions of the UN General Assembly, Commission on Human Rights and subsequently Human Rights Council.<sup>6</sup>

The Office of the High Commissioner for Human Rights also underlines that regional human rights systems:

- assist 'national governments with the implementation of their international human rights obligations; for example, assisting with the implementation of the recommendations of treaty bodies, special procedures and the Universal Periodic Review;'
- provide 'people with more accessible mechanisms for the protection of their human rights, once national remedies have been exhausted;'
- help 'to raise peoples awareness of their human rights, placing them in a more localized context and reflecting their particular human rights concerns;'
- provide 'regional input to the development of international human rights standards and the improvement of international human rights mechanisms;'
- help 'national governments to better address regional human rights concerns that cross national borders; for example, human rights concerns related to migration, transnational crime and environmental disasters.'<sup>7</sup>

According to art. 21 (1) of TEU, the European Union is committed to 'develop relations and partnerships with (...) regional organisations which share [its] principles'. In a study for the European Parliament on the regional human rights mechanisms one can read that 'Regional human rights protection mechanisms constitute important pillars of the international system for the promotion and protection of human rights.'<sup>8</sup> Indeed, considerable attention is paid to these mechanisms at the international level. They are considered as the most desirable complementary mechanisms to the

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<sup>4</sup> This sub-chapter is applicable, *mutatis mutandi*, to all FP7-FRAME Work Package No. 5 deliverables on the EU engagement with Regional Multilateral Organisations.

<sup>5</sup> Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna, 25 June 1993, para 37.

<sup>6</sup> For example, the General Assembly underlined that 'regional arrangements play a fundamental role in promoting and protecting human rights and should reinforce universal human rights standards, as contained in international human rights instruments, and their protection', see above, para 5.

<sup>7</sup> UN OHCHR, 'An Overview of Regional Human Rights Systems', <<http://bangkok.ohchr.org/programme/regional-systems.aspx>>, last accessed on 26 April 2016.

<sup>8</sup> Wolfgang Benedek, Jean P. Jacque, Zdzisław Kędzia, Felipe Gomez Isa, Renate Kicker, Gerd Oberleitner, Clara M. Raventos, Lisa Heschl, Sarah Kumar, Kerstin Wonish, 'The Role of Regional Human Rights Systems' (European Parliament 2010) 1.

universal system working under the auspices of the United Nations. From a local perspective, however, they are perceived as the primary supra-state source of protection, in particular if they offer judicial safeguards as it is the case in Europe, Latin America and Africa.

The development of regional human rights mechanisms is asymmetric. Regional systems of the human rights protection established under the Council of Europe and the Organisations of American States are advanced in the territorial coverage of legal commitments, regional standard-setting, development of implementation mechanisms, including judicial protection, and regarding the follow up procedures serving enforceability of the adopted commitments. The regional system established within the African Union does not differ in its basic set-up from the other two. However, significant differences are visible as far as the capacities and output are concerned. The AU system suffers from some weaknesses in the institutional framework; insufficient political will on the part of some AU Member States to cooperate with the regional system in a constructive manner; inadequate domestic capacities to respond to the requirements of the regional system.<sup>9</sup>

Finally, two other regions, namely Arab countries (in the framework of the Arab League and the Organisation of Islamic States) and Asia (*de facto* ASEAN, since elsewhere in Asia there have been no significant movements) are still at an initial stage of setting-up regional protection systems. Their imminent perspectives are not very clear, either. After the adoption of the Arab Human Rights Charter in 2004 and the establishment of the Arab Commission on Human Rights, there were indications that the Arab League would be able to energetically continue on this path but there is little evidence that this hope was justified. The situation within ASEAN seems to be similar. Also here the Member States were able to produce a Declaration of Human Rights and to set up an ASEAN Commission on Human Rights but further institutional developments towards a full-fledged regional protection system are still missing.

Accordingly, the aforementioned study for the European Parliament distinguishes between four basic types of situations of regional human rights protection systems:

- 1) An advanced regional system (Europe and America),
- 2) A regional system requiring further consolidation (Africa),
- 3) An emerging regional system – at the initial stage of standard setting and implementation machinery (Arab Countries and ASEAN),
- 4) A region without a regional system of the human rights protection (remaining part of Asia and Pacific).<sup>10</sup>

Essentially, from the EU perspective the systems in Europe and Latin America can be seen as partners in cooperative efforts but not as addressees of bilateral support. Other from the aforementioned systems can be considered as both partners of cooperation and potential recipients of EU support.

This assessment provides the overall conceptual framework for the analysis of the EU policies towards the systems of the human rights protection established by the Council of Europe and the Organisation for Security and Cooperation in Europe. Some specific elements of this framework are presented below.

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<sup>9</sup> Supra 12.

<sup>10</sup> Supra 11. The presentation in this report includes adjustments of points 3) and 4) of the original presentation.

## 1. Coherence, consistency, effectiveness

The clarification of the concepts 'coherence', 'consistency' and 'effectiveness' of the EU human rights policies has been elaborated in greater details in the 'Report on the analysis and critical assessment of EU engagement in UN bodies'. The findings contained therein are *mutatis mutandis* applicable to EU cooperation with regional systems of human rights protection.<sup>11</sup>

Accordingly, coherent/consistent EU policymaking is defined as 'policymaking that seeks to achieve common, identifiable goals that are devised and implemented in an environment of collaboration, coordination and cooperative planning among and within the EU Institutions, among the EU Institutions and Member States, as well as among EU Member States.'<sup>12</sup> Three dimensions of coherence/ consistency need to be diversified:

- 'Internal-external' dimension captures 'the degree to which the EU applies internally what it promotes externally.' It embraces the conduct of both the EU institutions and individual Member States. The latter aspect should be underlined in particular in the European context since EU Member States are also members of the CoE and the OSCE.
- 'External-external' dimension refers to the degree of uniformity in which the EU articulates and follows its policies in relation to the non-EU partners. In the European context, it may be especially important to ensure the necessary correlation between the policies implemented in cooperation with the CoE and the OSCE.
- 'Internal-internal' dimension 'captures the degree to which all representatives of EU institutions and EU Member States convey a uniform message about a particular country-specific or thematic human rights issue in the entirety of EU external action.'<sup>13</sup>

Lack of coherence/consistency may undermine credibility of the EU as a human rights actor with all the consequences in terms of authority and effectiveness of action and impair the EU ability to achieve its goals.

The concept of 'effectiveness' refers in this report to the EU ability to attain its policy goals in cooperation with the CoE and OSCE. It should help assessing the EU action vis-à-vis both organisations, as well as the impact of actions undertaken jointly by the EU - CoE and/or OSCE in Member States and third countries.

The EU Action Plan for 2015 – 2019 places great emphasis on the regional systems. Thus, it can play an important role in ensuring EU coherence/consistence and effectiveness. The general task of strengthening cooperation with regional Human Rights and Democracy mechanisms 'in particular by pursuing synergies and common initiatives on key thematic issues and at important multilateral events' has been entrusted to the EEAS and the Commission. These two actors and Member States are also called upon to promote 'peer-to-peer capacity building initiatives between Regional HR and

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<sup>11</sup> Grazyna Baranowska, Anna-Luise Chané, David D'Hollander, Agata Hauser, Jakub Jaraczewski, Zdzisław Kędzia, Mariusz Lewicki, Anna Połczyńska, 'Report on the Analysis and Critical Assessment of EU Engagement in UN Bodies' (2015) FP7-FRAME Work Package No. 5 – Deliverable No. 5.1 3-5.

<sup>12</sup> See supra, ch. I.B.1. and referred to there: FP-7 FRAME 'Coherence (and consistency)', FRAME Internal Fact Sheet, 2014 1; see also Tamara Lewis, Wolfgang Benedek and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', (2015) FP7-FRAME Deliverable 8.1.

<sup>13</sup> Supra (fn 8) 1.

Democracy support mechanisms.<sup>14</sup> References to regional systems are made throughout the Action Plan under various thematic activities.

While underscoring the EU engagement in multilateral and regional fora, the European Commission and the High Representative—for Foreign Affairs and Security Policy placed in their Joint Communication a particular emphasis on the United Nations and the Council of Europe.<sup>15</sup> The Council of Europe and OSCE are specifically mentioned in the Action Plan in the context of cooperation on the right to privacy and exchange of good practices. The latter is also referred to as partner in election monitoring.

## 2. Leadership and mutual influence

In 2011 Joint Communication to the European Parliament and the Council 'Human Rights and Democracy at the Heart of EU External Action – towards a More Effective Approach', the European Commission together with the High Representative of the European Union for Foreign Affairs and Security Policy have stated that 'The European Union has both the will and the means to be a leader when it comes to protecting human rights and supporting democracy worldwide'.<sup>16</sup> Indeed, its partners see the EU as a global human rights champion. Nobel Peace Prize for advancing the causes of peace, reconciliation, democracy and human rights in Europe awarded to the EU in 2012 illustrates, in a way, this perception.

What could the concept of the EU human rights leadership mean in the European context? Again, like in the previous sub-chapter, the response may be based on the findings of the 'Report on the analysis and critical assessment of EU engagement in UN bodies'<sup>17</sup> which provides some applicable clarifications. Hence, the EU leadership in the discussed context should not be perceived as aspiration leading up to an usurpation to be a leader. Leadership in this context is primarily a matter of responsibility, understood as a derivative of the EU commitment to the values protected by human rights and of the international and regional weight of the Union. Therefore, the EU should not aspire 'to be a leader' vis-à-vis the CoE or the OSCE but rather be guided by the principle of responsibility offering the lead, if needed and requested in agreed areas of cooperation. Such an approach reflects the spirit of cooperation, recognition of the status, role and autonomy of partners without EU abdicating from its responsibility. It also takes into account the Janus face with which the EU appears within these organisations. On the one hand, it is one of the key partners to them. On the other hand, the EU is present in these organisations through Member States thanks to their double-membership. Such a position is featured by a high degree of desirable flexibility. At the same time, however, it may pose considerable challenges regarding the previously discussed coherence/consistency of action. These questions will be discussed in more details in the subsequent parts of this report.

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<sup>14</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 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, 28 April 2015 5.

<sup>15</sup> See supra.

<sup>16</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council, 'Human Rights and Democracy at the Heart of EU External Action –Towards a More Effective Approach', COM(2011) 886, 12 December 2011.

<sup>17</sup> See supra (fn 8), I.B.2.

The relations based on partnership and cooperation, as well as double-membership of EU Member States enhance the potential of mutual influence between the EU and both the CoE and the OSCE. There are three channels of such an impact:

- firstly – the EU, the CoE, and the OSCE interact through cooperation on policy issues and specific programmes and projects,
- secondly – the EU contributes to decision making within the CoE and the OSCE through action taken by its Member States as members of both organisations,
- thirdly – policies and decisions adopted by the CoE and the OSCE and their mechanisms influence the developments in the EU Member States, and thus, may eventually (indirectly) have some impact on policy making within the EU.

In some aspects, the mutual influence between the EU and two others European actors has been formalized (e.g. the understanding of fundamental rights under the EU Charter in the light of the European Convention on Human Rights). A detailed analysis of such measures is presented in the subsequent parts of the report.

### C. Methodology

The research for this report has been primarily based the analysis of primary and secondary sources. Primary sources include legal sources and jurisprudence, policy documents, official programmes, plans and decisions. Secondary sources used for this report include published academic articles and books, and working papers. They were collected through surveys of various databases and library catalogues. The report also benefits from several semi-structured interviews with policy-makers, experts and other stakeholders. The main purpose of these interviews was to obtain insights, commentaries and assessments of policy-making and practical experience, otherwise not accessible.

EU, CoE and OSCE are different in many aspects, including their goals, membership and territorial coverage, organisational nature and structures. As a consequence, the systems of the human rights protection established under their umbrellas also bear specific characteristics. Nevertheless, they are interlinked through overlapping memberships, comparable general objectives and approaches, as well as in some cases they are also linked with each other legally or by mutual agreements. Bearing this in mind, searching for commonalities and distinctions between these systems, the report looks at them from the perspective of four features marking an effective regional protection mechanism, notably (a) inclusiveness, (b) independence, (c) access to justiciability, and (d) follow-up mechanisms.<sup>18</sup>

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<sup>18</sup> Supra (fn 5) 14.

## D. Structure

The report consists of four chapters.

The first one presents the aims of the report as well as methodology of the research. It also explains the basic conceptual framework of the deliverable.

The second chapter is devoted to the cooperation of the European Union with the Council of Europe. In particular, the authors of the report analyse the Memorandum of Understanding between the European Union and the Council of Europe, EU's policy documents and the issue of the rapprochement of the human rights protection systems of these two organisations. It also tackles the issue of common human rights standards.

The third chapter presents the issue of the European Union's cooperation with the Organisation for Security and Cooperation in Europe. It explains the placements of the EU vis-à-vis the OSCE and it presents the EU's substantive human rights goals and objectives. The authors of the report have also analysed the issue of common human rights standards and the EU's engagement in and support for the OSCE human rights activities.

The final chapter presents the conclusions of the research.

The report is supplemented by four case studies related to: 1. The role of Venice Commission 'Democracy through Law' and its cooperation with the European Union; 2. The legal influence of the ECHR on the EU in case of the right to an effective remedy and right to fair trial; 3. Joint Programme – Peer to Peer II, and 4. The EU's external human rights policy in view of crisis at the EU's doorstep: towards a gradual division of labour between EU-OSCE in Ukraine.



## II. Cooperation with the Council of Europe

### A. Mapping the CoE

#### 1. Introduction

Europe is undoubtedly the continent with the densest and most developed network of intergovernmental organisations dedicated solely to protecting and promoting human rights or whose work relate to human rights to a significant degree.<sup>19</sup> The Council of Europe is first and foremost an organisation devoted to safeguarding protection and furthering promotion of human rights, democracy and the rule of law in Europe and beyond. The relatively narrow focus of the CoE has a profound impact on how it interacts with other actors, including the EU. On one hand, the common aims of the CoE and the EU invite and encourage greater mutual understanding and deeper cooperation. On the other hand, the overlaps result in tensions and contradictions in the areas where both organisations pursue differing agendas regarding human rights, or step on each other's toes as far as methods and objectives are concerned. The specific focus of the CoE invites a closer look at primary bodies, agencies and venues of the organisation in order to shed light on the scope and complexity of its operations. The concept of an array of bodies with an intergovernmental decisive body, an advisory parliamentary body and a judicial body first introduced by the CoE was later emulated by several organisations, including the EU. An attempt to map and analyse the entirety of CoE's work related to human rights goes well beyond the scope of this report. For the sake of both relevance and brevity, the analysis focuses on an array of critical bodies and mechanisms which have the biggest influence on shaping the CoE's human rights protection system and where the EU is present in a meaningful capacity.

#### 2. Council of Europe – General Information<sup>20</sup>

The Council of Europe is a regional intergovernmental organisation established in 1949 by 10 European states<sup>21</sup> in order to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles, which are their common heritage and facilitating their economic and social progress. The Council of Europe was the first of many organisations set up by Western European countries who sought to avoid a repetition of horrors of WW2 and foster intergovernmental dialogue and cooperation. The principal foundational legal instrument which establishes the CoE, outlines its goals and aims as well as provides basic organisational structure and core bodies is the Statute of the Council of Europe, also known as the Treaty of London.<sup>22</sup> Currently, the CoE has 47 full members (including all EU Member States), which include all European<sup>23</sup> states

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<sup>19</sup> Monika Mayrhofer, Carmela Chavez, Venkatachala Hegde, Magnus Killander, Joris Larik, Bright Nkrumah, Elizabeth Salmón, Kristine Yigen, 'Report on the mapping study on relevant actors in human rights protection', (2015) FP7-FRAME Work Package No. 4 – Deliverable No. 4.1, 47.

<sup>20</sup> Supra 48-54.

<sup>21</sup> Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and United Kingdom.

<sup>22</sup> Statute of the Council of Europe, 5 May 1949, CETS no. 1.

<sup>23</sup> This assumes the commonly used geographic boundary of between Europe and Asia set along the Ural Mountains, Ural River, Caspian Sea, the Greater Caucasus range and the Black Sea, thus considering Azerbaijan, Georgia, Kazakhstan, Russia and Turkey as transcontinental states.

except Belarus, the Holy See, Kazakhstan and Kosovo.<sup>24</sup> Several states enjoy observer status with the CoE. Canada, Japan, Mexico, the US and the Holy See have observer status and can participate in the CoE Committee of Ministers (CoM) and all intergovernmental committees. Notably, these observers may contribute financially to the CoE budget on voluntary basis. Additionally, the national parliaments of Canada, Israel and Mexico have observer status with the CoE Parliamentary Assembly (PACE) and their delegations can participate in the works of PACE. Finally, the Palestinian Legislative Council participates in PACE debates on the Middle East and the Northern Cyprus' Assembly of the Republic participates in PACE discussions on the island of Cyprus. Notably, no international or regional organisations currently enjoy observer status with the CoE, and therefore the EU has no formal standing with the Council. The full members enjoy full rights to participate in works of the CoE with voting rights in accordance with the Statute of the Council of Europe, while observers are free to participate to a limited degree. The exact status of observers is highly formalised, unlike it is the case of the UN, with the principles set in the Committee of Ministers Statutory Resolution (93) 26 on Observer Status<sup>25</sup> and the detailed rules adopted in several resolutions and decisions on observer status. Above the matters related to membership and observer status it bears to mention that over 45 other countries throughout the world are parties to various CoE conventions and engage in CoE activities related to these acts.

The principal legal foundation of the CoE, as indicated above, is the Statute of the Council of Europe, an international treaty, which outlines the purposes and principles of the CoE, the rules concerning membership, core bodies of the CoE, their competences and powers, basic organisation and procedure rules as well as budgetary and technical matters. The primary purpose of the CoE, as noted above, was initially outlined as being a vehicle for achieving unity between Member States and protecting their common heritage while supporting economic and social progress. As the Statute of the CoE provides:

'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>26</sup>

These aims are realised through the work of several bodies, agencies, programmes and actions undertaken within the CoE structure. Administrative functions of the CoE are handled by the General Secretariat of the Council, with the Secretary-General (SG) as its head. The SG is the *de facto* the spokesperson of the CoE and is responsible for the strategic management of the CoE. Interestingly, very little in the way of his or her competences and powers are clearly defined in CoE law, and instead have evolved over the decades of practice and precedent. The Secretariat handles day-to-day management of various activities of the CoE, including external relations and contact with other organisations, including the EU. The finances of the CoE are split into four major areas: the so-called

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<sup>24</sup> Belarus applied for CoE membership in 1993 and its parliament held special guest status with PACE until 1997, but the status and the country's application were suspended in 1997. Kazakhstan applied for special guest status with PACE in 1999 and is currently undergoing dialogue and cooperation with CoE with a view towards full membership. The Holy See has not sought CoE membership insofar. Kosovo has indicated its desire to apply for full CoE Membership, but no action has been undertaken in this regard so far. All references to Kosovo, whether the territory, institutions or population, in this text shall be understood to be in full compliance with United Nation's Security Council Resolution 1244 and without prejudice to the status of Kosovo.

<sup>25</sup> CoE Committee of Ministers, Statutory Regulation (93) 26 on Observer Status, 14 May 1993.

<sup>26</sup> *Supra* (fn 1), art. 1 (b).

ordinary CoE budget, the Partial Agreements budget (covering, among others, the budget of the Venice Commission), extra-budgetary receipts and the budget for CoE-EU Joint Programmes. For 2016, the CoE budget was set at 401m Euro (with 260m Euro of ordinary budget and 141m Euro Partial Agreements budget) with 52m Euro extra-budgetary receipts and the ongoing (multiannual) budget of JPs at 112m Euro. The CoE budget is financed from obligatory contributions by Member States and voluntary contributions from both CoE Member States and other states which seek to support the aims and works of the CoE.<sup>27</sup>

### 3. Legal instruments of the CoE human rights system

The Statute of the Council of Europe, as recalled above, provides the legal foundations of the CoE. It makes several direct references to human rights apart from setting their realisation as one of CoE policy areas in art. 1 (b). Acceptance of principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms is one of prerequisites for CoE membership, as outlined in art. 3 of the Statute.<sup>28</sup> The Statute does not provide a bill of human rights and does not refer to any other international human rights instruments. From the very onset, the intention of the CoE was to draft and adopt its own core human rights act, which would serve as the bill of rights for Europe and the cornerstone of the CoE human rights system. This document, the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as and referred in this report as the European Convention on Human Rights or ECHR) is one of the crowning achievements of the CoE and European legal culture as a whole.<sup>29</sup> The work on drafting the ECHR commenced during the 1948 Hague Congress and the final text was made open for signature in 1950, with sufficient ratifications and entry into the force achieved in 1953. The Convention was ratified by all full Member States of the CoE, and thus by all Member States of the EU. The ECHR enshrines the CoE bill of rights and has had a tremendous impact beyond the CoE itself, becoming a vital influence on human rights law in states throughout the world as well as other international organisations, not the least the EU itself. The ECHR contains provisions related to civil and political rights and freedoms, thus reflecting the human rights paradigm common to drafting countries, where development of standards and practice related to economic, social and cultural (ESC) rights was far less homogenised and extensive.

The ECHR guarantees, among others, the right to life<sup>30</sup>, freedom from torture and inhuman or degrading treatment or punishment<sup>31</sup>, freedom from slavery or servitude<sup>32</sup>, the right to liberty and personal security<sup>33</sup>, the right to respect for family and private life<sup>34</sup>, freedom of thought, conscience,

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<sup>27</sup> In the 2016 CoE budget, contributions from the following non-CoE state are included: Algeria, Belarus, Brazil, Cape Verde, Chile, The Holy See, Israel, Kazakhstan, Republic of Korea, Kosovo, Kyrgyzstan, Lebanon, Mexico, Morocco, Peru, Tunisia and United States. The contribution by United States, budgeted at 436.000 Euro is by far the largest, with contributions from Brazil (98.000 Euro) and Morocco (84.000 Euro) the second and the third respectively.

<sup>28</sup> The exact same requirement is set out for potential observer states, as outlined in the Statutory Resolution (93) 26 on observer status.

<sup>29</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

<sup>30</sup> *Supra*, art. 1.

<sup>31</sup> *Supra*, art. 3.

<sup>32</sup> *Supra*, art. 4.

<sup>33</sup> *Supra*, art. 5.

<sup>34</sup> *Supra*, art. 8.

and religion<sup>35</sup> and freedom of expression<sup>36</sup> and association<sup>37</sup>. It also guarantees the right to fair trial<sup>38</sup>, forbids retroactive criminalisation<sup>39</sup>, safeguards the right for women and men to marry<sup>40</sup>, and forbids discrimination on any grounds, yet only with respect to rights and freedoms enshrined in ECHR<sup>41</sup>.

The Convention was expanded by means of Optional Protocols (OP), which were open to ratification by CoE Member States. The Optional Protocols serve several purposes. Some of them enshrine new rights and freedoms or expand the scope of existing ones. Other OP reform the procedures and modalities of the European Court for Human Rights (ECtHR). The following table illustrates the level of ratification of the OP which provide new substantive human rights provisions by EU Member States:

*Table 1 Optional Protocols to the ECHR - ratification*

<b>Optional Protocol</b>	<b>Ratification Status within the EU</b>
no. 1 (property rights, right to education, electoral rights)	all EU Member States
no. 4 (civil imprisonment, freedom of movement, expulsion of nationals and foreigners)	all EU Member States except Greece and United Kingdom
no. 6 (restriction of death penalty)	all EU Member States
no. 7 (procedural rights of expelled foreigners, right to appeal in criminal matters, prohibition of double jeopardy, spousal equality)	all EU Member States except Germany, Netherlands and United Kingdom
no. 12 (prohibition of discrimination applying to any law)	Cyprus, Finland, Luxembourg, Malta, Netherlands, Romania, Slovenia, Spain
no. 13 (absolute abolition of death penalty)	all EU Member States

The topic of EU's accession to the ECHR and its current state is covered extensively in chapter II.E of this report. The European Court for Human Rights is tasked with judicial enforcement of the ECHR. A brief outline of the Court and its competences follows later in this chapter.

While some provisions of ECHR and its OP relate to ESC rights, the bulk of rights and freedoms of economic and social nature are enshrined in a separate act, the European Social Charter (ESC). The ESC was adopted in 1961<sup>42</sup> and its provisions were largely revised by means of a new treaty adopted 1999, leading to the term 'Revised Charter' being used to refer to the latter version.<sup>43</sup> Both Charters coexist and while all EU Member States have ratified the 1961 treaty, the level of ratification of the

<sup>35</sup> Supra, art. 9.

<sup>36</sup> Supra, art. 10.

<sup>37</sup> Supra, art. 11.

<sup>38</sup> Supra, art. 6.

<sup>39</sup> Supra, art. 7.

<sup>40</sup> Supra, art. 12.

<sup>41</sup> Supra, art. 14. The Optional Protocol no. 12 extends the prohibition of discrimination to any human right or freedom recognised by the Member State, see below.

<sup>42</sup> Council of Europe, European Social Charter, 18 October 1961, ETS 35.

<sup>43</sup> Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163.

1999 treaty is far less uniform. To this date, it has been ratified by Austria, Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, The Netherlands, Portugal, Romania, Slovakia, Slovenia and Sweden. Both charters provide for a range of rights and freedoms in various areas, including labour, health, education, social security, housing, rights of migrant workers, freedom of movement, parental leave and rights of persons with disabilities. The Revised Charter provides a much broader and extended list of rights and freedoms compared to the 1961 Charter. In 1995, an Additional Protocol to the ESC was adopted, providing a mechanism of collective complaints. The mechanism allows NGOs,<sup>44</sup> national organisations of employers and trade unions to lodge complaints with the European Committee of Social Rights (ESCR), a body of independent experts tasked with monitoring Member State compliance with the Charter.<sup>45</sup> The applicants may request the ESCR to declare that certain laws and policies of the States parties are incompatible with their commitments under the Charter, without having to exhaust any domestic remedies which may be available. Insofar, 14 EU Member States have adopted the Additional Protocol.<sup>46</sup>

The third major element of the CoE human rights law are various international treaties ratified under the auspices of the CoE. Despite various titles ('agreement', 'convention', 'arrangement', 'charter', 'code', etc.), all these texts are international treaties in the sense of the 1969 Vienna Convention on the Law of Treaties. The drafting, negotiations and signatures of those treaties are facilitated by the CoE, with the Committee of Ministers adopting decisions on the formal adoption of the final text as a CoE treaty. As indicated earlier, participation in most treaties is not limited to CoE Member States, and the treaties are open to signature by non-Member States, insofar as they are invited to accede by the CoM. Over 210 treaties have been concluded under the aegis of CoE. Some of the most important treaties of the CoE system related to human rights are:

- Convention on Cybercrime,<sup>47</sup>
- Convention on the Prevention of Terrorism,<sup>48</sup>
- Convention against Corruption,<sup>49</sup>
- Convention on Action against Trafficking in Human Beings,<sup>50</sup>
- Convention on Human Rights and Biomedicine,<sup>51</sup>
- Framework Convention for the Protection of National Minorities,<sup>52</sup>
- European Charter of Local Self-Government,<sup>53</sup>
- European Convention on Mutual Assistance in Criminal Matters.<sup>54</sup>

<sup>44</sup> International NGOs and national NGOs when the country in question explicitly accepts it, which is the case of Finland.

<sup>45</sup> Council of Europe, Additional Protocol to the European Social Charter providing for a System of Collective Complaints, 9 November 1995, ETS 158.

<sup>46</sup> Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, Netherlands, Portugal, Slovenia, Sweden.

<sup>47</sup> Council of Europe, Convention on Cybercrime, 23 November 2001, CETS 185.

<sup>48</sup> Council of Europe, Council of Europe Convention on the Prevention of Terrorism, 16 May 2005, CETS No. 196.

<sup>49</sup> Council of Europe, Criminal Law Convention on Corruption, 27 January 1999, CETS 173.

<sup>50</sup> Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197.

<sup>51</sup> Council of Europe, Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, 1 December 1999, CETS 164.

<sup>52</sup> Council of Europe, Framework Convention for the Protection of National Minorities, 1 February 1995, ETS 157.

<sup>53</sup> Council of Europe, European Charter of Local Self-Government, 1 September 1988, CETS 122.

<sup>54</sup> Council of Europe, European Convention on Mutual Assistance in Criminal Matters, 12 June 1962, CETS 030.

The EU, as an international organisation, has signed or ratified 14 CoE treaties. Some of these treaties feature provisions related to human rights, such as the European Convention relating to questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite, the Convention on Information and Legal Co-operation concerning 'Information Society Services',<sup>55</sup> and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.<sup>56</sup>

#### 4. **Parliamentary Assembly of the Council of Europe**

The principal deliberative body of the CoE is the Parliamentary Assembly of the Council of Europe (PACE), based in Strasbourg. The Parliamentary Assembly is composed of 324 parliamentarians from national parliaments of CoE Member States. PACE members are not elected by popular vote; they are delegated by national legislative bodies with each CoE Member State receiving a number of seats based on country size.<sup>57</sup> The majority of PACE members join one of five existing organised political groups within the Assembly.<sup>58</sup> The Assembly's work is prepared by 10 committees and by the Bureau comprising the President of the Assembly, the 20 Vice-Presidents, the chairs of the five political groups and the committee Chairpersons. The Committee on Legal Affairs and Human Rights (AS/Jur) with its subordinate body the Sub-Committee on Human Rights is chiefly entrusted with work related to human rights, however, all other PACE committees deal with human rights topic to a significant degree. The PACE meets for four week-long sessions in a year.

The PACE has no legislative competences, its powers are limited to deliberative, investigative, advisory and creation (election) roles. Despite lack of legislative competences, PACE has several powers which are relevant to shaping the CoE human rights system. It may pass recommendations which demand action from CoE Member States, who are obliged to formally reply to the notions of PACE. The Assembly may conduct probes into human right violations, a tool which it has employed efficiently on several occasions, with the 2005 Dick Marty investigation into CIA extraordinary rendition activities in Europe often highlighted as a major achievement of PACE and CoE as a whole.<sup>59</sup> The PACE may also question the CoE Committee of Ministers as well as national heads of government and state regarding their activities in the field of human rights, democratisation and rule of law. The PACE passes approval for candidate states for CoE membership, and has employed this power on several occasions during the CoE enlargement wave after 1989 in order to commit prospecting members to reforms, in particular abolishment of death penalty. While PACE does not draft or approve CoE human rights conventions, it nevertheless takes part in the process of their adoption with a consultative role. The PACE can request the Venice Commission to give an opinion on legal developments in a Member State, and in case of gross violations of CoE standards by a Member State, it may suspend national

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<sup>55</sup> Council of Europe, European Convention relating to questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite, 11 May 1994, CETS 153. Signed and ratified but not yet in force.

<sup>56</sup> Council of Europe, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 16 May 2005, CETS 198. Signed but not ratified.

<sup>57</sup> The number of seats does not correspond directly to the land mass of the country. Instead, countries are grouped into tiers based on relative size. For example, the largest tier corresponds to 18 seats in the PACE and currently consists of France, Germany, Italy, Russia, Turkey and United Kingdom.

<sup>58</sup> The current groups are, in order of size: Socialist Group (social democracy, democratic socialism), European People's Party (Christian democracy, liberal conservatism), Alliance of Liberals and Democrats for Europe (liberalism), European Conservatives Group (conservatism) and United European Left Group (socialism, communism).

<sup>59</sup> Marta A. Orpizewska, 'El Masri v. Former Yugoslav Republic of Macedonia: Implications for the CIA Extraordinary Rendition Program' (2013) 39 North Carolina Journal of International Law and Commercial Regulation 1189.

delegations, deprive them of voting rights or recommend to the Committee of Ministers for a Member State to be expelled from the CoE. The Assembly has employed these powers against Russia in 2014 on grounds of Russian military involvement in Ukrainian crisis.<sup>60</sup> Finally, the PACE has the competence to elect the judges of the ECtHR and the CoE Commissioner for Human Rights, as well as the CoE Secretary General and PACE's own Secretary General.

In the context of the CoE architecture, the PACE fulfils a role not unlike that of the European Parliament. It is the popular element of the organisation, aspiring to the role of 'voice and conscience of 800 million citizens of Europe'.<sup>61</sup> These aspirations can be, naturally, fulfilled only to the degree the PACE powers allow, nevertheless despite not having legislative competences equivalent to the aforementioned European Parliament or the UN General Assembly, PACE has used its powers to sound effect in the field of human rights. In particular, its wide mandate for investigation and scrutiny of Member State activities is widely recognised and serves as an example on how a body of this type may impact human rights protection among Member States and beyond. The aforementioned 2005 CIA extraordinary rendition investigation has had major implications not only for judgments of the ECtHR,<sup>62</sup> but also on domestic proceedings and other international human rights systems.<sup>63</sup>

## 5. The Committee of Ministers

The Committee of Ministers (CoM) is the inter-governmental decision-making body of the CoE. It is comprised of Foreign Affairs Ministers from each CoE Member State, with every minister appointing a deputy, usually the country's Permanent Representative to the CoE. This effectively means that at any given time, the membership of CoE CoM overlaps with that of the Council of the EU in its Foreign Affairs Council (FAC) configuration. Each CoE Member State chairs the Committee in turn for six-months with a handover of the chairpersonship (in English alphabetical order of Member States) in May and November. The rotating CoM chairpersonship has implications not unlike the ones the EU rotating presidency has had prior to the Lisbon Treaty reforms, with the Member State currently holding the CoE chairpersonship having major, if temporary, influence on shaping the CoE's political agenda. The impact of the rotating chairpersonship on relations with other organisations could be best witnessed during the negotiations on the CoE-EU Memorandum of Understanding, where the Russian chairpersonship was effectively able to freeze the process for six months.<sup>64</sup>

The CoM meets at ministerial level once a year and at Deputy level usually four times a month. Three of the Deputies' meetings are devoted to all issues while one is held as a so-called 'DH meetings' and concerns solely with the execution and implementation of ECtHR judgments by Member States. Additionally, the CoM maintains currently seven Rapporteur Groups (RG), comprised of Permanent

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<sup>60</sup> The Guardian, 'Russia delegation suspended from Council of Europe over Crimea', <<http://www.theguardian.com/world/2014/apr/10/russia-suspended-council-europe-crimea-ukraine>> last accessed on 12 April 2016.

<sup>61</sup> Parliamentary Assembly of the Council of Europe, 'In brief. The democratic conscience of Greater Europe' <<http://website-pace.net/web/apce/in-brief>> last accessed on 21 January 2016.

<sup>62</sup> Cases *El-Masri v The Former Yugoslav Republic of Macedonia* (App no 39630/09) judgment of 13 December 2012; *Al-Nashiri v Poland* (App. No. 28761/11) judgment of 24 July 2014, *Husayn (Abu Zubaydah) v Poland* (App. No. 7511/13) judgment of 24 July 2014.

<sup>63</sup> UN Human Rights Council, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson. Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives.' A/HRC/22/52, 1 March 2013, 11.

<sup>64</sup> See chapter II.C for information on the MoU negotiations.



Representatives, which meet with various frequency, depending on the RG. The meetings of RGs are open to delegates from observer states and the European Union. Two RGs are of specific concern for this report: GR-H (Human Rights) and GR-EXT (External Relations) which deals among others with relationships between the CoE and the EU. The CoM has also the power to establish ad hoc working groups, though currently no such groups function.

The CoM has three principal roles: it serves as an emanation of CoE Member State governments, as a vehicle for intergovernmental tackling issues relevant to the CoE mandate and, jointly with PACE, as guardians of CoE values and Member States' respect towards those. In practice, it sets the CoE policies and considers actions to be taken on recommendations from other CoE bodies and Member States. It also determines the CoE budget, and undertakes strategic decisions regarding various areas of CoE's activity, such as its external relations with other organisations or various forms of inter-institutional cooperation such as the Joint Programmes (JP), which the CoE carries out jointly with the EU. Most importantly, as mentioned above, the CoM supervises the execution of ECtHR judgments, examining the outcome of every final judgment and following up on how the Member States execute and implement the decisions of ECtHR. The CoM has the principal role in facilitating the process of new Member States joining the CoE. It may also suspend or terminate membership on grounds of severe violations of CoE principles and values. The CoM drafts the CoE treaties, endorses the final text as an official CoE instruments, and facilitates negotiations towards their signature or ratification. It may also adopt non-binding declarations and resolutions on current issues relevant to the CoE. Finally, it may launch specific projects as so-called 'partial agreements' in the situation where a given goal is not pursued by all CoE Member States. One such partial agreement with particular importance to human rights is the European Commission for Democracy through Law, commonly referred to as the Venice Commission (VC).

## 6. The European Court of Human Rights

The Strasbourg-based European Court of Human Rights is one of the most successful and ground-breaking international bodies tasked with judicial oversight over human rights law. Its case law vastly outnumbers that of any other regional or international human rights instrument and it continues to serve as an example of influence and impact on unprecedented scale.<sup>65</sup> One can quote the Deputy Registrar of the Court, Mr. Michael O'Boyle:

'There seems to be unanimous agreement in Europe today that the European Convention on Human Rights (...) is one of the major developments in European legal history and the crowning achievement of the Council of Europe. The emergence of the authority of the European Court of Human Rights has been described as one of the most remarkable phenomena in the history of international law, perhaps in the history of all law.'<sup>66</sup>

The Court was initially established in 1959, however for close to the 30 years it did not operate as a permanent institution, as cases were brought before it indirectly through the now defunct European Commission of Human Rights. In 1998 the Protocol 11 to the ECHR established the Court as a

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<sup>65</sup> Andreas Follesdal, Birgit Peters, Geir Ulfstein, 'Introduction' in Andreaas Follesdal, Birgit Peters, Geir Ulfstein (eds) *Constituting Europe. The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 1.

<sup>66</sup> Michael O'Boyle, 'On Reforming the Operation of the European Court of Human Rights' (2008) 1 *European Human Rights Law Review* 4.



permanent body and abolished the mechanism of indirect application, opening the access to ECtHR to anyone whose case meets the admissibility criteria. The Court is composed of 47 judges, one from each CoE Member State. The judges are elected by the PACE through a majority vote from three candidates proposed by a Member State for a non-renewable nine-year term. The ECHR sets the criteria for judges who 'shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults<sup>67</sup> of recognised competence.'<sup>68</sup> The Court has extensive autonomy as to organising its own work, as the plenary court comprised of all the Court's judges elects the court's president, vice-president, registrar, deputy registrar, establishes chambers of the Court and adopts the Rules of the Court.

The Courts' jurisdiction extends to four types of jurisdiction. The first type are interstate cases, in which one or more Member States may allege breaches of the ECHR by another state party. A unique feature of these cases is that, unlike the traditional approach to state responsibility for injury or damage to aliens, the applicant state(s) need not to allege that human rights of their own nationals were violated.<sup>69</sup> Though interstate cases are considerably rare compared to individual applications, the few interstate judgments by ECtHR have had major implications for development of human rights protection standards in conflicts.<sup>70</sup> The second type of jurisdiction is advisory opinions regarding interpretation of the ECHR delivered on notion from the CoM. These opinions may only relate to content and scope which has not been subject of prior ECtHR judgments. The third type of jurisdiction concerns cases related to the execution of the ECtHR's judgments. If the CoM considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. If the CoM considers that a state refuses to abide by a final judgment in a case to which it is a party, it may refer to the Court the question whether that Party has failed to fulfil its obligation.

The fourth and by far most frequent type of jurisdiction are individual complaints, where persons, organisations or groups of individuals allege violation of ECHR by a Member State. On one hand, the general requirements of *ratione materiae*, *ratione temporis* or *ratione personae* for individual applications are broadly interpreted and universal, the Court has in the past heard cases where non-CoE nationals applied against alleged violations of ECHR by agents of CoE Member States acting in non-CoE Member State territory,<sup>71</sup> or held CoE Member States responsible for actions of agents of non-CoE Member States conducted on the territory of a CoE Member State.<sup>72</sup> On the other hand, the application must meet several criteria of admissibility, such as exhaustion of domestic remedies, lapse of maximum six months from the final domestic decision, non-anonymity, lack of substantial identity with a matter already submitted to the Court, or with another procedure of international investigation and existence of a significant disadvantage suffered by the applicant.<sup>73</sup> Additionally, the applicants

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<sup>67</sup> Experienced lawyers, legal scholars and other experts in the field.

<sup>68</sup> *Supra* (fn 29), art. 26.

<sup>69</sup> Philip Alston, Ryan Goodman, *International Human Rights* (Oxford 2013) 902.

<sup>70</sup> These cases include i.a. *Ireland v United Kingdom* (1978) 5310/71 ECHR 1, regarding use of torture in interrogation during the conflict in Northern Ireland, *Cyprus v Turkey* (2001) 25781/94 ECHR 331, regarding human rights violations during Turkish invasion of Cyprus in 1974 and the pending case *Georgia vs. Russia (II)*, regarding human rights violations during the 2008 Russo-Georgian war.

<sup>71</sup> *Al-Skeini and Others and Al-Jedda v The United Kingdom*, 5721/07 [2010] ECHR 858 (09 June 2010).

<sup>72</sup> *Cases El-Masri v The Former Yugoslav Republic of Macedonia* (App No. 39630/09) judgment of 13 December 2012; *Al-Nashiri v Poland* (App No. 28761/11) judgment of 24 July 2014, *Husayn (Abu Zubaydah) v Poland* (App No. 7511/13) judgment of 24 July 2014.

<sup>73</sup> Unless respect for human rights as defined in ECHR requires an examination of the application on the merits despite the objective lack of significant disadvantage on applicants' part.

may request for the Court to grant a so-called interim measures, whereas the Court instructs the Member State to immediately take an urgent action required to prevent harm to the applicants. In practice, interim measures are usually used to halt extradition or deportation of applicants.

Providing that all criteria are met and the case is not declared as inadmissible at the pre-judicial stage, the Court hears representations of both parties as well as any third party interveners. The provisions of ECHR and ECtHR case law regarding third party intervention are markedly liberal, for they allow interventions by other Member States (both in regards to case concerning their nationals<sup>74</sup> as well as in regard to situations where States consider their legal systems will be affected by the outcome of a case<sup>75</sup>), other international institutions (including European Commission intervening on the behalf of EU in the case *Bosphorus v. Ireland*)<sup>76</sup>, NHRIs<sup>77</sup>, NGOs<sup>78</sup>, bar associations,<sup>79</sup> and academic human rights litigation research projects.<sup>80</sup> The Court decides both issues concerning admissibility and merits of the case. The Court may find that the Member State has violated the ECHR in respect to some or all instances brought up in the applications. The most immediate effect of ECtHR judgments are material and/or moral damages as well as compensation of legal costs which the State may be ordered to pay to the applicants. This feature is unique among international judicial instruments of human rights protection. Secondly, the ECtHR judgement may oblige the State to implement legal or institutional measures in order to prevent further human rights violations in relation to merits of the case. The ECtHR cannot annul national laws or declare them void on grounds of violating the ECHR, but in practice its judgments frequently are an impulse for major changes in domestic legislation. The implementation of both aspects of ECtHR decisions is entrusted in the CoM, which oversees changes to national law and adjustments to institutional solutions which are supposed to implement the judgments. Any of the parties may appeal from Chamber's judgments to a Grand Chamber of 17 judges. The decisions of Grand Chamber are final.

The ECtHR is undoubtedly a major success of the CoE system and, by all means, an instrument of tremendous impact not only on CoE itself and its Member States, but also on other human rights system. The judgments of ECtHR are the primary source for interpretation of the Convention and several landmark decisions of the Court have established vital elements of ECHR standards. Among others, the Court has identified several key concepts such as the concept of 'margin of appreciation' and the principle of subsidiarity. Its jurisprudence has had, as elaborated in chapter II.F of this report, profound influence on EU law.

However, the success and relative popularity of ECtHR is both a blessing and a curse of the Court, for it continues to face major challenges related to case overload. The combination of two factors: establishing the court as a permanent institution with direct access for individuals and the expansion

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<sup>74</sup> While interventions by states are a rare occurrence, one such intervention by Germany has had a major impact on the outcome of a landmark case regarding standards of non-refoulement, see case *Soering v United Kingdom* 14038/88 [1989] ECHR 14, judgment of 7 July 1989.

<sup>75</sup> E.g. the intervention by ten Member States in the case *Lautsi v. Italy* 30814/06 [2011] ECHR 2412, judgment of 18 March 2011.

<sup>76</sup> Other notable interventions by international organisations include: the OSCE in case *Blecic v Croatia* 59532/00 [2006] ECHR 207 judgment of 8 March 2006, the UN High Commissioner for Human Rights in cases *El-Masri, Al-Nashiri and Husayn (Abu Zubaydah)*.

<sup>77</sup> E.g. Equality and Human Rights Commission for England and Wales in case *Al-Saadoon, Mufdhi v the United Kingdom* [2010] ECHR 279 judgment of 02 March 2010.

<sup>78</sup> Both international, such as Amnesty International, FIDH and Interrights as well as domestic.

<sup>79</sup> E.g. The Council of Bars and Law Societies of Europe in case *Staroszczyk v Poland* 59519/00 [2007] ECHR 222 judgment of 22 March 2007.

<sup>80</sup> E.g. Human Rights Centre of Ghent University in case *S.A.S. v France* 43835/11 [2014] ECHR 695 judgment of 01 July 2014.

of CoE post-1989 has led to a sudden spike in incoming applications, which soon overwhelmed the Court. The CoE has invested considerable energy and resources into reforming the Court towards alleviating the issue of overload. The process of reforming the Court has met obstacles of both political and legal nature, but ultimately culminated in 2010 with the adoption of Protocol no. 14, which introduced several provisions aimed at regulating the influx of cases into judiciary consideration by the Court. This included the introduction of new admissibility criteria and adjustments to existing ones. The overarching goal of alleviating the burden upon the Court is steadily being met with decrease in cases applications allocated to a judicial formation,<sup>81</sup> yet at the same the new criteria of admissibility which give ECtHR more flexibility in rejecting cases have been with criticisms from both academics and the civil society.<sup>82</sup> Just over 60% of currently pending applications originate from four CoE Member States: Ukraine (21.4%), Russia (14.2%), Turkey (13%) and Italy (11.6%).<sup>83</sup> Apart from Italy, other EU Member States with significant amount of pending applications are: Hungary (7.1%), Romania (5.5%), Poland (2.6%) and Slovenia (2.5%).<sup>84</sup>

## 7. The Commissioner for Human Rights

The CoE Commissioner for Human Rights was established by the CoM in 1999 as an independent and impartial non-judicial institution set to promote awareness of and respect for human rights in CoE Member States. The Commissioner is elected by PACE from a list of three candidates put forth by CoM for a non-renewable term of six years. The idea behind creating the post of the Commissioner originated from an initiative by Finland taken up during the Second CoE Summit in 1997.<sup>85</sup> The concept was to provide the CoE with an institution akin to a NHRI, complementary to but separate from ECtHR, acting as a human rights monitoring body and point of reference for all European citizens. The fundamental objectives of the Commissioner for Human Rights are laid out in Resolution (99) 50 on the Council of Europe Commissioner for Human Rights.<sup>86</sup> According to this resolution, the Commissioner is mandated to:

- foster the effective observance of human rights, and assist Member States in the implementation of Council of Europe human rights standards;
- promote education in and awareness of human rights in Council of Europe Member States;
- identify possible shortcomings in the law and practice concerning human rights;
- facilitate the activities of national ombudsperson institutions and other human rights structures;
- provide advice and information regarding the protection of human rights across the region.

The primary areas of Commissioner's work are: country monitoring, thematic work and human rights awareness-raising. The aspect of country work is realised through visits to CoE Member States towards

<sup>81</sup> European Court of Human Rights, 'Annual Report 2015. Provisional Version.' (ECtHR 2016) 5.

<sup>82</sup> Helen Keller, Andreas Fischer and Daniela Kühne, 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals' (2011) 20 European Journal of International Law 1 1037-1039.

<sup>83</sup> Supra (fn 81), 191.

<sup>84</sup> Supra (fn 81), 191.

<sup>85</sup> Council of Europe, 'Second Summit of Heads of State and Government (Strasbourg, 10 – 11 October 1997) Final Declaration and Action Plan' 11 October 1997.

<sup>86</sup> CoE Committee of Ministers, Resolution (99) 50 on the Council of Europe Commissioner for Human Rights, 7 May 1999.

assessing human rights situation on the ground. The Commissioner engages with a wide variety of stakeholders, including NHRIs and civil society as well as both general population and specific groups towards establishing the state of human rights protection. The thematic areas of Commissioner's work are centred around select areas deemed vital to human rights. Currently, these topics include: children's rights, counter-terrorism, economic crisis, LGBTI rights, freedom of media, migrants' rights, persons with disabilities, post-conflict justice, Roma and Travellers, systematic issues, women's rights, gender equality and human rights defenders. The Commissioner does not consider individual complaints, however, he or she may intervene in a proceeding before the ECtHR and in the event of Optional Protocol no. 16 to the ECHR coming into force, he or she will also have the competence to partake in advisory opinion proceedings before the Court. Insofar, the Commissioner has used his competence to intervene before ECtHR sparingly, and has not yet developed a practical set of criteria for doing so.

## 8. Other CoE institutions and structures

Beyond the core bodies and instruments of the CoE, protection and promotion of human rights is present in majority of CoE work and is the primary or secondary focus of great deal of institutions and structures formed within the CoE. An exhaustive review of all CoE human rights mechanisms is beyond the scope of this report, however, a few specialised entities within the CoE sphere warrant mentioning:

### *a) The European Commission for Democracy through Law (Venice Commission)*

The Venice Commission came into existence in May 1990 as one of partial arrangements of the CoE, wherein a new structure is established by the CoM despite some not all CoE members electing to participate in it.<sup>87</sup> The Venice Commission is unique among partial agreements of the CoE, due to the fact that while initially it was founded with participation of 18 CoE Member States,<sup>88</sup> eventually the remaining 29 Member States joined the Commission. It is also notable for a sizeable contingent of full members which are not CoE Member States<sup>89</sup> as well as several observer members<sup>90</sup> and a single associate member (Belarus). Three entities enjoy the so-called 'special status', which is for most part equivalent to that of an observer: The European Union (represented by the European Commission), the Palestinian National Authority and South Africa. Additionally, the EU Committee of Region, the OSCE (via ODIHR) and IACL<sup>91</sup> may participate in the plenary sessions of the Venice Commission. The Commission is made up of individual members (one member and one substitute per state), usually university professors of constitutional and international law, supreme and constitutional court judges, members of national parliaments and civil servants who are designated by the agreeing states for four-year terms. The individual members act in individual and independent capacity.

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<sup>87</sup> CoE Committee of Ministers, Resolution (90)6, on a Partial Agreement Establishing the European Commission for Democracy through Law, 10 May 1990.

<sup>88</sup> The founder states are: Austria, Belgium, Cyprus, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, Malta, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey.

<sup>89</sup> Kyrgyzstan, Chile, Republic of Korea, Morocco, Algeria, Israel, Brazil, Peru, Tunisia, Mexico, Kazakhstan, United States and Kosovo.

<sup>90</sup> Argentina, Canada, Holy See, Japan, Uruguay.

<sup>91</sup> The International Association of Constitutional Law.

The Venice Commissions' role is to provide legal advice with particular focus on states who seek to bring their legal and institutional framework into line with regional and international standards in the fields of human rights, democracy and rule of law. The opinions may be requested by Member States, the CoE and other international organisations, including both the EU and the OSCE. Opinions are prepared by working groups of rapporteur over the course of an inclusive and participatory process which engages national authorities, civil society, NHRIs and other stakeholders. Apart from serving as guidance to the Member States, opinions of the Venice Commission are referred to in judgments of the ECtHR. Apart from its primary role as an advisory body, the Venice Commission facilitates the Council for Democratic Elections, which is a joint institution with PACE and the Congress of Local and Regional Authorities dedicated to enhancing the cooperation and promotion of common values and standards in the field of electoral law. The third element of Venice Commission's primary activities is the cooperation with Member State constitutional courts, ordinary courts and ombudspersons in the field of constitutional justice. For an analysis on the Venice Commission with a particular focus on the role which the European Union has in its works, see appendix I of this report.

### ***b) European Commission against Racism and Intolerance (ECRI)***

The European Commission against Racism and Intolerance is an independent monitoring body established by the CoM in 1993.<sup>92</sup> The ECRI deals with combating racism, discrimination, xenophobia, antisemitism and intolerance. The Commission consists of 47 experts, one nominated by every CoE Member State. The PACE, the Congress of Local and Regional Authorities of the Council of Europe, the European Union (represented by European Commission via DG JUST), Mexico and Holy See are represented in ECRI as observers without the right to vote. The three main fields of ECRI activity are: country monitoring, general thematic work and relations with NGOs, NHRIs and other national specialised bodies. The ECRI publishes regular reports on situation in CoE Member States and issues general policy recommendations.

### ***c) The Steering Committee for Human Rights (CDDH)***

The Steering Committee for Human Rights is an intergovernmental body set up by the CoM in order to facilitate coordination of CoE multiple efforts to promote and protect human rights. The CDDH is made up of representatives of the Member State, and under the supervision of CoM it oversees coherency and synergy between varied bodies and mechanisms of the CoE which deal with human rights. The CDDH holds plenary meetings as well as meetings in the framework of more specialised and smaller sub-committees, which it supervises and whose work it directs. These sub-committees can be committees of experts or *ad hoc* working groups. Their terms of reference are elaborated by the Steering Committee, with those of the committees of experts then being adopted by the Committee of Ministers. Sub-committees are of a non-permanent nature and are dissolved once they have completed their specific function, linked to a particular issue of the Steering Committee's work. Examples of areas of specialised work by the CDDH include: protection of human rights, social rights, fight against terrorism, fight against impunity for human rights violations and selection of candidates

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<sup>92</sup> CoE, Committee of Ministers Resolution, Res(2002)8 on the statute of the European Commission against Racism and Intolerance, 13 June 2002, amended by CoE CoM Resolutions CM/Res(2013)12 and CM/Res(2014)2 adopted, respectively, on 9 October 2013 and 19 February 2014.

for the ECtHR. In 2010, the CDDH was given an ad-hoc mandate to elaborate, in cooperation with the European Commission, the adequate legal instrument for EU accession to the ECHR. The CDDH was further entrusted with carrying out negotiations with the EU in the '47+1' format towards finalising the accession modalities.

## 9. Conclusions

The two most striking differences between the EU and the CoE are the narrower focus of the latter and the discrepancy in available resources. The CoE seeks to preserve, protect, uphold and promote standards related to human rights, democracy and rule of law by means of a highly varied array of instruments and structures. It has achieved several major accomplishments in these fields, from the adoption of the ECHR and introduction of ECtHR to the works of the Venice Commission and the constantly expanding list of CoE treaties whose reach extends well beyond CoE Member States. On the first glance, the EU appears as a natural partner for the CoE, but historical developments have led to parallel designs and tensions resulting from overlapping aspirations of the two organisations.<sup>93</sup> The EU is present in various aspects in works of the CoE, varying from being the defining presence in the Joint Programmes to engaging in various capacity and capability in other CoE activities. The interface between the organisations is heavily influenced by the current status and state of fundamental rights protection within the law and internal policies of the EU.

A factor which merits remembering throughout the analysis of the relationship between both organisations is the issue of finances. The budget of the EU for the year 2016 is set at 155b Euro, compared to the total budget of the CoE set at 422m Euro. In 2015, contributions by the EU to the Joint Programmes alone were greater than the combined contributions of 37 (out of 47) CoE Member States to the CoE budget and roughly equal to the entire 2015 CoE ordinary budget for the Governing Bodies and General Services of the Council of Europe.<sup>94</sup> The CoE budget was frequently criticised as insufficient, with Member State contributions failing to grow over time to meet the expanding needs of the organisation.<sup>95</sup> Naturally, the difference in the scope of both organisations' activities must be taken into the account when making such comparisons, but the difference in available resources for protection and promotion of human rights is a factor, which heavily influences the dynamic of co-operation between the EU and the CoE.

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<sup>93</sup> Monika Mayrhofer, Katharina Häusler, Renata Bregaglio, Carmela Chavez, Tingting Dai, Felipe Gómez Isa, Venkatachala Hegde, Jakub Jaraczewski, Magnus Killander, Karin Lukas, María Nagore, Bright Nkrumah, Lingying Yin, 'Report on the global human rights protection governance system' FP7-FRAME Work Package No. 4 - Deliverable No. 4.2, 67-71.

<sup>94</sup> Andrew Drzemczewski, 'International Workshop: EU cooperation with the UN & regional organisations in the field of human rights Poznań, Poland, 27-28 October 2015 (Frame Work Package 5) Background note: the relationship between the EU and the Council of Europe' 3.

<sup>95</sup> Olivier De Schutter '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' (2008) 14 The Columbia Journal of European Law 3534.

## **B. Mapping the EU: Major EU Human Rights Stakeholders involved directly or indirectly with the Council of Europe**

### **1. Introduction**

The following section will map EU institutions, agencies and other bodies or stakeholders which are involved directly or indirectly in the cooperation with the Council of Europe. It aims to provide a first brief overview of the EU's institutional framework for multilateral human rights cooperation after the Lisbon Treaty.

### **2. European Council**

The European Council is the primary agenda setter of the EU, tasked with providing the EU with 'impetus', 'political directions' and 'priorities'.<sup>96</sup> In the area of the Common Foreign and Security Policy ('CFSP'), the European Council shall 'identify the Union's strategic interests, determine the objectives [...] and define general guidelines'.<sup>97</sup> In practice the European Council does not have the capacities to address every aspect of EU foreign policy, leaving it to the Council of the EU to fill the void. The few Council Conclusions which referred to the Council of Europe expressed the importance of 'fruitful' and the need for strengthened cooperation.<sup>98</sup> In recent years the European Council has not addressed the matter. The President of the European Council, however, actively engages in the high-level political dialogue with the Council of Europe.

### **3. Council of the European Union**

The Council of the EU is mandated with policy-making, coordinating and legislative functions.<sup>99</sup> Of the different configurations of the Council, the Foreign Affairs Council ('FAC') is responsible for the definition and implementation of EU foreign policy. The Council is supported by a Secretariat, the Permanent Representatives Committee ('COREPER'), the Political and Security Committee ('PSC') and more than 150 working parties, 38 of which are subordinate to the Foreign Affairs Council.<sup>100</sup>

The FAC 'shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent'.<sup>101</sup> In line with this mandate, the FAC is responsible for defining the Union's strategies and priorities in its engagement with the Council of Europe. Since 2012, the FAC has adopted biannual strategic priorities, which identify the Union's geographic and thematic priorities for the next two years. They increase the transparency of EU action and enable EU and EU Member States representatives to ensure more focused, proactive, and coordinated action.

Among the various working groups in the Council, the Working Party on Human Rights (COHOM) and the Working Party on OSCE and the Council of Europe (COSCE) are responsible for the EU's human rights cooperation with the Council of Europe. They prepare and coordinate the EU's action in the

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<sup>96</sup> TEU art. 15(1).

<sup>97</sup> TEU art. 26(1).

<sup>98</sup> European Council 15/16 June 2006, 'Presidency Conclusions', 17 July 2006, Doc No 10633/1/06 REV 1, para 58; European Council 19/20 June 2008, 'Presidency Conclusions', 17 July 2008, Doc No 11018/1/08 REV 1.

<sup>99</sup> TEU art. 16(1).

<sup>100</sup> See for an overview Council of the EU, 'List of Council preparatory bodies', 18 January 2016, Doc No 5183/16.

<sup>101</sup> TEU art. 16(6).

Council of Europe<sup>102</sup> and exchange with representatives of the Council of Europe, for example the Commissioner for Human Rights.<sup>103</sup>

#### 4. **EU High Representative for Foreign Affairs and Security Policy/Vice President of the Commission**

The double-hatted High Representative for Foreign Affairs and Security Policy/Vice President of the Commission ('HR/VP') combines the two posts of the former High Representative for CFSP and of the former EU Commissioner for External Relations. As High Representative she is responsible for conducting the Union's CFSP,<sup>104</sup> representing the EU externally, chairing the FAC<sup>105</sup> and coordinating the EU Member States' positions in international organisations and conferences.<sup>106</sup> As Vice President of the Commission, the HR/VP is responsible 'within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action'.<sup>107</sup> The HR/VP engages in high-level political dialogue with representatives of the Council of Europe, in particular the Secretary General and the Commissioner for Human Rights.<sup>108</sup> She participates in the tripartite dialogue meetings with the Secretary General and the Chair of the Committee of Ministers of the Council of Europe. She also regularly issues joint statements with the Secretary General of the Council of Europe on the occasion of the Day against the Death Penalty.<sup>109</sup>

#### 5. **European External Action Service**

The European External Action Service ('EEAS') assists the HR/VP<sup>110</sup> and represents the Union externally.<sup>111</sup> At headquarters level, the division for human rights and multilateral diplomacy is responsible for mainstreaming human rights in the work of the EEAS. On the ground the EU Delegation to the Council of Europe in Strasbourg, which was opened in 2011, is responsible for promoting cooperation with the Council of Europe and coordinating EU action. Members of the Delegation participate in Ministerial sessions, meetings of the Ministers' Deputies and its rapporteur groups.<sup>112</sup>

<sup>102</sup> Council of the EU, 'EU priorities for cooperation with the Council of Europe in 2016-2017', 18 January 2016, Doc No 5339/16.

<sup>103</sup> EU Annual Report on Human Rights and Democracy in the World in 2013, 23 June 2014, Doc No 11107/14, p 41.

<sup>104</sup> TEU art. 18(2).

<sup>105</sup> TEU art. 18(3), 27(1).

<sup>106</sup> TEU art. 34(1).

<sup>107</sup> TEU art. 18(4).

<sup>108</sup> Council of Europe, Directorate of External Relations, 'Implementation of the Memorandum of Understanding between the Council of Europe and the European Union: Overview of activities (1 January-31 December 2011)', 14 June 2012, Doc No DER/INF(2012)3 REV.

<sup>109</sup> See for the latest statement: 'Joint Declaration by the European Union High Representative for Foreign Affairs and Security Policy, Federica Mogherini, on behalf of the EU, and the Secretary General of the Council of Europe, Thorbjørn Jagland, on the European and World Day against the Death Penalty, 10 October 2015', 9 October 2015, available at <[http://eeas.europa.eu/statements-eeas/2015/151009\\_02\\_en.htm](http://eeas.europa.eu/statements-eeas/2015/151009_02_en.htm)>.

<sup>110</sup> TEU art 27(3).

<sup>111</sup> TFEU art 221(2).

<sup>112</sup> Council of Europe, Directorate of External Relations, 'Implementation of the Memorandum of Understanding between the Council of Europe and the European Union: Overview of activities (1 January-31 December 2011)', 14 June 2012, Doc No DER/INF(2012)3 REV 25, 38.



## 6. EU Special Representative for Human Rights

The EU Special Representative for Human Rights ('EUSR') is mandated among others with improving the coherence and mainstreaming of human rights in EU external action, and with enhancing the human rights dialogue with regional organisations.<sup>113</sup> He works under the authority of the HR/VP,<sup>114</sup> and receives 'strategic guidance and political direction' from the Political and Security Committee ('PSC').<sup>115</sup> He coordinates with the EEAS<sup>116</sup> and reports to the HR/VP and the PSC on a six monthly basis.<sup>117</sup> He contributes to the high-level political dialogue between the EU and the Council of Europe through his meetings with the Secretary-General,<sup>118</sup> the Commissioner for Human Rights,<sup>119</sup> representatives of the monitoring bodies, or the European Court of Human Rights.<sup>120</sup>

## 7. European Commission

As the EU's executive body, the European Commission shall 'promote the general interest of the Union and take appropriate initiatives to that end', and ensure and oversee the application of EU primary and secondary law.<sup>121</sup> Members of the Commission, both the President and line Commissioners, engage in high-level political dialogue with representatives of the Council of Europe. The Commission furthermore negotiates the EU's accession to the ECHR and cooperates with the Council of Europe through Joint Programmes (for further detail see below, chapter II.G.). Cooperation between the European Commission and the Council of Europe is particularly close in the areas of EU enlargement and neighbourhood policy, where the EU takes into account the results of Council of Europe monitoring bodies to assess the human rights records of candidate and partner countries. The European Commission also ensures coherence of EU legislation with Council of Europe standards.

## 8. European Parliament

In line with Rule 213 of its Rules of Procedure, the European Parliament engages in interparliamentary dialogue with the Parliamentary Assembly of the Council of Europe ('PACE').<sup>122</sup> The 2007 MoU encouraged both bodies to strengthen their cooperation.<sup>123</sup> In the same year, both institutions signed a cooperation agreement in which they agreed to reinforce their cooperation, coordinate with each

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<sup>113</sup> Council Decision 2012/440/CFSP of 25 July 2012 appointing the European Union Special Representative for Human Rights, OJ [2012] L 200/21, art 3(c).

<sup>114</sup> See supra, art. 4(1).

<sup>115</sup> See supra, art. 4(2).

<sup>116</sup> See supra, art. 4(3).

<sup>117</sup> See supra, art. 10; Interview under Chatham House Rules, September 2014.

<sup>118</sup> See Delegation of the EU to the Council of Europe, 'EU Special Representative Lambrinidis visits Strasbourg (10/12/2012)', available at <[http://eeas.europa.eu/delegations/council\\_europe/press\\_corner/all\\_news/news/2012/20121210\\_en.htm](http://eeas.europa.eu/delegations/council_europe/press_corner/all_news/news/2012/20121210_en.htm)>.

<sup>119</sup> EU Annual Report on Human Rights and Democracy in the World in 2014, 22 June 2015, Doc No 10152/15.

<sup>120</sup> See Delegation of the EU to the Council of Europe, 'EU Special Representative Lambrinidis visits Strasbourg (10/12/2012)', available at <[http://eeas.europa.eu/delegations/council\\_europe/press\\_corner/all\\_news/news/2012/20121210\\_en.htm](http://eeas.europa.eu/delegations/council_europe/press_corner/all_news/news/2012/20121210_en.htm)>.

<sup>121</sup> TEU art. 17(1), 27(2).

<sup>122</sup> EP Rules of Procedure, rule 213: '1. Parliament's bodies, particularly the committees, shall cooperate with their counterparts at the Parliamentary Assembly of the Council of Europe in fields of mutual interest, with the aim in particular of improving the efficiency of their work and avoiding duplication of effort. 2. The Conference of Presidents, in agreement with the competent authorities of the Parliamentary Assembly of the Council of Europe, shall decide on the arrangements for implementing these provisions.'

<sup>123</sup> Memorandum of Understanding between the Council of Europe and the European Union, 11/23 May 2007, para 46.

other, take into consideration their respective achievements, and promote complementarity.<sup>124</sup> The catalogue of measures to be taken includes in particular meetings at the level of the Presidents, the Presidential Committee and Conference of Presidents, the Committees and their Chairpersons, and the Secretariats. Cooperation should be particularly close at Committee level, in order to avoid overlap and ensure complementarity. In addition, both institutions agree to refer to the achievements and activities of each other in their documents and work, to extend invitations to each other for conferences or other events, and to reinforce their cooperation in joint electoral observation missions.<sup>125</sup>

In light of the EU's envisaged accession to the ECHR, the European Parliament adopted a resolution in May 2010, in which it stressed 'that it is important to have an informal body in order to coordinate information sharing between the European Parliament and the Parliamentary Assembly of the Council of Europe'.<sup>126</sup> This joint informal body, consisting of members of the European Parliament and of the PACE, developed over the course of three meetings held in 2011 and 2012 the modalities for the participation of members of the European Parliament in the election of judges of the ECtHR.<sup>127</sup> The outcomes of these meetings fed into the draft Accession Agreement.

## 9. Court of Justice of the European Union

The European Court of Justice has referred to the ECHR and the case law of the ECtHR since the 1960s, when it first began to grant fundamental rights protection at the EU level. Today, the role of the ECHR is firmly enshrined in EU primary law (art. 6(3) TEU; art. 52(3) and 53 CFREU). Since the CFREU became legally binding, it appears that the European Court of Justice has begun to refer less frequently to the ECHR, although it still enjoys 'special relevance' in the case law of the Court.<sup>128</sup> For more detail see below, chapter II.F.

## 10. Fundamental Rights Agency

The creation of the Fundamental Rights Agency ('FRA')<sup>129</sup> initially raised concerns that the new institution might 'duplicate' the work of the Council of Europe.<sup>130</sup> In 2008, an agreement on cooperation between the FRA and the Council of Europe was adopted, with the goal to 'avoid duplication and ensure complementarity and added value'.<sup>131</sup> It provides among others for regular contacts between both institutions, the appointment of contact persons, reciprocal invitations to

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<sup>124</sup> Agreement on the strengthening of cooperation between the Parliamentary Assembly of the Council of Europe and the European Parliament, 28 November 2007, para 1.

<sup>125</sup> See *supra*, para 2.

<sup>126</sup> European Parliament resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (2009/2241(INI)), para 34.

<sup>127</sup> Andrew Drzemczewski, 'Election of EU Judge onto the Strasbourg Court', in Vasiliki Kosta, Nikos Skoutaris and Vassilis Tzevelekos (eds) *The EU Accession to the ECHR* (Hart 2014) 70.

<sup>128</sup> Allan Rosas, 'Five Years of Charter Case Law: Some Observations', in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds) *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Studies of the Oxford Institute of European and Comparative Law 2015) 14 et seq.

<sup>129</sup> See Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights, OJ [2007] L 53/1.

<sup>130</sup> See for example Olivier De Schutter, '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' (2008) 14 *Columbia Journal of European Law* 509, 517.

<sup>131</sup> Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe, OJ [2008] OJ L 186/7, para 2.

participate in meetings, exchange of information, and joint activities. In the past, joint activities have for example been carried out with the Commissioner for Human Rights and with the European Court of Human Rights.<sup>132</sup>

## 11. Committee of the Regions

The Committee of the Regions has its counterpart in the Congress of Local and Regional Authorities of the Council of Europe. Both institutions concluded a cooperation agreement in 2005,<sup>133</sup> which was subsequently revised in 2009.<sup>134</sup> Cooperation happens at different levels. The Presidents of both institutions define the thematic and political priorities for cooperation in their annual meetings. In February 2016, they met for the first time in the format of a High Level Group '3+3', bringing together the President of the Congress of Local and Regional Authorities, the President of the Congress Chamber of Local Authorities and the President of the Congress Chamber of Regions on the one side, and the President of the Committee of the Regions, the first Vice-President and the Chair of the CIVEX Commission on the other side.<sup>135</sup> Based on these strategic objectives, the Contact Group, which is composed of six members of each institution, develops a work programme, which is subsequently implemented by the responsible commissions, committees and working groups of the Committee of the Regions and the Congress of Local and Regional Authorities of the Council of Europe. The 2005 cooperation agreement explicitly recognized the 'primary importance [of] bringing politics closer to the citizens, in favour of the respect of human rights and of a sustainable quality of life for the citizens'.<sup>136</sup> This passage was dropped in the 2009 revised agreement.

## C. The CoE-EU Memorandum of Understanding

### 1. Introduction

The 2007 Memorandum of Understanding between the European Union and the Council of Europe (MoU)<sup>137</sup> represents a critical step towards shaping the current state of relations between the two organisations. It is also a document of major importance for the European landscape of human rights, democracy and rule of law, as it represents a joint commitment of both organisations to reinforce these values and strengthen the existing modes of co-operation between the EU and the CoE as well as to introduce new mechanisms and modalities. The inter-organisational relations aspect of the MoU as well as the genesis and history of the document were recently extensively covered in an excellent contribution by M. Kolb.<sup>138</sup> Therefore the following subchapter will briefly outline these aspects while

<sup>132</sup> 'Co-operation between the Council of Europe and the European Union – Report for the 120th Ministerial Session', 6 May 2010, Doc No CM(2010)52 final, para 13.

<sup>133</sup> Cooperation Agreement between the Committee of the Regions and the Congress of Local and Regional Authorities of the Council of Europe, 13 April 2005.

<sup>134</sup> Cooperation Agreement between the Committee of the Regions and the Congress of Local and Regional Authorities of the Council of Europe, Revised Version, 12 November 2009.

<sup>135</sup> Congress of Local and Regional Authorities, 'First Congress/Committee of the Regions High-Level meeting', <[www.coe.int/t/congress/NewsSearch/default\\_en.asp?p=nwz&id=7828&lmLangue=1](http://www.coe.int/t/congress/NewsSearch/default_en.asp?p=nwz&id=7828&lmLangue=1)>, last accessed 10 March 2016.

<sup>136</sup> Cooperation Agreement between the Committee of the Regions and the Congress of Local and Regional Authorities of the Council of Europe, 13 April 2005, art IV para 2.

<sup>137</sup> See supra (fn 123).

<sup>138</sup> Marianna Kolb, *The European Union and the Council of Europe* (Palgrave Macmillan 2013) 141-162.

providing an analysis of the MoU from the point of view of its relevance for protection and promotion of human rights in Europe and beyond.

## 2. History of the MoU

The origins of the MoU can be traced to the Third Summit of Heads of State on Government of the CoE, which took place in Warsaw in May 2005.<sup>139</sup> Several factors influenced the CoE's undertaking to establish a new framework for cooperation with the EU. One year earlier, the EU underwent its biggest enlargement to date, both in geographical and political terms. Since 2004 the EU is no longer an organisation made up exclusively of long-standing Western democracies, for it has welcomed into its fold the post-communist countries of Central and Eastern Europe. Human rights issues present in the region, such as the situation of Roma or the systematic shortcomings in justice systems, became internal matters of concern for the EU. The close neighbourhood of the EU (consisting of partner, associated and candidate states), where it cooperated with the CoE via Joint Programmes<sup>140</sup>, shrunk considerably. And the EU itself was undergoing major shifts in its areas of concern and policy, for it was steadily moving away from being primarily an organisation of economic cooperation and saw its focus expand to other areas, including fundamental rights. Within the CoE there was an emerging concern, voiced most strongly by Member States who remained outside the EU and the European Economic Area (EEA), about the possible overlap between the two organisations and their continued co-existence. These concerns were not unfounded from the CoE's perspective, for in 2005 the EU has initiated the process of establishing its own human rights agency, the Fundamental Rights Agency, envisioned to monitor and analyse the compliance of EU Member States with their obligations regarding fundamental rights as enshrined in the EU legal framework.<sup>141</sup> These factors led the CoE Member States to declare their determination to create a new framework for enhanced co-operation with the EU with particular focus on human rights, democracy and rule of law.<sup>142</sup> From the onset, the CoE has set out to conclude an agreement in the form of a memorandum of understanding, yet initially it has envisioned it as a legally binding document.<sup>143</sup> In order to establish the priorities for the new arrangement and to benchmark the areas where a strengthened framework would be needed the most, the CoE has commissioned the then Primer Minister of Luxembourg, Jean-Claude Juncker, to prepare in his personal capacity a report on the state of the relationship between the CoE and the EU. The report was delivered in 2006 and played a vital role in shaping the final text of the MoU.<sup>144</sup> Juncker produced a critical assessment of the relationship between the organisations, referring to them as 'at best a shaky team' which was prone to waste resources on rivalry instead of focusing on synergy.<sup>145</sup> In particular, the report included 15 recommendations which the author saw as measures necessary in order to strengthen the partnership between both organisations. These recommendations served

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<sup>139</sup> Council of Europe. 'Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16–17 May 2005) Warsaw Declaration' 17 May 2005.

<sup>140</sup> See below, ch II.G..

<sup>141</sup> Bal Sokhi-Bulley. 'The Fundamental Rights Agency of the European Union: A New Panopticism' (2011) 11 Human Rights Law Review 686.

<sup>142</sup> Council of Europe. 'Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16–17 May 2005) Warsaw Declaration' 17 May 2005. Para 10.1.

<sup>143</sup> See supra (fn 138) 152.

<sup>144</sup> 'Council of Europe - European Union: 'A sole ambition for the European continent', Report by Jean-Claude Juncker, Prime minister of the Grand Duchy of Luxembourg' 11 April 2006.

<sup>145</sup> Supra, 2.

as background for negotiating the final text of the MoU. Among the recommendations one can identify several items which relate directly to human rights, including suggestions for:

- Immediate initiation of the EU's accession to the ECHR,
- Recognition of the CoE as Europe-wide reference source for human rights,
- Establishing the CoE Commissioner for Human Rights as a reference point for the EU,
- Limiting the future FRA's mandate solely to matters related to EU law.

The negotiations regarding the MoU were protracted and difficult, owing to several factors.<sup>146</sup> First and foremost, a different philosophy and vision regarding the role of the MoU became quickly apparent, as the CoE sought to conclude a document which would confirm its status and role as a human rights benchmark in Europe, while the EU saw the agreement as an instrument of improving the existing cooperation and alleviating political tension within the CoE. At the same time, the ongoing process of creation of the FRA quickly became a major issue in the relationship with CoE, and the tensions resulting from disagreements as to FRA's role and mandate reflected on the process of drafting the MoU. Moreover, the complicated structure of both organisations hampered the negotiation process, with multiple actors on both sides involved. One of these structural issues was the problem of the rotating presidency of the Council of the EU and the rotating chairpersonship of the CoE Committee of Ministers. The negotiation process coincided with Russia assuming the CoE presidency, which resulted in a virtual standstill for half a year until the CoE presidency passed on, due to Russian scepticism of the EU and their apparent disinterest in furthering any major advances in CoE-EU relations. Ultimately, the MoU was signed in May 2007, first by the CoE Secretary General and the San Marino's Minister for Foreign Affairs acting in his capacity as the rotating presidency of the EU, and two weeks later by the Presidency of the Council of the EU and the head of DG RELEX on behalf of the Commission. The final text of the MoU includes a provision for follow-up procedures, including regular evaluation of implementation and eventual decision on amendments which was to be undertaken no later than 2013. The evaluations have been published annually by the CoM during the years 2008-2012,<sup>147</sup> while from the year 2012 on they were included in the annual CoM summary reports on cooperation between the CoE and the EU.<sup>148</sup> The assessment of the MoU towards establishing the eventual need to revise the document was carried out in 2013 during high-level dialogue meetings between CoE and EU, and resulted in a decision not to amend the MoU.<sup>149</sup>

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<sup>146</sup> Supra (fn 138) 146-148.

<sup>147</sup> CoE Committee of Ministers, 'CM(2008)49 add. 30 April 2008. 118<sup>th</sup> Session of the Committee of Ministers (Strasbourg, 7 May 2008) – Stocktaking of the implementation of the Memorandum of Understanding between the Council of Europe and the European Union.' Strasbourg; CoE Committee of Ministers 'CM(2009)52 addendum 1. 7 May 2009. 119<sup>th</sup> Session of the Committee of Ministers (Madrid, 12 May 2009). Co-operation between the Council of Europe and the European Union – Stocktaking of the Implementation of the Memorandum of Understanding between the Council of Europe and the European Union (1 January– 31 December 2008); Council of Europe, GR-EXT 'DPA/Inf (2011) 18. 5 May 2011. Implementation of the Memorandum of Understanding between the Council of Europe and the European Union: Overview of Activities' (1 January– 31 December 2010). CoE Directorate of External Relations 'DER/INF(2012)3 REV 14 June 2012. Implementation of the Memorandum of Understanding between the Council of Europe and the European Union: Overview of Activities' (1 January– 31 December 2011).

<sup>148</sup> CoE CoE Committee of Ministers, Working Group for External Relations, GR-EXT(2012)7, 1 June 2012, Co-operation between the Council of Europe and the European Union. Summary report; CoE CoE Committee of Ministers CM(2013)43, 22 April 2013, Co-operation between the Council of Europe and the European Union. Summary report; CoE Committee of Ministers CM(2014)38, 30 April 2014, Co-operation between the Council of Europe and the European Union. Summary report; CoE Committee of Ministers CM(2015)66, 29 April 2015, Co-operation between the Council of Europe and the European Union. Summary report.

<sup>149</sup> CoE Committee of Ministers CM(2013)43, 22 April 2013, Co-operation between the Council of Europe and the European Union. Summary report, 3.

### 3. Nature of the MoU

The term 'Memorandum of Understanding' is frequently used as a title of international agreements, including inter-institutional arrangements. For the most part, the term 'MoU' refers to instruments of non-legally binding nature. However, calling the instrument a MoU does not determine its legal character, and some legally binding treaties are also given that name.<sup>150</sup> Therefore, establishing the actual character of the MoU requires an analysis of its content from the perspective of international law. As outlined above, the CoE initially sought for the MoU to be a legally binding instrument. However, the EU rejected the idea during negotiations, for two major reasons. One was the EU's desire to stay short of binding itself and creating obligations, while the second was the potentially complicated and prolonged ratification process which would require all EU Member States to ratify the treaty, as well as involve the CJEU.<sup>151</sup> Ultimately, a consensus was reached to sign a non-legally binding agreement. The semantics of the final text of the MoU include phrases and expressions typical to MoUs which do not impose legal obligation on the signatories, such as the use of phrases 'will' and 'signed' instead of 'shall' and 'done'. Nevertheless, despite its nature as a soft law instrument, the MoU is an instrument of significant value and importance. As Aust points out, the lack of a legally binding character should not lead to MoUs not being treated seriously. The political commitments contained therein are expressions of good faith of both organisations, and while they will not suffer legal consequences for failure in carrying out the MoU, the states are not free to disregard them and doing so could seriously damage their reputation and provoke a major political response.<sup>152</sup>

### 4. The MoU from the perspective of human rights

The MoU opens with a preamble, which establishes the background and context of its provisions. The preamble outlines the joint goal of 'seeking to achieve greater unity between the states of Europe through respect for the shared values of pluralist democracy, the rule of law and human rights and fundamental freedoms'.<sup>153</sup> In the next paragraph, the preamble recognises the 'unique contribution' of the ECHR, ECtHR and other CoE standards and instruments and 'takes into account' the importance of the CFREU and Art. 6.2 of TEU, which enshrines the obligation for the EU to accede to the ECHR.<sup>154</sup> The Preamble goes on to recall the genesis of the MoU<sup>155</sup> and establish that both organisations seek to intensify co-operation and co-ordination of action on issues of mutual interest<sup>156</sup>, taking into consideration their comparative advantages and specific characteristics as well as good relations insofar.<sup>157</sup> Significantly, and characteristically for non-legally binding documents, the Preamble ends with the phrase 'have reached the following understanding' as opposed to the language of 'undertakings' more frequently found in treaties.<sup>158</sup>

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<sup>150</sup> Anthony Aust, *Modern Treaty Law and Practice* (Cambridge 2001) 18.

<sup>151</sup> Supra (fn 138) 152.

<sup>152</sup> Supra (fn 150) 39.

<sup>153</sup> Supra supra (n 123), para 1.

<sup>154</sup> Supra (fn 123), para 2.

<sup>155</sup> Supra (fn 123), para 3.

<sup>156</sup> Supra (fn 123), para 5.

<sup>157</sup> Supra (fn 123), para 6.

<sup>158</sup> Supra (fn 123), Preamble, final sentence.

The MoU contains four substantive chapters: *Purposes and Principles of Cooperation, Shared Priorities and Focal Areas for Cooperation, Arrangements for Cooperation* and *Visibility of the Partnership*. The first chapter, *Purposes and Principles of Cooperation*, opens with an outline of the cooperation, stating that the CoE and the EU will develop their relationship in all areas of common interest, i.a. the respect for human rights and fundamental freedoms.<sup>159</sup> Notably, the MoU refers to the CoE Action Plan adopted during the 2005 Warsaw Summit, recalling the Guidelines on the Relations between the Council of Europe and the European Union which were included as an appendix to the Action Plan as principles to be followed in the CoE-EU cooperation.<sup>160</sup>

Paragraph 10 of the MoU contains an item which was one of the most controversial elements of Juncker's report and subject to long negotiations. Its full text is: 'The Council of Europe will remain the benchmark for human rights, the rule of law and democracy in Europe.'<sup>161</sup> Following the aspirations laid out in the final documents of the Warsaw Summit and later in the Juncker Report, during the negotiation process the CoE expressed its desire to firmly establish within the MoU that its legal and institutional framework provides the reference point for both organisations in the field of human rights, the rule of law and democracy. This was seen within the CoE as the critical item, as inclusion of it in the MoU was expected to lay to rest the CoE's concerns regarding the EU establishing its own human rights framework and eventually either drifting away from CoE standards or establishing itself as a human rights benchmark and thus undermining the very foundations of CoE's existence. Apart from those political undercurrents, there were arguably several substantial grounds for such declaration. The ECHR has already had a special place within the EU fundamental rights law (see chapters II.E and II.F) and the jurisprudence of the ECtHR bore significant importance for the development of ECJ's case law. Finally, the timing of the negotiations was in favour of the CoE's position, as the EU was at that time recovering from the failure to adopt the Treaty Establishing a Constitution for Europe, and it was only one month after the signing of the MoU that the Action Committee for European Democracy (also known as the 'Amato Group') presented its proposal to rewrite the Constitutional Treaty into what became the Treaty of Lisbon and to give legal force to the CFREU. Paragraphs 11 and 12 of the MoU provide for basic concepts of partnership, complementarity, exchange of views, preparing common strategies and utilising comparative advantages, respective competencies and expertise of the CoE and the EU while having both organisations 'acknowledge each other's experience and standard-setting work'<sup>162</sup> and extend their co-operation to all areas where it is likely to bring added value to their action.'<sup>163</sup>

The chapter *Shared Priorities and Focal Areas for Cooperation* includes a subchapter 'Human Rights and Fundamental Freedoms', which opens with an affirmation of indivisibility and universality of human rights as basis for co-operations and refers to the human rights standards of both the UN and the CoE, with particular attention to the ECHR.<sup>164</sup> The reference to the UN standards is significant. If we assume that the drafters understood the term 'fundamental texts' in the context of the UN as the core conventions and treaties, this means that the scope includes the UDHR as well as ICCPR and ICESCR, both with their respective optional protocols. Paragraph 17 reinforces the concept of the EU

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<sup>159</sup> Supra (fn 123), para 9.

<sup>160</sup> Supra (fn 123), para 9.

<sup>161</sup> Supra (fn 123), para 10.

<sup>162</sup> Supra (fn 123), para 11.

<sup>163</sup> Supra (fn 123), para 12.

<sup>164</sup> Supra (fn 123), para 16.

holding the CoE in regard as the (emphasis JJ) Europe-wide reference source for human rights.<sup>165</sup> Furthermore, it states that the relevant CoE human rights norms will be cited as references in EU documents, the decisions and conclusions of its monitoring activities will be taken into account by the EU institutions and that the EU will develop cooperation with the CoE Commissioner for Human Rights.<sup>166</sup> The link between the CoE and EU human rights system is further expanded in par. 19, which states that coherence between EU law and the relevant CoE conventions will be ensured. The paragraph does not clarify, whether this pertains to conventions which the EU is a party of, or to any CoE conventions.<sup>167</sup> The MoU goes on to state that the early accession of the EU to the ECHR 'would greatly contribute to coherence in the field of human rights in Europe'.<sup>168</sup> It does not, however, state any deadlines, parameters or procedures towards this aim. Paragraph 21 of the MoU has particular importance for policy goals in CoE-EU engagement, as it provides a list of focus areas for both organisations to cooperate on. The list includes: protection of persons belonging to national minorities, the fight against discrimination, racism, xenophobia and intolerance, the fight against torture and ill-treatment, the fight against trafficking in human beings, the protection of the rights of the child, the promotion of human rights education and freedom of expression and information.<sup>169</sup>

Paragraph 22 of the MoU contains the perhaps most striking element of the document after the clause on the 'benchmark status' of CoE human rights law. It deals with the EU Fundamental Rights Agency, whose creation, status and competences were subject to major disagreements between the CoE and the EU (see chapter II.B.10 of this report). The CoE sought to enshrine limitations on FRA's mandate in the MoU towards ensuring that the new agency will not supersede or overlap with its own institutions. Towards these objectives, the paragraph 22 limits the scope of FRA's mandate to strengthening 'the European Union's efforts to ensure respect for fundamental rights within the framework of the European Union and Community law'.<sup>170</sup> It goes on to state that FRA respects the unity, validity and effectiveness of the instruments of CoE's monitoring mechanisms and that concrete details on cooperation between the FRA and the CoE will be the subject of a bilateral agreement between the CoE and the EU.<sup>171</sup>

The further paragraphs of the chapter 'Shared Priorities and Focal Areas for Cooperation' refer to areas of rule of law, legal cooperation, democracy, good governance, democratic stability, intercultural dialogue, cultural diversity, education, youth and social cohesion. Several paragraphs of these subchapters have relevance for the subject matter of this report. In paragraphs 23 to 25 the desire to ensure greater coherence in law-making is repeated and reinforced with the clause on CoE-EU consultations in early stages of standard-setting. Paragraph 27 refers to fostering gender equality and greater participation of women in decision-making processes.<sup>172</sup> Paragraph 28 briefly refers to the Venice Commission. In paragraphs 30 and 31, the CoE and the EU elaborate their desire to increase common efforts towards enhanced pan-European relations, including specifically cooperation with EU's Neighbourhood and Enlargement areas, as well as in states aspiring for membership of the CoE.<sup>173</sup>

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<sup>165</sup> Supra (fn 123), para 17.

<sup>166</sup> Supra.

<sup>167</sup> Supra (fn 123), para 19.

<sup>168</sup> Supra (fn 123), para 20.

<sup>169</sup> Supra (fn 123), para 21.

<sup>170</sup> Supra (fn 123), para 22.

<sup>171</sup> Supra.

<sup>172</sup> Supra (fn 123) para 27.

<sup>173</sup> Supra (fn 123), para 30 and 31. Considering the current membership of the CoE this paragraph should be interpreted as referring to Belarus.



Paragraphs 39 and 40 deal with the operationalisation of the CoE's concept of 'social cohesion'<sup>174</sup> with provisions for cooperation between the CoE and the EU based on the ESC and relevant EU laws and policies.<sup>175</sup> Notably, both organisations set out to support efforts by Member States in exchanging good practices and developing 'more efficient policies in this field.'<sup>176</sup>

The chapter 'Arrangements for Co-operation' contains procedural and technical provisions, some of which have major implications for the subject matter of this report. Paragraph 45 calls for more frequent consultations and political dialogue between the Chairpersonship of the CoM and Secretary General on one side and the Presidency/Troika on the other.<sup>177</sup> Since the institution of then-Troika (MoFA of the Presidency State, the Secretary General of the Council of the EU [who under pre-Lisbon arrangements acted as a High Representative of the CFSP] and the head of DG RELEX) became defunct with the Lisbon Treaty, it is assumed that this competence passed on to the HR/VP. Such meetings are to take place on an informal basis at the Minister's Deputies level and at formal basis at the level of the Political and Security Committee of the Council of the EU. This paragraph is notable in involving the Council of the EU in the CoE-EU relations, as previously the dialogue was carried out exclusively by the Commission. Paragraphs 46 to 50 deal with inter-institutional cooperation between other institutions and bodies of the CoE and the EU, including the European Parliament (EP) and the Parliamentary Assembly of Council of Europe (PACE)<sup>178</sup>, the CoE Human Rights Commissioner, the Committee for Prevention of Torture (CPT), the European Commission against Racism and Intolerance (ECRI)<sup>179</sup>, the Committee of Regions (CoR)<sup>180</sup> with the overarching aim of encouraging the contribution from civil society.<sup>181</sup>

Paragraph 52 refers to the Joint Programmes. It recalls the 2001 Joint Declaration on co-operation and partnership between the Council of Europe and the European Commission and goes on to declare reinforcement of the ongoing cooperation 'which could include regional thematic programmes'.<sup>182</sup> The same paragraph provides for consultations involving the European Commission, the CoE SG and 'as a general' rule the CoE Member States concerned regarding the priorities of Joint Programmes.<sup>183</sup> Joint Programmes are additionally referred to in paragraph 54, in which the CoE and the EU resolve to increase the visibility of their joint activities, including the JPs, with emphasis on beneficiary countries.<sup>184</sup>

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<sup>174</sup> The CoE's conceptualisation of social cohesion has underwent several changes over the years, but can be broadly defined as the capacity of a society to ensure the well-being of all its members – minimising disparities and avoiding marginalisation – to manage differences and divisions and ensure the means of achieving welfare for all members. In the CoE's approach, social cohesion is a political concept that is essential for the fulfilment of the three core values of the CoE: human rights, democracy and the rule of law. The current reference document within the CoE framework is CoE Committee of Ministers, 'New Strategy and Council of Europe Action Plan for Social Cohesion' 7 July 2010.

<sup>175</sup> Supra (fn 123), para 39.

<sup>176</sup> Supra (fn 123), para 40.

<sup>177</sup> Supra (fn 123), para 43.

<sup>178</sup> Supra (fn 123), para 46.

<sup>179</sup> Supra (fn 123), para 47.

<sup>180</sup> Supra (fn 123), para 49.

<sup>181</sup> Supra (fn 123), para 50.

<sup>182</sup> Supra (fn 123), para 52.

<sup>183</sup> Supra.

<sup>184</sup> Supra (fn 123), para 54.

## 5. Conclusions

The tenth anniversary of the MoU is approaching rapidly and undoubtedly the year 2017 will bring a number of retrospectives on its relevance, impact and importance today. There is little doubt that the MoU has had a profound impact on the relationship between the CoE and the EU. Looking at the political dialogue between both organisations, at the ongoing reform and advancement of the JP framework and the progress made on EU's accession to the ECHR up to the CJEU Opinion 2/13, one can quote the CoE CoM assessment of the impact of the MoU:

'Since the signing of the Memorandum of Understanding, there has been an unprecedented qualitative change in mutual relations, which have been transformed into a true, strategic partnership in the areas of political dialogue, legal co-operation and concrete cooperation activities (...)'<sup>185</sup>

Looking from the CoE's perspective, the MoU helped alleviate the greatest fears in Strasbourg – those that the EU will eclipse the CoE and take over its role as Europe's premier human rights organisation. The reference to the CoE as a human rights benchmark organisation in Europe and the limitation on FRA's mandate served as sufficient means of ensuring that tensions resulting from EU's expansion in the field of human rights are resolved. However, not all elements of the Juncker report were ultimately included in the MoU. The perhaps most ambitious of his recommendations, the concept of the EU becoming a full member of the CoE by the year 2015, was not included in the final text of the MoU and was not picked up in any other form. On a less dramatic note, the concept of joint budget planning between the CoE and the EU was dropped as well, although given the discrepancies in budget structure, planning and adoption procedures between both organisations the concept was joint financial strategy was a little too optimistic.

From the EU's perspective interests and goals, the MoU can too be considered a relative success. It ultimately became a non-legally binding document, meaning that the potentially risky process of seeking consent from Member States within the EU and engaging actors such as Russia within the CoE was circumvented. On a general level, the EU was able to achieve its goals of lessening the tensions with the CoE while avoiding major commitments and obligations. The MoU provided the EU with an entrenchment of cooperation with the CoE in a single high-level document, instead of the previous array of informal and formal arrangements scattered all over the complicated structure of both organisations. It also outlined substantive priorities and key policy areas for future engagement. As outlined in chapter II.D of this report, these proprieties serve as a foundation for the biannual EU priorities for cooperation with the CoE. The MoU paved the way towards a reform and reinforcement of Joint Programmes, where the EU was at the time increasingly dissatisfied with the state of things.<sup>186</sup>

Notwithstanding these achievements, there are also shortcomings of the MoU. From the perspective of the protection and promotion of human rights in Europe, the limitation on FRA's mandate imposed in the MoU can only be seen as a major misstep. Limiting the FRA to ensuring respect for fundamental rights solely within the framework of the EU policies and law was an adequate fulfilment of CoE's desire to keep the new EU human rights agency delineated from its own policies and institutions and to avoid duplication of competences and marginalisation of the CoE. However, it is rather striking that an organisation so heavily invested in the protection of human rights in Europe as the CoE saw the

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<sup>185</sup> CoE Committee of Ministers. CM(2014)38 Co-operation between the Council of Europe and the European Union. Summary report 30 April 2014.

<sup>186</sup> See below, ch IV.C.

newcomer institution not as an opportunity to synergise and increase the respect for human rights within the EU, but as a threat that must be at very best contained and prevented from stepping on CoE's toes. The EU on the other hand, was arguably all too willing to sacrifice FRA's mandate as a way to placate the CoE and keep it from increasing tensions. While the FRA and the CoE established their own cooperation agreement one year later and were able to work together effectively towards joint goals,<sup>187</sup> the way both organisations resolved the issue falls far from a sincere undertaking of joint responsibility for human rights in Europe.

Another criticism to the MoU itself and its implementation concerns the scope of rights and freedoms in relation to which both organisations undertook to cooperate on. The MoU makes a welcome reference to the international human rights system, including a mention of the fundamental texts of the UN. If we understand these fundamental texts as the UN Bill of Rights and thus look at the MoU from the perspective of UDHR, ICCPR and ICESCR, the attention given to economic, social and cultural rights is markedly lower than the focus on civil and political rights or general issues. The MoU mentions several specific explicit human rights concerns such as rights of minorities, discrimination, intolerance, racism, torture, rights of child or freedom of expression. It refers to the concepts of cultural diversity, intercultural dialogue, education and social cohesion, but it stops short of referring directly to core ESC rights, such as labour rights, right to health, right to adequate standards of living or right to social security. The sole provision of the MoU dealing with the concept of 'social cohesion' is far from exhaustive when it comes to concerns related to ESC rights. Naturally, this does not preclude cooperation in the field of ESC rights between the CoE and the EU, and many elements of safeguarding these rights have been touched upon in Joint Programmes, but the fact that the EU's overarching reference framework for cooperation with the CoE does not explicitly mention ESC rights as an area of concern is a shortcoming. The impact of MoU's deficiency in addressing ESC rights is clearly visible in the biannual EU priorities for the cooperation with the CoE, which, as chapter II.D of this report observes, have insofar not referred to ESC rights at all since their first introduction in 2012.

## **D. Substantive Human Rights goals and objectives of the EU vis-à-vis the CoE**

### **1. Introduction**

The EU has identified human rights in general as a policy area on which it intends to cooperate with the Council of Europe.<sup>188</sup> The 2007 MoU between the EU and the Council of Europe lists human rights as one of the areas of common interest in which both organisations seek to develop their relationship.<sup>189</sup> Similarly, the EU's 2012 Strategic Framework on Human Rights and Democracy affirms the Union's commitment to 'continue its engagement with the invaluable human rights work of the Council of Europe',<sup>190</sup> while the 2015 Action Plan commits the EEAS, the European Commission and the EU Member States to engage with Council of Europe on best practices for human rights.<sup>191</sup>

Apart from this general commitment to human rights cooperation, the EU's substantive goals and objectives for its cooperation with the Council of Europe have been specified in a number of policy

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<sup>187</sup> See supra (fn 138), 185-186.

<sup>188</sup> See also supra, ch II.A.

<sup>189</sup> See supra (fn 123), para 9.

<sup>190</sup> Council of the EU, 'EU Strategic Framework on Human Rights and Democracy', 25 June 2012, Doc No 11855/12.

<sup>191</sup> Council of the EU, 'EU Action Plan on Human Rights and Democracy', 20 July 2015, Doc No 10897/15 [2015 Action Plan].

documents. The first and primary source is the **MoU**, concluded between the EU and the Council of Europe in 2007,<sup>192</sup> which identifies seven thematic human rights issues on which the EU and the Council of Europe will cooperate.<sup>193</sup> In addition to that, the Foreign Affairs Council of the EU biannually adopts strategic **priorities for cooperation with the Council of Europe**.<sup>194</sup> They identify non-exclusive geographic and thematic priorities for the upcoming two years as well as a number of transversal issues that apply to EU-Council of Europe relations in general. Beyond that, a number of general human rights strategic documents of the EU identify the Council of Europe as a partner for cooperation. They include primarily the 2012 **Strategic Framework on Human Rights and Democracy**, the 2012 and the updated 2015 **Action Plan**<sup>195</sup> as well as the **EU human rights guidelines** for selected human rights issues.

## 2. Thematic priorities

The MoU identifies the following primary areas of human rights cooperation between the EU and the Council of Europe:

Co-operation between the Council of Europe and the European Union will include the protection of persons belonging to national minorities, the fight against discrimination, racism, xenophobia and intolerance, the fight against torture and ill-treatment, the fight against trafficking in human beings, the protection of the rights of the child, the promotion of human rights education and freedom of expression and information.<sup>196</sup>

The listed human rights issues reflect core areas of activity of the Council of Europe and correspond to central human rights priorities of the EU. The biannual EU priorities for cooperation with the Council of Europe take up most of these priorities. Together with the Action Plans and the EU human rights guidelines they provide details on possible thematic and geographic focal areas and concrete strategies to operationalize them.

*Table 2 Overview of EU thematic priorities for cooperation with the Council of Europe*

	MoU	2012-13 priorities	2014-15 priorities	2016-17 priorities	2012 Action Plan	2015 Action Plan	EU Guidelines
<b>Children</b>	•	•	•	•			•
<b>Death penalty</b>				•			
<b>Racism, xenophobia &amp; intolerance</b>	•			•			---

<sup>192</sup> See supra, ch II.A.

<sup>193</sup> They include: human rights of national minorities; discrimination, racism, xenophobia and intolerance; torture and ill-treatment; trafficking in human beings; children's rights; human rights education; and freedom of expression and information.

<sup>194</sup> Council of the EU, 'EU Priorities for cooperation with the Council of Europe in 2012-2013', 25 July 2012, Doc No 12898/12; Council of the EU, 'EU priorities for cooperation with the Council of Europe in 2014-2015', 19 November 2013, Doc No 16444/13; Council of the EU, 'EU priorities for cooperation with the Council of Europe in 2016-2017', 18 January 2016, Doc No 5339/16.

<sup>195</sup> See also FRAME, 'Policy Brief', November 2015, available at <<http://www.fp7-frame.eu/wp-content/uploads/2016/03/FRAME-PB-No-2-Deliverable-7.6-Revised-8-November-2015.pdf>>.

<sup>196</sup> See supra (fn 123), para 9.

Freedom of expression	•	•	•	•			•
LGBTI		(•)	•	•	•		•
National minorities (Roma, FoRB)	•	•	•	•	•	(•)	• <sup>197</sup>
Respect for European HR standards		•	•	•	•	(•)	• <sup>198</sup>
Socio-economic rights				•		(•) <sup>199</sup>	---
Torture and ill-treatment	•			•	•	(•)	•
Trafficking in human beings	•		•	•		(•)	---
Women			•	•			

*(brackets indicate that a thematic issue is not expressly declared a priority or that the document only generally refers to regional organisations without explicitly mentioning the Council of Europe)*

### **a) Respect of European human rights standards**

All three biannual priority documents list 'strengthening the respect of European human rights standards' as the first priority for cooperation between the EU and the Council of Europe. The exact contours of this priority were however not immediately defined. Initially, the 2012-2013 document only referred in very brief terms to '[c]ontinued support to enforcing the ECHR system in Council of Europe member countries'. This goal was subsequently fleshed out in the 2014-2015 and 2016-2017 priorities. They firstly highlight the importance of cooperating with Human Rights Defenders and with the Commissioner for Human Rights towards achieving this goal. The 2014-2015 priorities additionally put a focus on economic and social inclusion, which the 2016-2017 priorities replaced with a focus on torture, ill-treatment and the death penalty. Both will be discussed in more detail below. Beyond the biannual priorities, the 2012 and the 2015 Action Plan also commit the EU to strengthening regional human rights mechanisms, although only the former refers to the Council of Europe explicitly. In addition, the EU Guidelines on Human Rights Defenders identify the Commissioner for Human Rights of the Council of Europe as one of the regional mechanisms for the protection of human rights defenders, which the EU should support.<sup>200</sup>

<sup>197</sup> Council of the EU, 'EU Guidelines on the promotion and protection of freedom of religion or belief', 24 June 2013.

<sup>198</sup> Council of the European Union, Ensuring Protection – European Union Guidelines on Human Rights Defenders, 2 June 2004, Doc No 10056/04.

<sup>199</sup> Only refers to Business and Human Rights.

<sup>200</sup> Council of the European Union, Ensuring Protection – European Union Guidelines on Human Rights Defenders, 2 June 2004, Doc No 10056/04, para 12.

### *b) Freedom of expression*

Freedom of expression and in particular media freedom are a shared priority of the EU and the Council of Europe. Media freedom, independence and diversity is one of the main aspects of the thematic work of the Commissioner for Human Rights of the Council of Europe. In line with the MoU, the EU has consistently identified freedom of expression as a priority area of cooperation since 2012. The focus of this priority has however shifted over time. In 2012-2013 the EU placed a thematic focus on media freedom and a geographic focus on the situation of journalists in Russia, Turkey and the South Caucasus (in particular Azerbaijan). Subsequently, in 2014-2015 two thematic priorities on information society and intolerance/hate speech were added. The geographic focus was dropped in 2016-2017, instead a thematic focus on terrorist content online and in social media was added.

In 2013 the EU adopted a set of Guidelines on freedom of expression online and offline.<sup>201</sup> They, too, identify the Council of Europe as one of the regional organisations with which the EU should cooperate on freedom of expression. In addition, the Guidelines outline the form that this cooperation should take. For example, they commit the EU to 'step up its engagement' with the Council of Europe, in particular by undertaking joint activities with the Commissioner for Human Rights and to support the work of the Council of Europe in its bilateral relations by encouraging third states to implement recommendations of the Council of Europe, to comply with judgments of the ECtHR, and to cooperate with the Steering Committee on Media and Information Society (CDMSI).

### *c) National minorities (Roma/religious minorities/freedom of religion or belief)*

The protection of national minorities takes a central position in the work of the Council of Europe. Its Framework Convention for the Protection of National Minorities is the first general and legally binding international instrument for the protection of national minorities. On the EU side, the fact that the Treaty on the European Union enshrines the respect for minority rights as one of the founding values of the EU would indicate a similarly strong commitment.<sup>202</sup> Nevertheless, the EU has sometimes been criticized for an alleged double-standard in its promotion and protection of minorities. It has been observed that whereas minority rights are actively promoted externally, for example through their inclusion in the Copenhagen criteria for accession candidates,<sup>203</sup> internally their protection is mostly limited to the prohibition of discrimination.<sup>204</sup> For example the EU Charter for Fundamental Rights, while progressive in many respects, does not contain provisions on minority rights other than in the context of non-discrimination.<sup>205</sup> The controversies surrounding minority rights protection are also

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<sup>201</sup> Council of the European Union, EU Human Rights Guidelines on Freedom of Expression Online and Offline, 12 May 2014, Doc No 9647/14.

<sup>202</sup> TEU, art. 2.

<sup>203</sup> European Council, 'Presidency Conclusions of the Copenhagen European Council', 21-22 June 1993, para 7.A.iii.

<sup>204</sup> Marika Lerch and Guido Schweltnus, 'Normative by nature? The role of coherence in justifying the EU's external human rights policy' (2006) 13 *Journal of European Public Policy* 304, 313.

<sup>205</sup> Sybe de Vries, 'The Protection of Fundamental Rights within Europe's Internal Market after Lisbon: An Endeavour for More Harmony', in: Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds) *The Protection of Fundamental Rights within Europe's Internal Market after Lisbon: An Endeavour for More Harmony* (Hart 2013) 71.

illustrated by the fact that not all EU Member States have ratified the Council of Europe's Framework Convention so far.<sup>206</sup>

Nevertheless, the MoU lists the 'protection of persons belonging to national minorities' as one of the core areas of cooperation between the EU and the Council of Europe.<sup>207</sup> This was translated into a thematic focus on **Roma** and **religious minorities** in the biannual priority documents. Protection of Roma focused initially particularly on socio-economic integration but since 2014 the EU also identifies a focus on women and children and on local action, and gives 'special attention' to access to education, the labour market and social protection.<sup>208</sup> The focus on religious minorities and freedom of religion or belief was not further detailed in the 2012-2013 priorities. Since 2014 the biannual priority documents refer to the implementation of the EU Guidelines on the promotion and protection of freedom of religion or belief, which were adopted in June 2013. They commit the Union to 'promote initiatives at the level of [...] the Council of Europe' and to foster regular exchanges. Beyond that, the 2015 Action Plan obliges the EEAS, the European Commission and the EU Member States more generally to support initiatives on minority rights of regional organisations, however without explicitly referring to the Council of Europe.<sup>209</sup>

#### *d) Rights of the child*

The protection of the **rights of the child** is a joint priority of the EU and the Council of Europe. The Council of Europe works towards the protection of children's rights, focusing in particular on child-friendly justice and on the fight against sexual exploitation and abuse. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse entered into force in 2010, however, five EU Member States have not yet ratified it.<sup>210</sup> It follows in a long succession of Council of Europe conventions addressing children's rights issues. In the EU, Art 3(3) and 3(5) TEU commit the EU to promote the protection of children's rights internally and to contribute to the protection of children's rights externally. The rights of the child are a core priority of the EU, as evidenced by the adoption of two sets of guidelines<sup>211</sup> and by the traditional tabling of EU resolutions on the rights of the child in UN human rights fora.

In line with this joint commitment, children's rights have been identified as a priority area of cooperation in the MoU and in the biannual priorities since 2012. Initially, a particular focus was placed on human rights education and training. In the period 2014-2015, the EU added a focus on combating violence against children and child labour. This was dropped in 2016-2017, instead the priorities now refer explicitly to 'cooperation in context of the Convention on the Protection of Children against

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<sup>206</sup> Belgium, Greece and Luxembourg signed the Framework Convention but did not ratify. France has neither signed nor ratified the Framework Convention, see <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/157/signatures>.

<sup>207</sup> The protection of national minorities takes a central position in the work of the Council of Europe. See for example the Framework Convention for the Protection of National Minorities, the first general and legally binding international instrument for the protection of national minorities. On the EU side the Treaty on European Union enshrines the respect for minority rights as one of the founding values of the EU, TEU art 2.

<sup>208</sup> Education, labour market and social protection in the 2014-2015 Priorities.

<sup>209</sup> 2015 Action Plan (n 191) para 16.c.

<sup>210</sup> The Czech Republic, Estonia, Ireland, Slovakia and the United Kingdom signed the Convention but did not ratify it, see <<http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201/signatures>>.

<sup>211</sup> Council of the European Union, EU Guidelines on Children and Armed Conflict, 4 December 2003, Doc No 15634/03; Council of the European Union, EU Guidelines on the Promotion and Protection of the Rights of the Child, 10 December 2007, Doc No 16031/07.



Sexual Exploitation and Sexual Abuse with a view to the EU joining the Convention'. The latter is a reaction to the difficulties in the accession process of the EU to the ECHR after Opinion 2/13 of the CJEU. Highlighting that accession to the ECHR remains a treaty obligation of the EU, and that the EU's 'political commitment to the CoE's convention system is strong', the 2016-2017 priorities declare that the EU should 'strengthen its commitment to accede to a number of selected conventions', the abovementioned being one of them.

In addition, the EU Guidelines on the Promotion and Protection of the Rights of the Child contain a number of references to the Council of Europe. They identify the Council of Europe as one of the regional organisations with which the EU will seek to work in partnership and coordinate its activities. More specifically the Guidelines provide: 'the EU will strengthen existing partnerships, in particular with [...] the Council of Europe [...], particularly around research and systematic data collection, analysis and dissemination and in designing appropriate country response strategies'. The Guidelines also commit the EU to support the Council of Europe in its bilateral relations with third states, among others by urging states to cooperate with the Council of Europe and to adhere to ECtHR decisions.

#### *e) Rights of LGBTI persons*

The **rights of LGBTI persons** were not included as an area of cooperation in the MoU. Three years later, however, they moved high up on the agenda of the Committee of Ministers of the Council of Europe, when it adopted Recommendation CM/Rec (2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity. This signified the first commitment of the Committee of Ministers in this respect.<sup>212</sup> Today, LGBTI rights have been prioritized as one of the thematic areas for the Commissioner for Human Rights. The Council of the EU identified LGBT rights as 'other key issue' in its priorities for the years 2012 and 2013, stating that 'LGBT is a theme which deserves EU's attention in the CoE as well as in other (UN) multilateral fora'. In the successor documents for 2014-2015 and 2016-2017, the rights of LGBTI persons were included in the canon of priorities, committing the EU to support and to cooperate with the Council of Europe in the fight against discrimination based on sexual orientation and gender identity. In addition, the EU Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons provide a framework of how the EU should promote LGBTI rights in its bilateral and multilateral relations.<sup>213</sup> They provide that the EU raises LGBTI concerns in statements and questions at the Council of Europe, and also that the EU takes into consideration the work of the Council of Europe on LGBTI rights.

#### *f) Women's rights*

Similarly, the MoU was also silent on **violence against women** or **women's rights** in general. Nevertheless, the EU prioritized these issues in 2014 after the Council of Europe's Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) entered into force. The focus shifted slightly for the years 2016-2017 from violence against women to 'gender equality, women and girls' rights, their empowerment and participation'. At the same time,

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<sup>212</sup> Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2013) 3.

<sup>213</sup> Council of the European Union, Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons, 24 June 2013, Doc No 11492/13.



the Union's commitment to the Istanbul Convention has been strengthened by including a reference to the Union's potential accession to the Convention. The EU Guidelines on violence against women and girls and combating all forms of discrimination against them state that the EU will 'regularly raise' the issue of violence against women in regional organisations, without however specifically referring to the Council of Europe.<sup>214</sup>

### *g) Trafficking in human beings*

Human trafficking is one of the Council of Europe's core areas of activity. In 2008 the Convention on Action against Trafficking in Human Beings entered into force, which has been ratified by all but one European Union Member State.<sup>215</sup> An independent expert body, the Group of Experts on Action against Trafficking in Human Beings (GRETA) was tasked with monitoring the implementation of the Convention. Similarly, the EU has a dense legal and policy framework on trafficking in human beings.<sup>216</sup> The EU Anti-Trafficking Coordinator is tasked with coordinating EU action, developing new and monitoring the implementation of existing policies.<sup>217</sup>

Although the MoU explicitly listed **trafficking in human beings** as one of the areas of cooperation between the EU and the Council of Europe, this has only been reflected in the EU's priorities since 2014. The 2014-2015 priorities merely comprised a brief reference to cooperation in the context of the Council of Europe's Convention on Action against Trafficking in Human Beings. For 2016-2017 this thematic focus has been considerably strengthened. Not only does it now declare the Union's accession to the Convention to be a 'long-term objective', it also explicitly encourages dialogue between the EU Anti-Trafficking Coordinator and the Council of Europe, as well as an exchange of information and best practices between both organisations. It is also noteworthy that the EU Strategy towards the Eradication of Trafficking in Human Beings (2012-2016) explicitly recognizes the 'important work' of the Council of Europe and urges the EU Member States to ratify the Council of Europe Convention on Actions against Trafficking in Human Beings.<sup>218</sup>

### *h) Torture and ill-treatment; death penalty*

The fight against torture and inhuman or degrading treatment is among the priorities of the Council of Europe. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has been ratified by all Member States of the Council of Europe. The Convention provided the basis for the creation of the Committee for the Prevention of Torture (CPT),

<sup>214</sup> Council of the European Union, EU guidelines on violence against women and girls and combating all forms of discrimination against them, 8 December 2008, Doc No 16173/08.

<sup>215</sup> The Czech Republic has neither signed nor ratified the Convention, Council of Europe, 'Chart of signatures and ratifications of Treaty 197', < [http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197/signatures?p\\_auth=0uzHY73d](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197/signatures?p_auth=0uzHY73d)>.

<sup>216</sup> See only Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ [2011] L 101/1, and 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU Strategy towards the Eradication of Trafficking in Human Beings (2012-2016)', 19 June 2012, COM/2012/0286 final.

<sup>217</sup> See for more information <[https://ec.europa.eu/anti-trafficking/eu-anti-trafficking-coordinator\\_e](https://ec.europa.eu/anti-trafficking/eu-anti-trafficking-coordinator_e)>n.

<sup>218</sup> 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU Strategy towards the Eradication of Trafficking in Human Beings (2012-2016)', 19 June 2012, COM/2012/0286 final.

which has the authority to conduct unannounced visits to detention facilities in the State Parties in order to monitor the treatment of prisoners. The prohibition of torture is also a central element in EU human rights policy, as evidenced by the adoption of EU Guidelines on torture and other cruel, inhuman or degrading treatment or punishment.<sup>219</sup>

In line with this dual commitment, the MoU identified the fight against torture and ill-treatment as one of the areas of cooperation between both organisations. Nevertheless, the biannual priorities of the EU were initially silent on this issue. At first it was only the 2012 Action Plan which committed the EEAS and the EU Member States to '[a]ctively and continuously support and implement [...] Council of Europe anti-torture efforts', referring explicitly to the Committee for the Prevention of Torture.<sup>220</sup> It was however not specified, which form this support should take. Similarly, the 2015 Action Plan commits the EEAS, the European Commission and the EU Member States to 'undertake joint actions' for the eradication of torture in close cooperation with regional organisations, though not explicitly mentioning the Council of Europe.<sup>221</sup> At the same time the Guidelines to EU Policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment (adopted in 2001, revised in 2008 and 2012) set out a framework for the promotion of the prohibition of torture in EU external relations. They focus mostly on bilateral relations with third states, through which the EU seeks to strengthen the relevant Council of Europe actors and instruments, e.g. by urging third countries to implement ECtHR decisions and CPT recommendations, and to consent to the publication of reports or to country visits. It was only 2016, that torture, ill-treatment and the death penalty were added to the EU's biannual priorities for the Council of Europe. No further details are provided; the issue is not even treated as an independent priority but listed as a bullet point under 'strengthening respect of European human rights standards'.

### *i) Socio-economic rights*

The silence of most policy documents on socio-economic rights reflects the fact that they sometimes appear to take second place in the work of both the EU and the Council of Europe. They are not mentioned in the MoU, neither in the 2012-2013 or 2014-2015 annual priorities. There are no EU Guidelines dealing specifically with socio-economic rights, and the 2012 and 2015 Action Plan do not link EU action on economic or social rights to the Council of Europe. Nevertheless, the 2014-2015 priorities included a brief bullet point on economic and social inclusion under 'strengthening respect of European human rights standards'. This was expanded in the 2016-2017 document, which for the first time identified **social and economic rights** as a thematic priority for EU cooperation with the Council of Europe. Specifically, it focuses on three different aspects: (1) fundamental socio-economic rights and business and human rights, (2) interaction between the European Social Charter and EU law and policies,<sup>222</sup> (3) education of disadvantaged children and youth. It is noteworthy, that the 2015 Action Plan also commits the EU to raise awareness of the UN Guiding Principles on Business and Human Rights and corporate social responsibility in its cooperation with regional organisations.

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<sup>219</sup> Council of the EU, 'Guidelines to EU Policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment', 20 March 2012, Doc No 6129/1/12.

<sup>220</sup> Council of the EU, 'Action Plan on Human Rights and Democracy', 25 June 2012, Doc No 11855/12, para 17.a.

<sup>221</sup> 2015 Action Plan (n 191) para 13.c.

<sup>222</sup> This is a direct result of the Turin process, launched by the Secretary General of the CoE in October 2014. See for more information <[www.coe.int/en/web/turin-process/home](http://www.coe.int/en/web/turin-process/home)>.

### j) *Discrimination, racism, xenophobia and intolerance*

In the Council of Europe, the European Commission against Racism and Intolerance (ECRI) monitors instances of racism, xenophobia, intolerance and discrimination on racial grounds. At the EU level, a dense legal and policy framework has been adopted.<sup>223</sup> Consequently, the MoU listed the 'fight against **discrimination, racism, xenophobia and intolerance**' as an area of cooperation between both organisations. Initially however, these issues only partially found entry into the biannual priority documents. In particular discrimination against LGBTI persons, national or religious minorities, and women were singled out, while a more overarching EU focus also on racism and xenophobia was missing. Only the most recent biannual priorities explicitly refer to the work of ECRI and commit the EU to promote awareness of its activities and the implementation of its recommendations.

### 3. *Country-specific priorities*

In 2012 and in 2014 the Council of the EU identified the same group of countries on which the EU intends to focus its cooperation with the Council of Europe, namely Azerbaijan, Belarus, Bosnia and Herzegovina, Kosovo, Russia, Turkey and Ukraine. In addition, the EU placed a geographic focus on Russia, Turkey and the South Caucasus (with Azerbaijan 'in particular') in its thematic prioritisation of media freedom and the protection of journalists. For 2016-2017 the EU no longer refers to specific focal countries, but merely to its candidate and potential candidate countries, Eastern and Southern partner countries under the ENP, and to Russia and Central Asia.

### 4. *Conclusions*

The EU's selection of thematic goals and objectives reflects the core areas of work of the Council of Europe. This includes a stronger focus on civil and political rights than on economic, social and cultural rights. Over time the EU has expanded its priorities in order to mirror developments at the level of the Council of Europe, namely in the field of LGBTI rights and violence against women. Socio-economic rights and the fight against the death penalty were added in the most recent biannual priorities. The former corresponds to one of the primary human rights objectives of the EU, the latter may be an indication of EU efforts to move economic, social and cultural rights higher up on its agenda. As the overview in table 2 shows, not all relevant EU policy documents are consistent. Most noticeably, the 2012-2013 and the 2014-2015 biannual priorities omitted some of the core areas of cooperation that were identified in the MoU, namely torture and ill-treatment, as well as racism, xenophobia and intolerance. The 2012-2013 priorities were furthermore silent on the issue of trafficking in human beings. The most recent biannual priorities for 2016-2017 are the first that include the entire range of human rights issues listed in the MoU. Similarly, the 2012 Action Plan only identified the Council of Europe as a regional organisation with which the EU should cooperate in the areas of freedom of religion, the rights of LGBTI persons, and torture and ill-treatment. It thereby omitted other core areas such as violence against women, trafficking, children's rights and freedom of expression – although all of them are explicitly addressed in the Action Plan. Furthermore, none of the mentioned policy

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<sup>223</sup> See for an overview European Commission, 'Racism and xenophobia', <[http://ec.europa.eu/justice/fundamental-rights/racism-xenophobia/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/racism-xenophobia/index_en.htm)>.

documents reflect the Council of Europe's active engagement with regard to the rights of migrants and the rights of people with disabilities. Both of these should play a significant role in EU human rights policy, in light of the migrant crisis on the one hand, and the EU's accession to the UN Disability Convention on the other hand. These gaps and inconsistencies are unfortunate. All of the examined policy documents are supposed to substantiate EU human rights policies and to provide guidance to those EU and EU Member States officials who are tasked with their implementation. If these documents do not identify potential regional partners or omit human rights issues which belong to the particular expertise of these partners, they risk that certain avenues of cooperation will be overlooked. Avoiding these blind spots could enable the EU to realize untapped potential for cooperation and ultimately strengthen EU external human rights policy.

The geographic priorities of the EU on the contrary are very broad. They encompass virtually all Council of Europe members and some observers, with the exception of the EU Member States, the members of the European Economic Area, and the microstates Andorra, Monaco and San Marino. Here it should be examined, whether a stronger country-specific focus, linking thematic issues to countries where violations are particularly prevalent, may be a useful strategy.

## **E. Rapprochement of the human rights protection systems of the CoE and the EU**

### **1. The impact of the Council of Europe on EU human rights law and policy**

#### **a) Introduction**

Scholarly attention often focuses on the EU's actual or potential impact at the multilateral level. In light of the EU's commitment to effective multilateralism, a score of researchers have examined the ways in which the EU can promote its agenda through or in partnership with other international organisations. Studies have focused on the ways in which the EU can engage in state-centric multilateral settings, how it can enhance its participation rights, how it can ensure that its Member States 'speak with one voice', how it can increase policy coherence and which goals and objectives it should pursue.<sup>224</sup> The EU's unique nature and ensuing challenges, paired with its perceived

<sup>224</sup> See for example Spyros Blavoukos and Dimitris Bourantonis (eds) *The EU Presence in International Organizations* (Routledge 2011); Evan Brewer, 'The Participation of the European Union in the Work of the United Nations: Evolving to Reflect the New Realities of Regional Organizations' (2012) 9 *International Organizations Law Review* 181; Nicolas Burmester and Michael Jankowski, 'Reassessing the European Union in the United Nations General Assembly' [2014] *Journal of European Public Policy* 1; Eugénia da Conceição-Heldt and Sophie Meunier, 'Speaking with a Single Voice: Internal Cohesiveness and External Effectiveness of the EU in Global Governance' (2014) 21 *Journal of European Public Policy* 961; Anne Degrand-Guillaud, 'Actors and Mechanisms of EU Coordination at the UN' (2009) 14 *European Foreign Affairs Review* 405; Anne Degrand-Guillaud, 'Characteristics of and Recommendations for EU Coordination at the UN' (2009) 14 *European Foreign Affairs Review* 607; Thomas Gehring, Sebastian Oberthür and Marc Mühleck, 'European Union Actorness in International Institutions: Why the EU Is Recognized as an Actor in Some International Institutions, but Not in Others' (2013) 51 *JCMS: Journal of Common Market Studies* 849; Sieglinde Gstöehl, 'EU Diplomacy After Lisbon: More Effective Multilateralism?' (2011) 17 *Brown Journal of World Affairs* 181; Sieglinde Gstöhl, "'Patchwork Power" Europe: The EU's Representation in International Institutions' (2009) 14 *European Foreign Affairs Review* 385; Frank Hoffmeister, 'Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies' (2007) 44 *Common Market Law Review* 41; Katie Verlin Laatikainen, 'Multilateral Leadership at the UN after the Lisbon Treaty' (2010) 15 *European foreign affairs review* 475; Gjovalin Macaj and Joachim A Koops, 'Inconvenient Multilateralism: The Challenges of the EU as a Player in the United Nations Human Rights Council' in Jan Erik Wetzel (ed), *The EU as a 'Global Player' in Human Rights?* (Routledge 2011); Gjovalin Macaj and Kalypto Nicolaïdis, 'Beyond "one Voice"? Global Europe's Engagement with Its Own Diversity' (2014) 21 *Journal of European Public*

ineffectiveness in multilateral fora, prompted researchers to examine how the EU could 'punch its weight' on the international scene.<sup>225</sup>

The relationship between the EU and the Council of Europe is no exception in this respect. Scholars have tended to focus on the influence of the EU on the Council of Europe rather than the other way around, particularly in light of the Lisbon reform and potential accession to the ECHR.<sup>226</sup> This comes as no surprise. Although the Council of Europe predates the EU, the latter quickly acquired a more prominent position through a rapid expansion of its competences and its membership. Areas which used to fall under the exclusive remit of the Council of Europe gradually moved within the sphere of the EU. This includes the area of human rights, which was originally absent from EU treaty law but which has since acquired a central position in the EU framework, but also for example the area of democratic reform, in which EU conditionality – in the framework of its enlargement and neighbourhood policies – began to trump commitments which Central or Eastern European countries might have had towards the Council of Europe.<sup>227</sup> The EU's thematic and geographic growth gave rise to speculations about whether the Council of Europe might ultimately be rendered obsolete. Indeed, the Council of Europe has sometimes been dubbed as a mere 'antechamber' for accession to the EU.<sup>228</sup>

This predominant focus on the EU's actual or potential impact, however, risks overlooking that its relationship with other international organisations is by no means a one-way street. On the contrary, by engaging at the multilateral level, the EU creates opportunities to influence but also to be influenced in turn. This chapter aims to shed some light on this generally understudied aspect of the EU's engagement with multilateral institutions, by exploring the ways in which the Council of Europe impacts or could potentially impact on the coherence of EU human rights law and policy. The scope of the chapter does not allow for a comprehensive assessment of all possible channels of influence. It will consequently have to focus on a few selected examples. Other chapters in this report will further explore the impact of the ECHR and the case law of the ECtHR (chapters II.E.1 and II.F.) the impact of the Joint Programmes (chapters II.G. and Appendix I) and of the Venice Commission (Appendix I).

### **b) *Assessing inter-institutional impact***

The relationship between the EU and the Council of Europe has grown increasingly close over the past decades. Nevertheless, the EU is still not a member of the Council of Europe and has only ratified a small fraction of its Conventions. It is neither subjected to the jurisdiction of the ECtHR, nor can it be monitored by any of the other treaty or resolution based monitoring mechanisms. It thereby remains largely outside of the institutional framework of the Council of Europe and the inter-institutional

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Policy 1067; Karen E Smith, 'Speaking with One Voice? European Union Co-Ordination on Human Rights Issues at the United Nations' (2006) 44 *JCMS: Journal of Common Market Studies* 113; Karen E Smith, 'The European Union at the Human Rights Council: Speaking with One Voice but Having Little Influence' (2010) 17 *Journal of European Public Policy* 224; Karen E Smith, 'The European Union and the Politics of Legitimization at the United Nations' (2013) 18 *European Foreign Affairs Review* 63.  
<sup>225</sup> See Daniel C Thomas, 'Still Punching below Its Weight? Coherence and Effectiveness in European Union Foreign Policy' (2012) 50 *JCMS: Journal of Common Market Studies* 457. See also *supra* (fn 10).

<sup>226</sup> See below, chapter II.F.d.

<sup>227</sup> Barbara Schumacher, 'The Influence of the Council of Europe on the European Union: Resource Exchange and Domain Restriction as Venues for Inter-Institutional Influence', in Oriol Costa and Knud Erik Jørgensen (eds) *The Influence of International Institutions on the EU: When Multilateralism hits Brussels* (Palgrave Macmillan 2012) 186.

<sup>228</sup> Tony Joris and Jan Vandenbergh, 'The Council of Europe and the European Union: Natural Partners of Uneasy Bedfellows?' (2009) 15 *Columbia Journal of European Law* 1, 13.

relations between the EU and the Council of Europe are mostly reduced to cooperation and coordination. How then, can the Council of Europe impact on the EU's approach to human rights?

Generally speaking, international institutions will remain uninfluential if they are not supported at the domestic level. In order to realize its goals and objectives, an international organisation consequently has to find a way to build domestic majorities which support its policies. In practice this means that it needs to engage with supportive domestic policy-makers and 'improv[e their] chances for success'.<sup>229</sup> This can take many different forms, including for example the provision of resources (e.g. information, expertise, capacity, tools or money) or the creation of legal norms and rules.

The latter is particularly relevant in the case of the Council of Europe. Since its inception, the Council of Europe has adopted 219 treaties, agreements, conventions and protocols, dealing with a range of issues that fall under the broad mandate of the organisation.<sup>230</sup> They deal with issues as diverse as biomedicine, culture, the environment, education, animal protection, sports and all sorts of matters of legal cooperation, but also particularly with human rights. By adopting these legal instruments, the Council of Europe has created a dense framework of legal norms which enjoys considerable authority. Not only do they provide domestic actors with a ready-made legal framework to which they can resort, the overall high acceptance of Council of Europe conventions also makes it more difficult for states to opt for deviating national solutions. The effect of these legal instruments is strongest if they are ratified and integrated into national law. However, even in case of non-ratification, they can serve as a source of inspiration and guidance which may influence domestic legal frameworks. These factors contribute to strengthening the coherence of the approaches to human rights across the continent.

Secondly, throughout its history, the Council of Europe has gathered a wealth of expertise and information on various policy issues. A variety of treaty- and resolution-based bodies monitor developments in the Member States in the areas of human rights, democracy and the rule of law.<sup>231</sup> A range of field offices, particularly in Eastern European and Central Asian Member States, provide capacity and expertise on the ground.<sup>232</sup> The Council of Europe has been closely engaged in the democratic reform processes in Eastern Europe after the end of the Cold War and has thus acquired particular capacities in this policy area.<sup>233</sup> The Council of Europe can use this expertise and information to feed into domestic policy-processes and thereby impact on the outcomes. Relying on the authority of the Council of Europe will often be unavoidable for domestic policy-makers – not only because of the costs involved with gathering the required information independently, but also because of the legitimacy that the Council of Europe provides.<sup>234</sup>

It has been rightly observed, that the EU with its complex institutional framework and manifold human rights relevant bodies provides for 'an unusual abundance of access points to the policy-making process for interested actors'.<sup>235</sup> While there is a multitude of potentially supportive policy

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<sup>229</sup> Oriol Costa and Knud Erik Jørgensen, 'The Influence of International Institutions on the EU: A Framework for Analysis', in Oriol Costa and Knud Erik Jørgensen (eds) *The Influence of International Institutions on the EU: When Multilateralism hits Brussels* (Palgrave Macmillan 2012) 3.

<sup>230</sup> CoE, 'Complete list of the Council of Europe's treaties', available at <[www.coe.int/en/web/conventions/full-list](http://www.coe.int/en/web/conventions/full-list)>, accessed on 10 March 2016. See also supra ch II.B.3.

<sup>231</sup> CoE, 'Monitoring mechanisms', <[www.coe.int/en/web/human-rights-rule-of-law/monitoring-mechanism](http://www.coe.int/en/web/human-rights-rule-of-law/monitoring-mechanism)>, accessed on 10 March 2016.

<sup>232</sup> CoE, 'List of external offices', available at <[www.coe.int/en/web/programmes/external-offices](http://www.coe.int/en/web/programmes/external-offices)>, accessed on 10 March 2016.

<sup>233</sup> See Schumacher, supra (fn 227).

<sup>234</sup> See supra.

<sup>235</sup> See Costa and Jørgensen, supra (fn **Error! Bookmark not defined.**) 7.

entrepreneurs in the EU with whom the Council of Europe could engage, it must not be overlooked that this complex institutional framework also makes majority building more difficult. As Costa and Jørgensen have stated: 'The EU system is a chain of institutions that act not only as access points, but also as veto points'.<sup>236</sup> They argue that international institutions will be most successful if they engage with what they call the 'meso-level' of the EU, meaning technical and expert bodies, such as Commission Directorates, Council Working Parties, special agencies etc. The stability and technical approaches of these bodies appear to make them more conducive to building majorities than purely political bodies.<sup>237</sup>

When studying the impact of the Council of Europe on the EU, two important factors may not be overlooked. Firstly, attention needs to be paid to the fact that influence can occur through direct channels (between the Council of Europe and the EU) and through indirect channels (from the Council of Europe to the Member States, to the EU). All EU Member States are simultaneously members of the Council of Europe. By impacting on these Member States (e.g. through legal instruments, adjudication and monitoring, and the provision of expertise and capacities) the Council of Europe may indirectly also impact on the EU. When EU Member States engage in policy-making in the EU, they may do this against the backdrop of the Council of Europe conventions which they have ratified, and the recommendations they have received from monitoring bodies. It can be challenging to identify these indirect influences.

Secondly, attention needs to be paid to the problem of circularity. As stated above, influence between the Council of Europe and the EU is not a one-way street. The Council of Europe may be impacting on the human rights approaches of the EU and its Member States. But at the same time, the EU and its Member States participate actively in the policy-setting of the Council of Europe. Policy proposals may originate in a bottom-up process in the EU and its Member States and come back again top-down through the Council of Europe. Distinguishing the origin of a policy and isolating the top-down from the bottom-up dimension can be challenging.

Figure 3 illustrates the different dimensions of inter-organisational impact of the Council of Europe on the EU in the area of human rights, indicating direct (blue) and indirect (grey) channels of influence. It only shows half of the picture, as in reality all arrows will be double-headed to indicate the influence of the EU and its Member States on the Council of Europe.

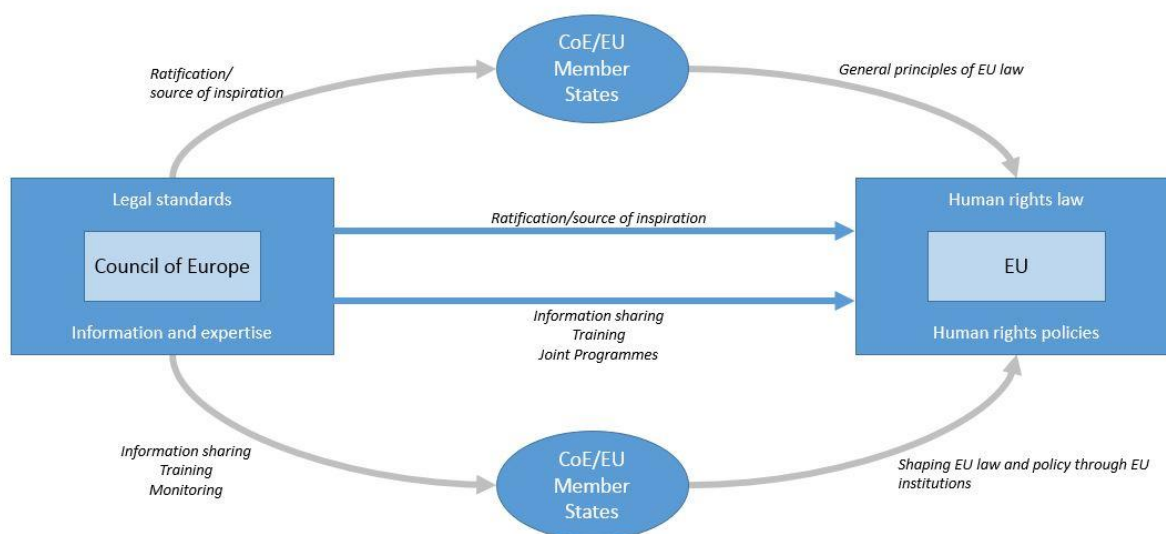
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<sup>236</sup> See *supra*.

<sup>237</sup> See *supra*, 8 et seq.



Figure 1 Channels of influence of the CoE on EU human rights law and policy



In the following, we will examine more closely how the Council of Europe can impact on the EU by providing legal standards, information and expertise. Given that the scope of this subchapter does not allow for a comprehensive analysis, these examples aim to illustrate the different channels of influence and point out areas where additional research is needed.

### c) *Legal instruments*

#### (1) The impact of Council of Europe human rights instruments on the EU

As indicated above, since 1949 the Council of Europe has adopted 219 individual instruments covering a broad a range of legal areas.<sup>238</sup> 35 of these Conventions and Protocols address primarily human rights issues.<sup>239</sup> The oldest and most prominent of these treaties is the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which was adopted in 1950 and entered into force in 1953.<sup>240</sup> Since then, 16 additional protocols to the Convention have been adopted, adding new fundamental rights or revising the competences of the ECtHR. The ECHR, which focuses on civil and political rights, was joined in 1961 by the European Social Charter, which deals with socio-economic rights.<sup>241</sup> However, the European Social Charter never reached the same level of acceptance as the ECHR. It did not acquire the same number of ratifications, nor has it been endowed with a similarly strong enforcement mechanism. Other major human rights treaties of the Council of Europe deal with torture and inhuman or degrading treatment and punishment,<sup>242</sup> the rights of minorities,<sup>243</sup>

<sup>238</sup> Supra (fn 230).

<sup>239</sup> CoE, treaty data base, select subject matter 'human rights', <[www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/search/subject](http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/search/subject)>, accessed on 10 March 2016.

<sup>240</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No.005.

<sup>241</sup> European Social Charter, CETS No.035.

<sup>242</sup> European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CETS No.126.

<sup>243</sup> European Charter for Regional or Minority Languages, CETS No.148; Framework Convention for the Protection of National Minorities, CETS No.157.



racism and xenophobia,<sup>244</sup> trafficking in human beings,<sup>245</sup> violence against women and domestic violence.<sup>246</sup>

The effect of a legal instrument of the Council of Europe on the EU is strongest, if the EU signs and ratifies it. According to art. 216(2) TFEU, agreements concluded by the EU bind its institutions and the EU Member States. They become part of Union law, subsidiary to EU primary law but hierarchically higher than EU secondary law.<sup>247</sup> In line with the primacy of EU law, they trump the national law of the EU Member States.<sup>248</sup> Upon entering into force they are directly applicable in the EU Member States and may under certain conditions also have direct effect.

Even if the EU does not ratify a treaty, it may nevertheless have certain effects on EU law and policy. This will occur in particular if a Council of Europe convention has been ratified by all EU Member States. In the 1960s, the European Court of Justice began to grant fundamental rights protection at the European level in its case law. Arguing that the 'law', whose observance the Court has to ensure,<sup>249</sup> also includes 'general principles of law' as they result from the constitutional traditions common to the Member States, the Court began to draw on human rights conventions which had been ratified by all EU Member States as indicators of the scope of these general principles. The Court relied particularly on the ECHR,<sup>250</sup> which has over time – through the case law of the ECJ – considerably contributed to the development of fundamental rights protection in the EU.<sup>251</sup> Art. 6(3) TEU today provides that:

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

As will be examined in more detail in chapter II.F, the ECHR has a strong influence on the coherence of EU human rights law and policy. It is noteworthy that the CFREU in its preamble acknowledges the impact of the ECHR, and provides in art. 53 that the interpretation of the Charter shall be in line with the ECHR.

Beyond the ECHR, other legal instruments of the Council of Europe have provided inspiration and guidance for the interpretation or design of EU law, and informed EU policy-processes. For example, Cornu has identified such an impact in the case of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.<sup>252</sup> Despite not having acceded to the Convention, the EU modelled its 1995 Data Protection Directive after the Convention and integrated its standards into the data protection laws for Europol and the Schengen system.<sup>253</sup>

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<sup>244</sup> Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, CETS No.189.

<sup>245</sup> Council of Europe, Convention on Action against Trafficking in Human Beings, CETS No.197.

<sup>246</sup> Council of Europe, Convention on preventing and combating violence against women and domestic violence, CETS No.210.

<sup>247</sup> Case C-344/04 *The Queen Ex parte International Air Transport Association, European Low Fares Airline Association v Department for Transport* [2006] ECR I-403, para 35.

<sup>248</sup> See Case 6/64 *Costa v Enel* [1964] ECR I-585; Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR I-1125.

<sup>249</sup> TEU art 19(1).

<sup>250</sup> Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR I-3727.

<sup>251</sup> For more detail see below ch II.F.

<sup>252</sup> Elise Cornu, 'The Impact of Council of Europe Standards on the European Union', in Ramses A. Wessel and Steven Blockmans (eds) *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (Asser 2013) 125.

<sup>253</sup> *Supra*.

The ratification of international conventions entails a number of legal challenges for the EU. Under EU law, the Union must meet the requirements of Title V TFEU. This means that the EU must not only observe the ratification procedure set out in art. 218 TFEU but also that it must have the competence to conclude the agreement. In line with art. 216(1) TFEU the EU can only conclude international agreements if:

1. the Treaties so provide
2. the conclusion of the agreement is necessary in order to achieve an objective referred to in the Treaties,
3. is provided for in secondary EU law or
4. is likely to affect common rules or alter their scope.

In addition, the international agreement must be open to the participation of the European Union. Originally, Council of Europe Conventions could only be ratified by states. In 1987, however, the European Community and the Council of Europe concluded an Arrangement in which they agreed:

'As regards any new draft European convention or agreement, consideration will be given to the appropriateness of inserting a clause allowing for the European Community to become a Contracting Party to the convention or agreement.'<sup>254</sup>

Today, 53 treaties of the Council of Europe are open to the accession of the EU.<sup>255</sup> Typically they contain a clause which stipulates that 'this Convention shall be open for signature by ... the European Union'. The text of the Convention usually refers to 'any state or the European Union' or simply to 'parties'. Nevertheless, the EU has only signed 15 and ratified eleven of them. Of the 53 instruments, 20 have particular implications for human rights. So far, the EU has signed three conventions dealing with terrorism, but ratified none of them (table 4).

*Table 3 List of Council of Europe legal instruments with particular human rights relevance which are open to the EU*

<b>CETS No.</b>	<b>Title</b>	<b>Opening of the treaty</b>	<b>Entry into Force</b>	<b>EU signature</b>	<b>EU ratification</b>
005	Convention for the Protection of Human Rights and Fundamental Freedoms	04/11/1950	03/09/1953		
160	European Convention on the Exercise of Children's Rights	25/01/1996	01/07/2000		
164	Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine	04/04/1997	01/12/1999		

<sup>254</sup> Arrangement between the Council of Europe and the European Community, concluded on 16 June 1987.

<sup>255</sup> CoE, 'Treaties open to: European Union', <[www.coe.int/en/web/conventions/search-on-states/-/conventions/treaty/openings/EU?p\\_auth=9M5qrk84](http://www.coe.int/en/web/conventions/search-on-states/-/conventions/treaty/openings/EU?p_auth=9M5qrk84)> accessed on 10 March 2016.

168	Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings	12/01/1998	01/03/2001		
173	Criminal Law Convention on Corruption	27/01/1999	01/07/2002		
174	Civil Law Convention on Corruption	04/11/1999	01/11/2003		
181	Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows	08/11/2001	01/07/2004		
186	Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin	24/01/2002	01/05/2006		
191	Additional Protocol to the Criminal Law Convention on Corruption	15/05/2003	01/02/2005		
192	Convention on Contact concerning Children	15/05/2003	01/09/2005		
195	Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research	25/01/2005	01/09/2007		
196	Council of Europe Convention on the Prevention of Terrorism	16/05/2005	01/06/2007	22/10/2015	
197	Council of Europe Convention on Action against Trafficking in Human Beings	16/05/2005	01/02/2008		
198	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the	16/05/2005	01/05/2008	02/04/2009	

	Proceeds from Crime and on the Financing of Terrorism				
201	Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse	25/10/2007	01/07/2010		
203	Additional Protocol to the Convention on Human Rights and Biomedicine concerning Genetic Testing for Health Purposes	27/11/2008			
210	Council of Europe Convention on preventing and combating violence against women and domestic violence	11/05/2011	01/08/2014		
213	Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms	24/06/2013			
214	Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms	02/10/2013			
216	Council of Europe Convention against Trafficking in Human Organs	25/03/2015			
217	Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism	22/10/2015		22/10/2015	

In light of the EU's strong commitment to human rights, its close relations with the Council of Europe and the – in theory – legal feasibility of participation, the low ratification rate raises questions. While the ongoing saga about the EU's accession to the ECHR has been thoroughly analysed (see also in this report chapter II.E.3.), the EU's lack of accession to other instruments has received less attention. One might suspect some form of 'EU exceptionalism' at play, with the EU seeking to preserve the autonomy of EU law and rejecting external scrutiny. One may also refer to the EU's troubled approach towards socio-economic rights which may be the reason why the EU pushes to accede to the ECHR but largely ignores the European Social Charter. Nevertheless, since the EU's accession to the ECHR has been halted with the Opinion 2/13, there appears to be some new momentum for accession to other Council of Europe conventions.

## (2) The role of the ECHR and of the European Social Charter in the EU legal order

The Council of Europe counts among its core human rights instruments the ECHR, which focuses on civil and political rights, and the European Social Charter, which focuses on socio-economic rights. The EU is a party to neither. Yet, whereas the ECHR has played a central role in the development of fundamental rights protection in the EU and is widely referred to in EU law and the case law of the CJEU, the European Social Charter has so far been mostly ignored.

EU primary law referred for the first time to the ECHR and the ESC in the Single European Act (1986). The preamble confirmed the determination of the EC Member States to 'to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter'. Noticeably, the provision does not distinguish between the ESC and the ECHR, but refers to them equally. The position of the reference in the preamble, however, meant that the legal value was limited.

In the 1992 Maastricht Treaty, the reference to the ECHR moved into the operative part, where art. F(2) enshrined the ECHR as forming part of the general principles of EU law: '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'. The reference to the ESC, on the contrary, was dropped entirely.

After the adoption of the Amsterdam Treaty in 1997, the ESC reappeared in the TEU and the TEC, albeit with a comparatively limited scope. The TEU, which continued to refer to the ECHR as being part of the guiding principles of EC law, only made a reference to the European Social Charter in its preamble. The TEC referred to the ESC in art. 136, which sets out the objectives of European social policy, 'having in mind fundamental social rights such as those set out 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'. The provision identifies the ESC as a source of inspiration for EU social policy, without however binding the EU legislator to observe it.<sup>256</sup> Furthermore, the ESC is mentioned in the same breath with the 1989 Community Charter – a non-binding EC document, which contains social rights for workers, although with a narrower scope than the ESC. It has been considered as an indication for the 'lack of commitment among at least some of the Member States to the protection of such rights at the EU level'.<sup>257</sup>

Today, the TEU not only refers to the ECHR in the context of the general principles of EU law (art. 6(3) TEU), but also commits the EU to accede to the Convention (art. 6(2) TEU). The references to the ESC, on the other hand, have remained unchanged, in the preamble of the TEU and art. 151 TFEU (ex art. 136 TEC). It is noticeable that the treaties neither envisage an accession of the EU to the ESC, nor do they explicitly consider the ESC to inform the Union's general principles of law.

The discrepancy is also apparent in the CFR. The preamble refers to both the ECHR and the ECJ:

<sup>256</sup> See: Olivier De Schutter, 'The European Social Charter in the context of implementation of the EU Charter of Fundamental Rights' (Europea Parliament 2016) 13.

<sup>257</sup> Urfan Khaliq, 'The EU and the European Social Charter: Never the Twain Shall Meet?', in Catherine Barnard and others (eds) *The Cambridge Yearbook of European Legal Studies*, Vol 15 (Hart 2013) 175.

This Charter reaffirms, [...], the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

Again, the ESC is mentioned together with the non-binding and considerably narrower Community Charter of the Fundamental Social Rights of Workers. The Charter contains a number of provisions concerning socio-economic rights, which, according to the Explanations Relating to the Charter of Fundamental Rights, have been based on the ESC (table 5).<sup>258</sup>

*Table 4 Articles of the CFREU which draw on the ESC*

Article 15 CFR	Freedom to choose an occupation and right to engage in work	Article 1(2) ESC Article 19(4) ESC
Article 23 CFR	Equality between women and men	Article 20 ESC (revised)
Article 25 CFR	The rights of the elderly	Article 23 ESC (revised)
Article 26 CFR	Integration of persons with disabilities	Article 15 ESC
Article 27 CFR	Workers' right to information and consultation within the undertaking	Article 21 ESC
Article 28 CFR	Right of collective bargaining and action	Article 6 ESC
Article 29 CFR	Right of access to placement services	Article 1(3) ESC
Article 31 CFR	Fair and just working conditions	Article 2 ESC
Article 32 CFR	Prohibition of child labour and protection of young people at work	Article 7 ESC
Article 33 CFR	Family and professional life	Article 16 ESC Article 8 ESC Article 27 ESC (revised)
Article 34 CFR	Social security and social assistance	Article 12 ESC Article 13 ESC Article 30 ESC (revised)

<sup>258</sup> Explanations relating to the Charter of Fundamental Rights, OJ [2007] C 303/17.

		Article 31 ESC (revised)
Article 35 CFR	Health care	Article 11 ESC Article 13 ESC

Whereas the ESC appears to have informed the CFREU to a considerable extent, the CFREU's provisions on the scope and interpretation of the rights, again confirm however the double standard. Article 52 CFREU provides:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

Whereas the provisions of the CFREU may not be interpreted more restrictively than the corresponding provisions in the ECHR, a similar reference to the ESC is missing. Similarly, art. 53 CFREU provides:

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.

Again, the CFREU makes an explicit reference to the ECHR but omits the ESC. Although the CFREU protects a range of socio-economic rights that draw on the ESC, the consequence is that the scope of protection for those rights is less rigorous than for the civil and political rights protected by both the CFREU and the ECHR.

The central role of the ECHR in the development of fundamental rights protection through the case law of the European Court of Justice has already been highlighted above. The ESC has so far not played a similar role in the case law of the Court. It has been observed, that the Court only refers rarely to the ESC and even if it does, the ESC has so far not played a substantive role in any decision. As Khaliq has observed, '[t]he ESC has not, in any case, materially influenced the reasoning of the CJEU'.<sup>259</sup> Whereas the Court has relied on the ECHR as a source for the development of general principles of law in line with art. 6(3) TEU, it has largely ignored the ESC in this respect.<sup>260</sup>

This distinction between civil and political rights on the one hand and economic, social and cultural rights on the other, contradicts the Union's commitment to the indivisibility of human rights.<sup>261</sup> Not only does it render the EU externally vulnerable to the criticism of double standards, it also creates internal incoherence between the obligations that the EU Member States have under EU law and those that they have under the ESC.<sup>262</sup> It should be explored how the EU could align the roles of the ECHR and of the ESC in its legal order. This could include acceding to the ESC, but also granting the ESC the same role in the case law of the European Court of Justice than the ECHR plays.

<sup>259</sup> Khaliq, *supra* (fn 257) 176.

<sup>260</sup> De Schutter, *supra* (fn 256) 13.

<sup>261</sup> See for example TEU art. 21(1).

<sup>262</sup> See *supra* (fn 93), 67 et seq.

#### d) *A new momentum for ratification?*

Although there appears to be no momentum for the accession to the ESC, or indeed strengthening the status of the ESC in the EU legal order at all, there have been a few initiatives recently to accede to other instruments of the Council of Europe. Up until 2014, the EU's priorities for the cooperation with the Council of Europe focused exclusively on the Union's accession to the ECHR.<sup>263</sup> Accession to other human rights instruments of the Council of Europe did not appear to play a major role in the strategy of the EU. When, however, the European Court of Justice halted the EU's accession to the ECHR on 18 December 2014, this strategy needed to be reconsidered. In the introduction the 2016-2017 EU priorities state:

[...] the EU's political commitment to the CoE's convention system is strong. The EU should therefore strengthen its commitment to accede to a number of selected conventions and these priorities identify a number of such conventions.<sup>264</sup>

In the subsequent thematic priorities, four conventions were identified as goals for eventual EU accession:

- Convention on Action against Trafficking in Human Beings (as a long term objective)
- Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse
- Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)
- Convention on data protection.<sup>265</sup>

With regard to the Istanbul Convention the first steps have been taken. On 4 March 2016, the Commission published a proposal for a Council Decision on the signing of the convention.<sup>266</sup> It states:

The signing of the Convention would send a strong political message about the EU's commitment to combating violence against women, create coherence between its internal and external action, as well as complementarity between national and EU levels, and reinforce its credibility and accountability towards its international partners. It would also consolidate the EU's action targeting violence against women by achieving a more coordinated approach internally and giving it a more effective role in international fora.<sup>267</sup>

The remainder of the proposal provides information about the background and content of the convention, and identifies the legal basis for the accession by the EU. The proposal was discussed by the Justice and Home Affairs Council on 11 March 2016.<sup>268</sup>

<sup>263</sup> Council of the EU, 'EU Priorities for cooperation with the Council of Europe in 2012-2013', 25 July 2012, Doc No 12898/12; Council of the EU, 'EU priorities for cooperation with the Council of Europe in 2014-2015', 19 November 2013, Doc No 16444/13.

<sup>264</sup> Council of the EU, 'EU priorities for cooperation with the Council of Europe in 2016-2017', 18 January 2016, Doc No 5339/16.

<sup>265</sup> See Supra.

<sup>266</sup> European Commission, 'Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence', COM(2016) 111 final, 4 March 2016.

<sup>267</sup> Supra, para 1.3.

<sup>268</sup> Provisional agenda, 3455th meeting of the Council of the European Union (Justice and Home Affairs), Doc No 6757/16, 9 March 2016.



The EU's accession to the Istanbul Convention would contribute considerably to strengthening the coherence in the EU's approach to human rights. Firstly, it would demonstrate that the EU does not hold partner countries and potential accession candidates to higher standards than it is itself willing to observe. The criticism of 'EU exceptionalism' and of maintaining a double standard between its internal and external human rights promotion weakens the EU's external perception as a human rights advocate. Secondly, the Convention would become part of Union law and thus directly applicable to the EU Member States, even to those who have not yet signed or ratified the Convention, thereby strengthening coherence among the Member States. The EU institutions would be bound to observe the Convention, and the European Court of Justice would have jurisdiction over the Convention to the extent that it falls under Union competence, thereby strengthening coherence in its interpretation. Finally, the EU would be subjected to the external monitoring of the Group of experts on action against violence against women and domestic violence ('GREVIO'). This would avoid incoherencies between the EU and its Member States and ensure a high level of protection by the EU.

Proposals for the ratification of the other four Conventions have not progressed that far. However, the ratification of the Istanbul Convention could be the first step towards strengthening the impact of Council of Europe legal instruments on the EU legal order. The benefits for the coherence of EU human rights law and policy will be significant.

#### e) *Information exchange*

As stated above, the Council of Europe has acquired a particularly broad range of expertise and information on a variety of policy matters with relevance for EU human rights policies. By providing information, knowledge and expertise to the EU, the Council of Europe can exercise direct influence on the EU human rights policies. It has been argued that the European Commission, as a 'transnational expertocracy'<sup>269</sup> is particularly dependent on information and expertise when exercising its mandate. Using external sources, such as for example from the Council of Europe, is not only less cost and time intensive, it may also increase the legitimacy of the Commission's actions.<sup>270</sup>

Schumacher observed this relationship between the EU and the Council of Europe in the context of the EU's neighbourhood policy.<sup>271</sup> When the ENP was launched in 2004, the European Commission lacked the necessary experience in the thematic and geographic area. It consequently relied heavily on the expertise of the Council of Europe, which had closely followed the democratic reform processes in Eastern Europe after the end of the Cold War. This was not only easier and cheaper, but also strengthened the legitimacy of the EU's policy. Instead of imposing (external) EU legal standards on the Eastern partners, it relied on the standards of the Council of Europe, to which the partner countries had committed.

This information exchange can take multiple channels. Meetings between EU and Council of Europe officials take place regularly and at all levels. Council of Europe representatives are invited to sessions of COHOM and COSCE, they meet with the HR/VP, with the EUSR, and with representatives of the Commission, and engage with the European Parliament. Members of the EU Delegation to the Council of Europe in Strasbourg regularly attend sessions at the Council of Europe, including for example the

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<sup>269</sup> Schumacher, *supra* (fn 227) 189 citing Maurizio Bach, *Die Bürokratisierung Europas. Verwaltungseliten, Experten, und politische Legitimation in Europa* (Campus Verlag 1999).

<sup>270</sup> *Supra*, 190.

<sup>271</sup> *Supra*, 190 et seq.

meetings which address the compliance with judgments of the ECtHR.<sup>272</sup> The Council of Europe regularly organizes training sessions for the staff of the EEAS on a range of topics in the areas of human rights, democracy and the rule of law.<sup>273</sup>

The EU relies in particular on the expertise of Council of Europe treaty and resolution based monitoring mechanisms. The Council Regulation concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, for example, provides that the decision whether or not to grant an export authorisations shall take into account the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment (CPT).<sup>274</sup> References to the CPT can be found in a variety of Council Decisions on accession partnerships, for example with Bulgaria, Macedonia and Turkey. Repeatedly the Council requested the accession candidates to ensure the implementations of the recommendations made by the CPT.<sup>275</sup> As stipulated in the EU's Human Rights Guidelines, it relies on the recommendations of the CPT more generally in its external human rights policies, certainly in the fight against torture and inhuman and degrading treatment,<sup>276</sup> but also in the promotion of LGBTI rights.<sup>277</sup> Similarly, the EU ensures close relations with the Group of Experts on Action against Trafficking in Human Beings (GRETA). GRETA members regularly participate in meetings, consultations and conferences organized by EU institutions, for example the meetings of National Rapporteurs and Equivalent Mechanisms.<sup>278</sup> The Group of States against corruption (GRECO) has for example been consulted by the EEAS for the preparation of European Union progress reports on the implementation of European Neighbourhood Policy Action Plans.<sup>279</sup>

Reliance is particularly strong on the case law of the ECtHR and the expertise of the Venice Commission.

## *f) Conclusions*

While the influence of the EU in international institutions has received a lot of scholarly attention, the influence of international organisations on the EU is often overlooked. Although being sometimes perceived as the 'weaker' of the two institutions, the Council of Europe impacts considerably on EU human rights laws and policies. Through the adoption of legal standards and the provision of information and expertise, the Council of Europe has a number of direct channels of influence at its disposal, through which it can shape EU policy-making. Impact is strongest when the EU ratifies legal

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<sup>272</sup> Council of Europe, Directorate of External Relations, 'Implementation of the Memorandum of Understanding between the Council of Europe and the European Union: Overview of Activities (1 January-31 December 2011)', Doc No DER/INF(2012)3 REV, 14 June 2012.

<sup>273</sup> Supra.

<sup>274</sup> Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, art 6(2).

<sup>275</sup> See only Council Decision 2008/157/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC; Council Decision 2008/212/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the former Yugoslav Republic of Macedonia and repealing Decision 2006/57/EC; Council Decision 2003/396/EC of 19 May 2003 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Bulgaria.

<sup>276</sup> Council of the European Union, 'Guidelines to EU Policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment', Doc No 6129/1/12 REV1, 20 March 2012.

<sup>277</sup> Council of the European Union, 'Guidelines to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons', 24 June 2013.

<sup>278</sup> Supra (fn 273).

<sup>279</sup> Supra.

instruments of the Council of Europe, but even beyond that the EU has tended to draw on the conventions of the Council of Europe as a source of inspiration for its own legal framework, and as an indication for the guiding principles of EU law. It is noticeable that the EU has so far only acceded to a very few Council of Europe conventions, although more than 50 are open to EU participation. The exclusive focus on the Union's accession to the ECHR has been partially redirected after the European Court of Justice issued its Opinion 2/13. Now, accession to other conventions, in particular in the areas of trafficking of human beings, children's rights, data protection and women's rights is being considered. A concrete proposal for signing the Istanbul Convention has most recently been published by the European Commission. Unfortunately, this progress can above all be witnessed in the area of civil and political rights, while economic, social and cultural rights continue to take second place in the EU. Particularly the different treatment of the ECHR and the ESC is striking, although the Turin process may generate new political momentum.<sup>280</sup> The Council of Europe does not only impact on EU human rights law and policy through the adoption of legal standards, but also by providing information and expertise. The European Commission relies heavily on knowledge provided by external sources, acting like a 'hunter and gatherer' for information.<sup>281</sup> Building on information provided by the Council of Europe is not only more convenient in terms of cost and time for the European Commission, it also adds legitimacy to its action. Close exchanges between officials of both institutions on all levels, training provided to EEAS staff by the Council of Europe, and the use of the recommendations made by the Council of Europe's monitoring bodies all contribute to strengthening the Council of Europe's impact on the EU. More research is needed in order to identify information streams and measure the impact.

## 2. The EU and the European Convention on Human Rights - the legal commitments

### a) Introduction

The process of rapprochement of the European Union and the Council of Europe has been going on almost since the establishment of the two organisations or their predecessors. The process has thus a long history and on different stages, it resulted in various common engagements. Different aspects and dimensions of this cooperation are being examined throughout this whole deliverable. In this chapter the attention will be focused on the rapprochement of the EU and the central CoE's human rights protection mechanism, which is the system of the Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>282</sup> commonly known as the European Convention on Human Rights (further: Convention or ECHR) in its formal aspect, namely the accession of the EU to the Convention.

In this regard the EU has found itself at the moment in a puzzling situation. On the one hand it is obliged to accede to the Convention by its own primary law (art. 6(2) Treaty on European Union<sup>283</sup>; further TEU) and the Convention has been amended in order to allow that (with adoption of Protocol

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<sup>280</sup> See above ch II.A.5.

<sup>281</sup> Schumacher, *supra* (fn 227) 190.

<sup>282</sup> See *supra* (fn 29).

<sup>283</sup> Treaty on European Union from 7 February 1992, OJ C 191 from 29 July 1992.

14<sup>284</sup>) as well as further, necessary instruments have been agreed on in the Draft Accession Agreement<sup>285</sup> (further: DAA), yet on the other hand the EU cannot accede to the Convention, at least on the terms so far agreed (in the DAA) due to the opinion issued by the CJEU which stated that the conditions agreed on in the DAA are not compatible with the EU law.<sup>286</sup>

A brief summary and analysis of the current situation regarding the process of the EU accession to the Convention will be provided in this chapter. In order to do so firstly, some background information on the history of the process will be presented. Secondly, a brief summary of the current legal and political situation will be provided. It will be followed by an assessment of the current state of the matter and with some comments on the perspectives on the future of the accession.

## **b) Background**

### **(1) The EU**

The idea of incorporating the Convention into the European Communities legal order dates back as early as to the first half of the 50's of the twentieth century, hence to the very beginning of the European integration, which led to the development of the EU. This idea found its expression for the first time in the European Political Community treaty (further: EPC), which was drafted in 1953.<sup>287</sup> The EPC has however never entered into force and the idea has been abandoned for a longer while. The three founding treaties,<sup>288</sup> on which the ECs were finally based, were all absent from any reference to human rights, not to even mention any direct reference to the Convention. 'Designed in that mode, the EEC treaty system provoked numerous claims — both academic and practical — as to the political accountability and constitutional legitimacy. The *raison d'être* of the initial construction of the EEC was to provide for economic integration of then Member States, therefore, went the argument, there was no need to surpass into the territory of political issues, such as human rights law'.<sup>289</sup> As some have argued, on the issue of human rights the EU and CoE became twins separated at birth.<sup>290</sup> The process of their full reunion showed up to be turbulent.

The idea resurfaced in official documents in 1976 when the European Commission examined it in its report to the European Parliament and to the Council.<sup>291</sup> The issue has however been abandoned

<sup>284</sup> Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, 14 May 2004, CEST no. 194.

<sup>285</sup> Fifth Negotiation Meeting Between the CDDH Ad Hoc Negotiation Group and The European Commission On the Accession of the European Union to The European Convention On Human Rights. Final report to the CDDH, 47+1(2013)008rev2, 10 June 2013.

<sup>286</sup> Opinion 2/13 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 from 18 December 2014.

<sup>287</sup> Griaenne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105 *American Journal of International Law* 4.

<sup>288</sup> Namely the: Treaty Establishing the European Coal and Steel Community from 18 April 1951; Treaty Establishing the European Economic Community from 25 March 1957; Treaty Establishing the European Atomic Energy Community from 25 March 1957.

<sup>289</sup> Fisnik Korenica, *The EU Accession to the ECHR. Between Luxemburg's Search for Autonomy and Strasburg's Credibility on Human Rights Protection* (Springer 2015) 36-37.

<sup>290</sup> Gerard Quinn, 'The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?' (2000-2001) 46 *McGill Law Journal*.

<sup>291</sup> The protection of fundamental rights as Community law is created and developed. Report of the Commission submitted to the European Parliament and the Council, COM (76) 37 final, 4 February 1976. Bulletin of the European Community, Supplement 5/76 5-16.

again. *Nota bene* at that time even the Commission did not consider it necessary for the Community to become a party to the Convention. The situation changed in 1979, when the Commission in its memorandum<sup>292</sup> clearly stated that the best way to enhance the human rights protection within the EC would lead through formal accession to the Convention. In this document the Commission examined theoretical and practical dimensions of such a step and despite some serious obstacles, which in its opinion were not impossible to overcome, recommended formal accession of the EC to the Convention. The proposition has been well received especially by the European Parliament<sup>293</sup> but not only. It did not however result in any instant actions towards accession. The Commission reiterated its position in 1990 and requested the Council both, for approval for the accession to the ECHR as well as for authorisation to negotiate the matter according to negotiating directives, which the Commission attached to its communication.<sup>294</sup>

After the entry into force of the Maastricht Treaty in 1993<sup>295</sup> the Council decided to verify whether the accession was at all legally possible and requested the ECJ for an opinion on the matter. The opinion<sup>296</sup> was issued on 28 of March 1996. The Court stated in it that the accession was not possible on the basis of the Community law as it stood at the time. *Nota bene* at this point accession was more of a hypothetical question as the EC had not yet even begun negotiations on the accession. The Court was clearly uncomfortable answering such a question in the abstract stating:

‘the Court has been given no detailed information as to the solutions that are envisaged to give effect in practice to such submission of the Community to the jurisdiction of an international court. It follows that the Court is not in a position to give its opinion on the compatibility of Community accession to the Convention with the rules of the Treaty’.<sup>297</sup>

The CJEU noted that accession would involve a ‘substantial change to the present system for the protection of human rights’, which would be of ‘constitutional significance’ to the Community.<sup>298</sup> The treaty did not provide for ‘any general power to enact rules on human rights’<sup>299</sup> and the residual power to negotiate treaties, at that time set out in art. 235,<sup>300</sup> was insufficient to negotiate a change of such significance.<sup>301</sup> The CJEU therefore concluded that the European Community did not have competence to accede to the Convention. It became thus clear, that the EU could not accede to the Convention without amending the EU law and providing the Union with such a competence.

Proposal to do so was made by Finland in 2000 in the process of the EU law reform taking place at that time. The proposal was aimed at changing at that time art. 303 of the EC by adding to it a provision

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<sup>292</sup> Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms. COM (79) 210 final, 2 May 1979. Bulletin of the European Communities, Supplement 2/79.

<sup>293</sup> European Parliament, Resolution of 22 October 1982 embodying the opinion of the European Parliament on the memorandum of the Commission of the European Communities on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, OJ C 304.

<sup>294</sup> European Commission Communication on Community accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms and some of its Protocols. SEC (90) 2087 final, 19 November 1990.

<sup>295</sup> Treaty on European Union from 7 February 1992, OJ C 191.

<sup>296</sup> Opinion 2/94 pursuant to Article 228(6) of the EC Treaty (Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms) from 28 March 1996.

<sup>297</sup> *Supra*, para 21-22.

<sup>298</sup> *Supra*, para 34.

<sup>299</sup> *Supra*, para 27.

<sup>300</sup> Now in the Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01, art. 352(1).

<sup>301</sup> *Supra* (fn 296) para 35.

providing the EU with competence to accede the Convention.<sup>302</sup> Nevertheless, finally the reform of the EU law introduced with the Treaty of Nice<sup>303</sup> did not include such a provision, hence the accession remained legally impossible. Appropriate provision found its place in art. I-9 in the final version of the Constitutional Treaty.<sup>304</sup> The treaty however never entered into force. The situation has finally changed when it comes to the EU's competence to accede to the Convention on 1 December 2009, with the entry into force of the Treaty of Lisbon<sup>305</sup> (further: TL), which provided the EU law with the express legal basis for the accession. As it will be explained later, after the TL reform, the EU not only did become competent to accede to the Convention, but also it became bound to do so.

Shortly after entry into force of the TL, on 11 December 2009, the European Council adopted the so-called Stockholm Programme. The Programme stressed *inter alia* that: 'After the entry into force of the Lisbon Treaty, the rapid accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is of key importance'.<sup>306</sup> *Nota bene* the Programme was aimed to cover four-years perspective (2010-2014).<sup>307</sup>

## (2) The CoE

When it comes to the Council of Europe, the idea of the accession has been welcomed by the Parliamentary Assembly of the Council of Europe (further: Parliamentary Assembly or PACE) at least since 1981, when it issued its favourable resolution on the matter.<sup>308</sup> In 2002 the Steering Committee for Human Rights (CDDH) of the Council of Europe prepared a study, in which it went through technical and legal issues concerning the EU joining the Convention.<sup>309</sup> The study reflected the fact that the EU is a *sui generis* international organisation. It also noted that due to the scope of the EU's competences and the organisation's supranational character the accession might not be an easy process. The study took under consideration as well the necessity of the Convention and CoE system adjustments in order to accommodate the fact of the EU becoming a party to it.

The emergence of the obligation on the side of the EU to join the Convention after the TL was positively noted by the PACE.<sup>310</sup> Regardless of the political favour, the legal system of the Convention was not ready for an accession. The same as the EU law it needed to be amended in order the EU could join the ECHR. Such a fundamental change has been introduced by additional Protocol no. 14 to the Convention. The Protocol was an important step in the process of the reform of the Convention system and it introduced many significant procedural changes to the system of the Convention, which however did not relate to accession, hence remain out of the scope of this analysis.<sup>311</sup> The process of ratification of the Protocol has been rather lengthy. This did not necessarily had to do only with the

<sup>302</sup> Simone White, 'The EU's Accession to the Convention on Human Rights: A New Era of Closer Cooperation Between the Council of Europe and the EU' (2010) 1 *New Journal of European Criminal Law* 434.

<sup>303</sup> Treaty of Nice from 26th February 2001, OJ C 80.

<sup>304</sup> Treaty Establishing a Constitution for Europe from 29 October 2004, OJ C 310.

<sup>305</sup> Treaty of Lisbon from 13 December 2007, OJ C 306/01.

<sup>306</sup> European Council, The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens, OJ C 115.

<sup>307</sup> *Supra*, para 1.

<sup>308</sup> PACE, Resolution 745(1981) from 29 January 1981 on Accession of the European Communities to the European Convention on Human Rights.

<sup>309</sup> CDDH, 'Study of Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights', Report adopted by the Steering Committee for Human Rights (CDDH) at its 53rd meeting (25-28 June 2002), DG-II(2002)006.

<sup>310</sup> PACE, Resolution 1836 (2011) on The impact of the Lisbon Treaty on the Council of Europe.

<sup>311</sup> For more on the protocol and the reform of the ECtHR see for example: David Harris, Michael O'Boyle, Edward Bates, and Carla Buckley *Law of the European Convention on Human Rights* (Oxford University Press 2014) 165.

question of the EU's accession to the convention, but also with the depth and scope of Convention system reform, which the Protocol introduced.<sup>312</sup> One should however bear in mind the attitude of Russia towards the Protocol, which refused to ratify it over an extended period of time, which in effect was obstructing both – elimination of the main obstacle on the side of the CoE for the EU's accession to the Convention as well as internal reform of the Convention system aimed at increasing its effectiveness.<sup>313</sup> The Protocol was opened for signatures on 13 of May 2004 and entered into force on 1 June 2010 after being finally ratified by all the parties to the Convention, which was a condition for its entry into force. However, the adoption of Protocol 14 was only half the battle. Protocol 14 did not settle many of the substantive issues posed by EU accession (like possibility on the side of the EU to elect a judge or to participate in the Committee of Ministers of the CoE in its activities related to implementation of the Convention) because, at the time it was drafted, the EU did not have competence to negotiate the terms of its accession. On 26 of May 2010 the Committee of Ministers of the CoE (further: CoM) provided the CDDH with *ad hoc* terms of reference for the CDDH to elaborate, in co-operation with representative(s) of the EU on the details of the accession.<sup>314</sup>

### (3) The EU and the CoE

The question of accession inevitably required cooperation between the two organisations, hence it has been a matter the EU and CoE common activities. They took place along other common endeavours of the two institutions which are examined in other parts of this deliverable. In May 2005 the CoE Warsaw Summit (of Heads of State and Government), which 'gave the impetus for the reconstruction of the relations between the COE and the EU',<sup>315</sup> *inter alia* invited then Prime Minister of Luxembourg Jean-Claude Juncker to prepare a report on how the two organisations could better cooperate. The report<sup>316</sup> to the Parliamentary Assembly, among other proposals of enhancing the cooperation between the EU and CoE especially in the field of human rights, advocated also for the EU's accession to the Convention. It all led to the development of the Memorandum of understanding between the CoE and the EU, which covered many aspects of cooperation between the two organisations.<sup>317</sup> The memorandum stated that: 'Early accession of the European Union to the Convention for The Protection of Human Rights and Fundamental Freedoms would contribute greatly to coherence in the field of human rights in Europe. The Council of Europe and the European Union will examine this further'.<sup>318</sup>

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<sup>312</sup> For more see for example: Bill Bowring, *The Russian Federation, Protocol no 14 (and 14bis), and the Battle for the Soul of the ECHR* (2012) 2 Goettingen Journal of International Law 589-617.

<sup>313</sup> This prolonged deadlock led even to adoption of a Protocol 14 bis (Protocol No. 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms from 27 May 2009, CETS no. 204) which allowed, pending the entry into force of Protocol No. 14, the application of some procedural elements of the latter with respect to those States which expressed their consent.

<sup>314</sup> CDDH, Ad hoc terms of reference concerning accession of the EU to the Convention given to the CDDH by the Ministers' Deputies during their 1085th meeting (26 May 2010), CDDH(2010)008.

<sup>315</sup> *Supra* (fn 138) 144.

<sup>316</sup> Council of Europe - European Union, 'A sole ambition for the European continent', Report by Jean-Claude Juncker, Prime minister of the Grand Duchy of Luxembourg, 11 April 2006.

<sup>317</sup> For more on the Memorandum, its background and significance see chapter II.C of this report.

<sup>318</sup> Memorandum of Understanding between the Council of Europe and the European Union, 23 May 2007.



*c) Legal basis for the Accession and the status of the Convention in the EU law*

(1) The EU – legal basis for the accession

This long political process in which the CoE as well as the EU have concluded on the need of accession, led both sides to undertake legal steps and adjust their respective legal systems so that the accession was formally possible. As it has been said, that demanded both – EU law amendment as well as adjustment of the text of the Convention.

*(a) The Treaty of Lisbon*

After the Treaty of Lisbon art. 6(2) of the TEU states as follows:

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

From the wording of the article it is clear that the EU is legally bound to accede to the Convention (*Union shall accede*). It is not therefore anymore a matter of a political decision if the Union joins the Convention or not.<sup>319</sup> What is the matter of a decision though, are the conditions on which it is going to happen. Art. 6(2) underlines that the accession may not interfere with the competences of the Union. According to this article, not only is the EU obliged to join the Convention but also some conditions for accession are put forward. Moreover, the treaty has been supplemented with some other, express frames, which the final terms of accession must meet, which are going to be addressed below.

After the TL also some procedural aspects of the accession have been clarified, which included establishment of an obligation of the Council to act unanimously on the matter<sup>320</sup>, a demand of a consent of the European Parliament before the Council adopts the decision concluding the agreement as well as of a demand of approval by the EU member-states of the Council's decision concluding the agreement for it to enter into force (see: current art. 218 TFEU<sup>321</sup>).

*(b) Protocol no. 8*

In relation to the mentioned above art. 6(2) a special protocol<sup>322</sup> has been added to the TL and hence has an equal legal status to it. The protocol states as follows:

‘(Article 1) The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the

<sup>319</sup> Supra (fn 311) 165.

<sup>320</sup> *Nota bene* The Treaty establishing a Constitution for Europe, which was the first to introduce competence on the side of the EU to accede to the Convention but have never entered into force, did not demand unanimity for a decision of the Council but a qualified majority. Unanimity was introduced at the request of Denmark, which ‘was anxious to avoid a referendum to ratify the Lisbon Treaty, and thus did not want to give the impression to its people that it was possible to extend the powers of the Union by a qualified majority. This precaution was not necessary, since Art. 6 specifically states that accession does not extend the powers of the Union’ (Jean P. Jacqué, ‘The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms’ (2011) 48 Common Market Law Review 996.)

<sup>321</sup> Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 326/01.

<sup>322</sup> Protocol (No 8) Relating to Article 6(2) of The Treaty on European Union on the Accession of the Union to The European Convention On the Protection of Human Rights and Fundamental Freedoms, OJ C 326 from 26 October 2012.



'European Convention') provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

- (a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention;
- (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

(Article 2) The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.

(Article 3) Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union.'

The protocol underlines in a little more detailed way than art. 6(2) TEU the conditions for future accession of the EU to the Convention. It reiterates that that the accession needs to be based on such rules, which are in accordance with the EU law and EU's specificity as a *sui generis* organisation. It all needs to be reflected in the accession agreement also for that the EU can fully participate in the Convention system as well as for it to be well distinguished from its MS when it comes to responsibility for protection of the rights guaranteed in the Convention. Special attention is put to the competences of the EU and powers of its institutions, which cannot be affected by the accession. Moreover, the accession cannot influence the legal situation of the EU MS in relation to the Convention together with the additional protocols to it. Finally, Protocol no. 8 also underlines the importance of the EU member-states obligation not to submit any possible disputes concerning the interpretation or application of the EU law to any method of settlement other than those provided in the EU law. This last issue perhaps is however more of an internal issue of relation between the EU and its member-states after the accession.

*(c) Declaration no. 2*

The final act of the intergovernmental conference which adopted the Treaty of Lisbon has also been annexed with some declarations, one of which is also related to the art. 6(2). Declaration no. 2<sup>323</sup> states that:

'The Conference agrees that the Union's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms should be arranged in such a way as to preserve the specific features of Union law. In this connection, the Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the

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<sup>323</sup> Declaration on Article 6(2) of the Treaty on European Union, see: Consolidated Version of the Treaty on European Union, OJ C 115/13.

European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention’.

This declaration succinctly reinforces in political terms some of the points raised in the aforementioned Protocol no. 8 and art. 6(2) TEU itself. It also points out to a very important and delicate issue of the relationship between the ECtHR and the CJEU. The question of relations between the two courts as well as their mutual influence and cooperation is examined in a more detailed way in chapters II.E.2 and II.F of this report.

#### *(d) Summary*

The main consequence of the aforementioned regulations is that the EU can and is obliged to accede to the Convention. This obligation, however, is hedged around with some formal conditions regarding the procedure of concluding and entering into force of the agreement on the accession, which include demands of:

- 1.) unanimity of the Council,
- 2.) consent of the European Parliament,
- 3.) approval of the EU member-states of the decision concluding the agreement.

Even more importantly, according to the aforementioned regulations, the obligation of the EU to accede to the Conventions is hedged around with four main material conditions which have to be met by the agreement on accession, which can be summed up as follows:

- 1.) it cannot infringe the EU’s competences nor influence powers of any of its institutions,
- 2.) it has to respect the special characteristics of the EU and the EU law,
- 3.) it has to respect the mechanisms of interpretation and application of the EU law,
- 4.) it shall not affect the situation of the EU Member States in relation to the European Convention and its Protocols.

#### *(2) The EU – current status of the Convention in the EU law*

After entry into force of the TL not only did the EU become bound to accede to the Convention, but also the Convention has gained a special status within the EU legal system even though the Union is not yet a party to it. The fact that the Convention has been formally incorporated into the EU legal system intensified the ongoing interrelation between the two systems.

Art. 6(3) TEU states that:

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

TL finally, after some years of uncertainty, introduced the Charter of Fundamental Rights of the European Union<sup>324</sup> (CFREU) to the legal system of the EU and placed it at the same level as the Treaties

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<sup>324</sup> Charter of Fundamental Rights of the European Union, OJ C 326/02.

hence gave it a status of primary law. The Charter was drafted by the European Convention, which was called to consolidate rights for the citizens of the EU and enshrine them in the EU law.<sup>325</sup> The Charter was solemnly proclaimed on December 2000 by the European Parliament, the Council of Ministers and the European Commission. In order to gain an undoubted legal status in the EU law it had to wait though until entry into force of the TL, which introduced the new art. 6(1) to the TEU. Art. 6(1) TEU states that:

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

Already the Preamble to the CFREU states that:

'This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, 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 and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. (...).'

Further in art. 52(3) of the Charter regulates that:

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

Finally, according to art. 53 of the 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 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.'

Moreover, the final act of the intergovernmental conference which adopted the TL has also been annexed with Declaration no. 1, which relates to the fundamental rights within the EU and to the Charter in relation to the Convention. The Declaration states that:

'The Charter of Fundamental Rights of the European Union, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States.

The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties.'

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<sup>325</sup> Cologne European Council 3 - 4 June 1999. Conclusions of The Presidency. Annex IV - European Council Decision on the Drawing Up of a Charter of Fundamental Rights of the European Union.

The abovementioned regulations and their consequences for the Union fundamental rights protection amounting to parallel to the accession dimension of legal rapprochement of the EU and Strasbourg human rights protection system, in more details have been addressed in section concerning common human rights standards within the EU and the CoE (II.F) and relations between the CJEU and the ECtHR (II.F). What is important here is the fact, that despite the EU has not yet become a party to Convention, to do what it is bound since 2009, the Convention has already been expressly introduced to the EU legal system through the TEU and the CFREU, which intensifies the bond between the two regimes.

After initial disregard, human rights with time have become one of the most significant areas of EU law.<sup>326</sup> Together with that the significance of the Convention for the EU increased, which was reflected in the CJEU jurisprudence relating to the Convention.<sup>327</sup> The 'Convention is not formally binding to the Union, but its provisions can and must be given effect as general principles of Union law'.<sup>328</sup> Especially after the TL the Convention is undoubtedly one of the sources for the EU fundamental rights law. The issue has been addressed in more details in section II.F of this report.

The Charter became the EU's basic document guarantying fundamental rights within the community and in a sense it is parallel to the Convention. Development of the Charter was preceded by the EU legal system becoming gradually human rights oriented mostly through long standing judicial activity of the Luxemburg Court.<sup>329</sup> Adoption of the Charter as a document of the same legal value as the Treaties was one of the final steps in the process of strengthening human rights protection within the EU, which at its origins was outside the scope of the Communities. The Charter reaffirms the rights guaranteed in it within the scope they overlap with rights which result from the Convention and the way in which the latter have been interpreted by the ECtHR. Rights guaranteed by the Charter, which correspond with rights guaranteed in the Convention according to the Charter shall have the same scope as they have on the basis of the Convention, except only if the EU would provide more extensive protection to those rights.

Nevertheless, just after the development of the Charter and long before the TL, already in 2000 Luzius Wildhaber, President of the ECtHR at that time, expressed a not uncommon concern when he addressed the EU initiatives to draw up its human rights charter and to accede to the Convention by stating that creating 'alternative, competing and potentially conflicting systems of human rights protection both within the Union and in the greater Europe (...) runs the risk of weakening the overall protection offered and undermining legal certainty in this field'.<sup>330</sup> Such a threat seems to be more feasible without completing the integration of the two systems through the EU's accession to the Convention.

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<sup>326</sup> See for example: Sionaidh Douglass-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review.

<sup>327</sup> For more see for example: Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing 2013) 50-81.

<sup>328</sup> Bernadette Rainey, Elizabeth Wicks, and Clare Ovey Jacobs, *White and Ovey: The European Convention on Human Rights* (Oxford University Press 2014) 17.

<sup>329</sup> See supra (fn 289) 35-67.

<sup>330</sup> Statement made before the Minister's Deputies' Rapporteur Group on Relations between the Council of Europe and the European Union (GR-EU) by Mr Wildhaber, President of the European Court of Human Rights on 7 March 2000, Parliamentary Assembly of the Council of Europe, Communication from Committee of Ministers, Doc 8767 - 8 June 2000, para 2.

### (3) The CoE – legal basis for the accession

The question of possibility of accession of a new party to the Convention has been regulated in its art. 59. Initially, this article formulated two conditions, which had to be met by the prospective party to the Convention for it to actually accede to the treaty. The first condition was that the party-to-be to the Convention was a member of the CoE. The second condition was that it properly deposited its instruments of ratification of the Convention. Art. 4 of the Statute of the CoE<sup>331</sup> has always made it clear that only states may become members of this organisation, hence due to the first condition from art. 59 of the Convention, only state actors could become parties to the Convention.

The Protocol 14 to the Convention added to art. 59 of the Convention a new paragraph 2, which reads that: ‘The European Union may accede to this Convention’. By doing so, it created an exception for the EU, which can accede to the Convention even without becoming a party to the CoE, which it cannot do, as it is not a state. That solves the essential obstacle on the part of the CoE for the accession. Nevertheless, that does not solve some other difficulties relating to different aspects of functioning of the system of the Convention, especially relating to functioning of the control bodies of the Convention, which are rooted in the institutions of the CoE. As the EU is as not a member of the CoE it could not participate in them and thus would be excluded from some important activities that all the other parties to the Convention undertake and which are necessary for full participation in the ECHR human rights protection system (i.e. especially issues like the appointment of judges to the ECtHR and participation in CoM activities regarding implementation of the Convention). Even after adoption of Protocol 14 those issues demanded further arrangements and adjustments, which would reflect the particular character of the EU as a non-state party to the Convention and needed to be reflected in the detailed instruments of the accession agreed on by the both sides.

#### d) Summary

With the entry into force of the TL the process of the EU’s accession to the Convention has reached, at least on the side of the EU, a point of no return.<sup>332</sup> The Union is obliged to join the Convention. It cannot do it however in a way which would turn out to be contrary to its laws and to its characteristics set forth in the treaties on which the Union is based. Crucial conditions which have to be met by the terms on which the accession will be based result from EU law and the specificity of EU as a *sui generis* organisation. The EU in order to become a fully-fledged member of the ECHR system needs also to gain the possibility to fully participate in this system and its institutions, hence also in those activities, which are so far accessible only to state-parties to the Convention, which are at the same time parties to the CoE and its institutions.

The aforementioned provisions make the accession possible, oblige the EU to accede to the Convention, as well as set forth main conditions for the accession. The changes introduced to the EU legal system with the TL as well as the changes introduced to the Convention system by the Protocol 14 were necessary for the accession to happen, nevertheless they were not sufficient for it to happen.

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<sup>331</sup> Statute of the Council of Europe from 5 May 1949, CETS no. 1.

<sup>332</sup> Alexander Kornezow, ‘The Area of Freedom, Security and Justice in the Light of the EU Accession to the ECHR – Is the Break-up Inevitable?’ in Catherine Barnard, Albertina Albers-Llorens, Markus W. Gehring, Robert Schutze (eds) *Cambridge Yearbook of European Legal Studies vol. 15* (Hart Publishing 2012-2013) 251.

What was necessary were further negotiations between the both sides aimed at developing detailed instruments of accession.

### 3. Negotiations concerning the Draft Accession Agreement and the CJEU opinion 2/13 and their perspectives

#### a) Negotiations on the EU's Accession to the ECHR

Such negotiations were an unprecedented endeavour. So far, the process of accession to the Convention was rather similar to application to the system, based on fulfilling by the candidate conditions imposed by the Convention. There was no room for negotiations as all the parties to the Convention were states and thus were similar to each other. With respect to the EU, due to its international character and the fact that it comprises of states, which are already parties to the Convention, which had to be reflected in its later functioning as a party to the Convention, the situation was different.

#### (1) Background and Preparations for the Negotiations

On 17 March 2010 the Commission presented to the Council its negotiating recommendations<sup>333</sup>. On 19 May 2010 the European Parliament adopted a resolution<sup>334</sup> on the matter in which it highlighted *inter alia* main arguments in favour of the accession. In short, according to the resolution, the accession:

- 1.) is a move forward in the process of European integration,
- 2.) will send a strong signal concerning the coherence between the Union and the countries belonging to the CoE and its pan-European human rights system, which will also enhance the credibility of the Union,
- 3.) will afford citizens protection against the action of the Union similar to that which they already enjoy against action by all its Member States,
- 4.) will create an integral system of human rights protection, in which the CJEU and ECtHR will function in synchrony,
- 5.) will also compensate to some extent for the fact that the scope of CJEU is somewhat constrained in the matters of foreign and security policy and police and security policy by providing useful external judicial supervision of all EU activities.<sup>335</sup>

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<sup>333</sup> Council of the European Union, Recommendation for a Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms, 7668/10.

<sup>334</sup> European Parliament resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2009/2241 (INI).

<sup>335</sup> *Supra*, para K(1).

Shortly after entry into force of the Protocol 14, on 4 June 2010, the Council of the EU adopted its negotiating mandate.<sup>336</sup> It nominated the European Commission to negotiate on behalf of the EU. The Commission were to conduct the negotiations in consultation with the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP), as the special committee appointed by the Council, in accordance with art. 218 (4) TFEU. The decision was annexed (Annex II<sup>337</sup>) with negotiating directives. The directives demanded that the effect of the negotiations ensured that:

- 1.) the EU or its member-states competences are not affected,
- 2.) powers of the EU institutions, offices or agencies including the CJEU are not affected,
- 3.) substantive and procedural features of the system of the Convention should be preserved to the largest extent possible,
- 4.) the EU member-states obligations under the Conventions are not affected,
- 5.) the CoE bodies applying the Convention are not called upon to interpret (even implicitly or incidentally) the EU law,
- 6.) equal status of the EU within the Convention system including participation in the ECtHR (i.e. equal status of the EU judge) as well as in the other CoE bodies activities (including CoM and PACE),
- 7.) the proceedings before the ECtHR properly involve member-states and/or the Union, as appropriate and that, if sufficient link with the EU law exists, Union should have the right to join the proceedings brought against its member-state as a co-respondent and *vice versa*.

The necessity to develop the latter mechanism, which will be described in a little more detail later on, seems necessary due to complex relationship between the EU law and the EU member-states law, which might lead to uncertainty whether the EU or a member-state is responsible for introducing certain norm leading to Convention rights violations and thus to uncertainty over who is thus responsible for the violation. In Annex III<sup>338</sup> the Council declared that parallel with the negotiations the Council will discuss binding internal rules setting up a co-respondent mechanism and determining in which cases the mechanism would be triggered. According to the Council, these internal rules should also establish a procedure for settling disagreements between the EU and its member-states arising in respect to the application of the co-respondent mechanism. These rules shall be adopted unanimously before the conclusion of the accession agreement of the European Union to the Convention. The annex mentions as well development of internal rules regarding prior involvement of the CJEU procedure.

In the Final clause<sup>339</sup> the Council reiterated that the accession agreement can enter into force only after the Council has taken a unanimous decision concluding the agreement, after obtaining the consent of the European Parliament and after having received the approval by the EU member-states, in accordance with their respective constitutional requirements.

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<sup>336</sup> Council of the European Union, Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR), 10817/10.

<sup>337</sup> Supra.

<sup>338</sup> Supra.

<sup>339</sup> Supra.

The CJEU was also active in the process leading to the development of an agreement on the accession. In January 2010 the Permanent Representatives Committee, approved the participation, as an observer, of a delegate from the Court in the meetings of the FREMP, throughout the duration of the discussions on the draft recommendations for the opening of the negotiations for the accession of the EU to the ECHR.<sup>340</sup> On 24 January 2011 Presidents of the CJEU and the ECtHR issued a joint communication<sup>341</sup> in which they agreed that ‘The accession of the EU to the Convention constitutes a major step in the development of the protection of fundamental rights in Europe.’ They also underlined that in order for the principle of subsidiarity to be respected a procedure should be put in place, in connection with the accession of the EU to the Convention, which would ensure that the CJEU may carry out an internal review of the EU law before the ECHR carries out an external review (the question of the prior involvement mechanism). This question was also one of the central issues raised by the CJEU in its discussion document on the accession from 5<sup>th</sup> May 2010.<sup>342</sup>

## (2) The Negotiations

As it has been said on 26 of May 2010 the CoM gave its mandate to negotiate the details of accession to the CDDH. The CDDH entrusted with this task the informal working group CDDH-EU. The group was composed of 14 experts from the CoE Member States (7 from EU member-states and 7 from non-EU Member States). It was agreed that the group together with the EU representative (the Commission) would draft instruments of the accession. The group therefore became the main working forum for the accession negotiations. It held eight meetings between July 2010 and June 2011, when its mandate ended. On 19 July 2011 draft of legal instruments on the accession<sup>343</sup> has been delivered to the CDDH. Organized shortly after, on 14 October 2011, the CDDH meeting, contrary to expectations, was not conclusive in a sense that the draft agreement has not been accepted due to two of delegations doubts regarding some elements of the agreement. The CDDH transmitted its report to the Committee of Ministers on the work done by the CDDH-EU together with the not accepted draft legal instruments on accession in appendix.<sup>344</sup>

On 27 April 2012, as a result to a discussion during the Justice and Home Affairs Council (JHA),<sup>345</sup> the negotiations on the accession have been recommenced. On 13 June 2012, the CoM instructed<sup>346</sup> the CDDH to pursue negotiations with the EU within the *ad hoc* group ‘47+1’ (47 CoM member-states and the representative of the EU – the Commission) in order to finalise agreement on draft legal instruments dealing with the accession modalities. The group held five meetings, which took place in Strasbourg. In the course of negotiations, the EU proposed many changes in relation to the previous

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<sup>340</sup> Council of the European Union, ‘I’ Item Note from Presidency to COREPER 17807/09 5 January 2010.

<sup>341</sup> Joint communication from Presidents Costa and Skouris, Strasbourg and Luxembourg, 24 January 2011.

<sup>342</sup> Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Luxembourg 5 May 2010.

<sup>343</sup> 8th Working Meeting of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission, Draft legal instruments on the accession of the European Union to the European Convention on Human Rights, CDDH-UE(2011)16 Final Version.

<sup>344</sup> Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights, CDDH(2011)009.

<sup>345</sup> Council of the European Union, Accession of the European Union to the European Convention for the protection of human rights and fundamental freedoms (ECHR): = Exchange of views/Certain issues 8915/12, 3 June 2015.

<sup>346</sup> Steering Committee for Human Rights (CDDH) ‘Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights’ (CM/Del/Dec(2011)1126/4.1, CM(2011)149) 13 June 2012.



draft agreement. The issues raised concerned many of the covered by the previous agreement aspects.<sup>347</sup> The non-EU countries were often sceptical to interferences in the draft agreement as it was drafted by the CDDH-EU. Fourteen of the non-EU countries after the third negotiations meeting expressed some of their concerns in a common paper from 21 January 2013,<sup>348</sup> which was prepared for the fourth meeting. The fourteen states underlined especially the necessity of preserving the nature, the integrity and the effectiveness of the Convention and respect for the values and traditions of the CoE as well as of equal footing between the EU and other parties to the Convention and of avoiding differentiating the situation of states which are members of the EU and those which are not. The negotiations again were not easy. Positions of parties involved in the negotiations differed significantly, which was reflected in various documents prepared in the course of the negotiations.<sup>349</sup>

The starting point for the fifth meeting was a revised Chairperson's of the group proposal,<sup>350</sup> which was based on discussions during the 4<sup>th</sup> negotiation meeting and subsequent bilateral informal talks. As the Chairperson herself admitted: 'The package proposed should be considered in its entirety and requires all negotiating parties to show flexibility and to depart from their respective original positions'.<sup>351</sup> The fifth meeting was held on 3-5 April 2013 and it became the last one. It was concluded with adopting a package of five accession instruments:<sup>352</sup>

- 1.) Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (further: Draft Accession Agreement or DAA),<sup>353</sup>
- 2.) Draft declaration by the European Union to be made at the time of signature of the Accession Agreement;
- 3.) Draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the European Union is a party;
- 4.) Draft model of memorandum of understanding between the European Union and X [State which is not a member of the European Union];
- 5.) Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>347</sup> See reports from the three first meetings: 1<sup>st</sup> meeting at:

<[http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting\\_reports/47\\_1\(2012\)R01Erev2.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2012)R01Erev2.pdf)>; 2<sup>nd</sup> meeting at:

<[http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working\\_documents/47\\_1\(2012\)02\\_Extracts\\_CDDH\\_Report\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents/47_1(2012)02_Extracts_CDDH_Report_EN.pdf)>

3<sup>rd</sup> meeting at:

<[http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting\\_reports/47\\_1\(2012\)R03\\_EN\\_final.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2012)R03_EN_final.pdf)>.

<sup>348</sup> Common Paper of Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Iceland, Liechtenstein, Monaco, Montenegro, Norway, Serbia, Switzerland, Russian Federation, Turkey and Ukraine on major concerns regarding the Draft Revised Agreement on the Accession of the European Union to the European Convention on Human Rights, 47+1(2013)003.

<sup>349</sup> List of the most important working documents including 'Chairperson's proposal on outstanding issues and Secretariat's Participation of the EU in the Committee of Ministers when the latter takes decisions other than those expressly provided in the Convention: implications of the various options under discussion' can be found here: <[http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working\\_documents\\_en.asp](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents_en.asp)>

<sup>350</sup> Revised chairperson's proposal on outstanding issues, 47+1(2013)006, 19 March 2013.

<sup>351</sup> Supra, para 1.

<sup>352</sup> Final report to the CDDH, 47+1(2013)008rev2.

<sup>353</sup> For more on the process of negotiations see: Andrew Drzemczewski, 'The EU Accession to the ECHR: The Negotiation Process' in Vasiliki Kosta, Nikos Skoutaris, Vassilis Tzevelekos (eds) *The EU Accession to the ECHR* (Hart 2014) 17-29.

### b) *The Draft Accession Agreement*

The agreement covers all the most important and difficult matters relating to the accession, which are going to be just briefly highlighted below.<sup>354</sup> According to the DAA, art. 59 of the Convention shall be further amended so that that the EU may join also Protocols to the Convention. Article 1 DAA deals with the scope of the accession and regulates that the accession shall impose on the EU obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf and that it will not require the EU to act outside its competences. Article 1 also provides rules for attribution of acts, measures or omissions to the EU member-states even when they implement they EU law (which does not preclude the European Union from being responsible as a co-respondent).

Article 3 DAA sets up a co-respondent mechanism.<sup>355</sup> The mechanism allows the EU or its member-states to become a co-respondent to proceedings before the ECtHR. A co-respondent becomes then a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings. This mechanism is supposed to deal with cases concerning the EU law. It makes possible to include the EU in proceedings in which a Member State has allegedly violated the Convention but it 'was obliged' by the EU law to act in that particular way, notably where the violation could have been avoided only by disregarding by the state an obligation under the EU law. Also, the other way around, the EU member-states may become co-respondent in cases where the EU is a respondent to an application. This concerns cases in which the EU primary law is at stake, notably where the violation could have been avoided only by disregarding by the EU an obligation under the TEU, TFEU or any other provision having the same legal value pursuant to those instruments. According to the DAA, there are two ways of becoming a co-respondent: either by accepting an invitation by the ECtHR or by a decision of the ECtHR upon a request of the EU or a member-state to become a co-respondent.

The co-respondent mechanism is connected with the prior involvement procedure<sup>356</sup> also provided in the DAA. In proceedings to which the EU is a co-respondent, if the CJEU has not yet assessed the compatibility with the rights at issue defined in the Convention or in the protocols to which the EU has acceded of the provision of the EU law, such a possibility should be afforded to the CJEU before the ECtHR judges the case. The main reason behind the procedure is to exhaust domestic remedies in the EU system but also to avoid circumventing the CJEU in its competences.

Article 4 of the DAA aims at amending art. 33 of the Convention so that it allows cases inter all parties to the Convention, which after the accession will not be just states but also the EU. Article 5 of the DAA covers questions relating to interpretation of art. 35 and 55 of the Convention so that the proceedings before the CJEU shall be understood as constituting neither procedures of international investigation or settlement within the meaning of art. 35, paragraph 2(b), of the Convention, nor

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<sup>354</sup> For more on the DAA and the mechanisms it seeks to introduce see for example: Paul Gragl, 'Agreement on the Accession of the European Union to the European Convention on Human Rights' in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds) *The EU Charter of Fundamental Rights – A Commentary* (Hart 2014); Paul Gragl 'A Giant Leap for European Human Rights? The Final Agreement on The European Union's Accession to the European Convention on Human Rights' (2014) 51 Common Market Law Review.

<sup>355</sup> For more on the co-respondent mechanism as drafted in the DAA see for example: Vasiliki Kosta, Nikos Skoutaris, Vassilis Tzevelekos (eds) *The EU Accession to the ECHR* (Hart 2014).

<sup>356</sup> For more on the prior involvement procedure as drafted in the DAA, See Supra.

means of dispute settlement within the meaning of art. 55 of the Convention. The DAA covers also some other issues relating to the accession, which include questions of: adjusting understanding of the wording of the Convention and Protocols thereto to the special character of the EU as a non-state party to the Convention including understanding of the Convention's jurisdiction clause (art. 1 DAA); the EU's possibility to make reservations to the Convention and Protocols (art. 2 DAA); the EU participation in functioning of the ECtHR and some CoE institutions involved in application of the Convention (art. 6 and 7 DAA); participation of the EU in the expenditure related to the Convention (art. 8 DAA); relations with other agreements (art. 9 DAA) as well as procedural issues regarding the DAA itself (art. 10-12 DAA). These regulations were not subject of the utmost controversies during drafting, nor did the effect turn out to be of the highest controversy afterwards, at least in the light of the CJEU's opinion.<sup>357</sup>

The DAA is annexed with other accession instruments including Union's declaration that it will request to become a co-respondent to the proceedings before the ECtHR or accept an invitation by the Court to that effect where the conditions set out in the DAA are met (Appendix II); additional rules for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the EU is a party (Appendix III); memorandum of understanding between the EU and states which are not members of the Union regarding cases between the EU and such states in which an alleged violation of the Convention or its Protocols calls into question a provision of the EU law (Appendix IV). Some complex issues resulting from the DAA are further explained in the Draft explanatory report to the DAA (Appendix V).

### *c) Opinion 2/13 of the CJEU on the Draft Accession Agreement*

Pursuant to art. 218(11) TFEU, which reads:

‘A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised’;

On 4 July 2013 the European Commission requested the CJEU for an opinion on the DAA. The Court issued its long awaited opinion on 18 December 2014.<sup>358</sup> In the Opinion the Court, contrary to the view of the Commission,<sup>359</sup> member-states, European Parliament and the Council submissions<sup>360</sup> as well as its own Advocate General,<sup>361</sup> stated that for numerous reasons including the very fundamentals of the EU and its law the DAA as negotiated on April the 5<sup>th</sup> 2013 is not compatible with the EU law, namely with art. 6(2) TEU and to the Protocol 8 relating to this article. After such a verdict of the Court

<sup>357</sup> For more on some of those issues see for example: Andrew Drzemczewski, ‘Election of EU Judge onto the Strasbourg Court’, in Vasiliki Kosta, Nikos Skoutaris and Vassilis Tzevelekos (eds) *The EU Accession to the ECHR* (Hart 2014) or more generally for a more thoroughgoing analysis of the whole DAA see *Supra* (fn 329), 89-350.

<sup>358</sup> Opinion 2/13 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, 18 December 2014.

<sup>359</sup> *Supra*, para 71-107.

<sup>360</sup> *Supra*, para 108-143.

<sup>361</sup> View of Advocate General Kokott delivered on 13 June 2014; what perhaps best reflects the differences between the Court's and the AG's approaches are the Advocate General Kokott's softer views ending in ‘Yes, but only if (...)’ [and] the Opinion's harsh ‘No, unless (...)’, compare: Daniel Halberstam, ‘“It's the Autonomy, Stupid!” A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward’ (2015) 16 *German Law Journal* 106.

accession of the EU to the Convention on the basis of the instruments of the accession as drafted in the DAA is not possible.

According to the Court the DAA is not compatible with the EU law as:

- it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between art. 53 of the ECHR and art. 53 of the Charter, does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16<sup>362</sup> and the preliminary ruling procedure provided for in Art. 267 TFEU;
- it is liable to affect Art. 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope *ratione materiae* of EU law being brought before the ECtHR;
- it does not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice that enable the specific characteristics of the EU and EU law to be preserved; and
- it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body'.<sup>363</sup>

The main concerns of the Opinion and main values, which the Court defends in it are the special characteristics of the EU especially when it comes to the relationship between the EU and its members-states in the context of the division of competences between them and in resulting from this scope of the EU institutions powers as well as the autonomy of the EU law and the CJEU's exclusive power to interpret the Union law in a binding manner.

Reference to previous Court's jurisprudence in cases on the international agreements concluded by the Union compatibility with the EU shows that an approach adopted by the Court in Opinion 2/13 is not unprecedented.<sup>364</sup> A good example here may be the CJEU's Opinion 1/00<sup>365</sup> in which the Court 'identified the two key components of the Union's external autonomy claim to be: (i) that the essential character of the powers of the Union and its institutions as laid down in the Treaty must remain

<sup>362</sup> Namely Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms from 2<sup>nd</sup> October 2013, CETS no. 214. The Protocol seeks to introduce to the system of the Convention an institution of advisory opinion from the ECtHR to the highest courts and tribunals of the parties to the Convention and the Protocol; for more on the Protocol and mechanisms it introduces see for example: Kanstantsin Dzehtsiarou, Noreen O'Meara, 'Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?' (2014) 34 *Legal Studies* 3; Paul Gragl, '(Judicial) Love is Not a One-Way Street: The EU Preliminary Reference Procedure as a Model for ECtHR Advisory Opinions under Draft Protocol No. 16' (2013) 38 *European Law Review*; Władysław Józwicki, 'Protocol 16 to the ECHR. A Convenient Tool for Judicial Dialogue and Better Domestic Implementation of the Convention?' in Elżbieta Kuźlewska, Dariusz Kloza, Izabela Kraśnicka, Franciszek Strzyczkowski (eds) *European Judicial Systems as a Challenge for Democracy* (Intersentia 2015).

<sup>363</sup> *Supra* (fn 358), para 258.

<sup>364</sup> I mean here especially, but not only, Opinion 1/91 delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area from 14<sup>th</sup> December 1991 (for more see for example: Gragl *supra* (fn 327)). For more on the relevant CJEU case law in the context of the EU accession to the Convention see also for example: Tobias Lock, 'Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order' (2011) 48 *Common Market Law Review*.

<sup>365</sup> Opinion 1/00 pursuant to Article 300(6) EC - Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area from 18 April 2002.

unaltered and (ii) that an international agreement must not grant a supervisory body the competence to interpret EU law in an internally binding manner, that is in a manner which binds the EU and its institutions'.<sup>366</sup>

In the Opinion 2/13 the Court ruled that the DAA is incompatible with and does not reflect the specific characteristics and the autonomy of the EU law for seven main (groups of) reasons:

- 1.) not curtailing the possibility of the EU member-states to have higher human rights protection standards than the EU law on the basis of the Charter in the fields where the EU has harmonized the law;<sup>367</sup>
- 2.) not providing for the application of the rule of mutual trust between the EU member-states especially in Justice and Home Affairs (JHA) matters;<sup>368</sup>
- 3.) not ruling out the possibility that when applying Protocol 16 to the Convention national courts and tribunals would ask the ECtHR to rule on EU law issues, before asking the CJEU, which would circumvent the EU's preliminary ruling procedure;<sup>369</sup>
- 4.) violating art. 344 TFEU by failing to rule out the possible use of the ECtHR to settle disputes between the EU member-states regarding the EU law (to settling which the CJEU has monopoly);<sup>370</sup>
- 5.) setting up a co-respondent mechanism in a way that would give the ECtHR power to: a) interpret the EU law while assessing the admissibility of requests to apply this mechanism; b) ruling on the joint responsibility of the EU and its member-states, which could impinge on the EU member-states' reservations to the Convention; c) to allocate responsibility for violating the Convention between the EU and its member-states, which would violate the monopoly of the CJEU to rule on the EU law;<sup>371</sup>
- 6.) setting up a prior involvement of the CJEU procedure in a way which did not reserve to the EU itself the power to rule on whether the CJEU has already dealt with an issue or not, and in a way which did not allow to the CJEU to rule on the interpretation the EU law at stake but just on its validity;<sup>372</sup>
- 7.) giving to the ECtHR competence of judicial review over EU acts in the Common Foreign and Security Policy (CFSP) matters, despite the fact that the CJEU has no such jurisdiction in most CFSP questions.<sup>373</sup>

Some of these arguments of the Court, which are just highlighted above, are further examined in chapter II.F of this report in the context of the common human rights protection standards in the Convention system and the EU.

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<sup>366</sup> Louise H. Storgaard, 'EU Law Autonomy versus European Fundamental Rights Protection—On Opinion 2/13 on EU Accession to the ECHR' (2015) 15 Human Rights Law Review 490.

<sup>367</sup> *Supra* (fn 358), paras. 185-190.

<sup>368</sup> *Supra*, paras. 191-195.

<sup>369</sup> *Supra*, paras. 196-199.

<sup>370</sup> *Supra*, paras. 201-214.

<sup>371</sup> *Supra*, paras. 215-235.

<sup>372</sup> *Supra*, paras. 236-248.

<sup>373</sup> *Supra*, paras. 249-257.

#### d) *Summary and prospects for the future*

The opinion by the CJEU is binding and thus halts the process of the EU's accession to the Convention until the accession agreement is changed in a way, that it becomes compatible with the EU law or until the EU law is changed itself so that the agreement is not contrary to it any more. Knowing the history of Convention reforms, especially those concerning the accession (Protocol 14) and knowing the history of the EU primary law amending processes in the last decades as well as most importantly knowing the history of the negotiations over the accession instruments, '[t]o say that either of these options is difficult is probably an understatement'.<sup>374</sup>

If the accession is to happen there are three ways of making it possible:

- 1.) the DAA is renegotiated and agreed on by all the parties to the Convention as well as the EU so that it is compatible with the EU law as set out in the Opinion 2/13;<sup>375</sup>
- 2.) the EU law is amended and the EU is restructured so that the DAA is not any more incompatible with it;
- 3.) both the DAA is partially renegotiated as well as the EU law is partially modified so that they are compatible.

If none of these happens, the EU will not be able to accede to the Convention but that would be contrary to the obligation imposed on it in art. 6(2) TEU. Non-accession would then also demand some, perhaps even more difficult to be agreed on and accepted, revision of the EU primary law.

The ECtHR President Dean Spielmann after the opinion was issued noted: 'Bearing in mind that negotiations on European Union accession have been under way for more than thirty years, that accession is an obligation under the Lisbon Treaty and that all the Member States along with the European institutions had already stated that they considered the draft agreement compatible with the Treaties on European Union and the Functioning of the European Union, the CJEU's unfavourable opinion is a great disappointment'.<sup>376</sup> Indeed the opinion has not been welcomed with enthusiasm neither by human rights scholars nor practitioners.<sup>377</sup> Some commentators referred to it as to a

<sup>374</sup> Ágoston Mohay, 'Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR - Case note' (2015) *I Pécs Journal of International and European Law* 34.

<sup>375</sup> It bears to mention that the new agreement might again undergo the CJEU control under the 218(11) TFEU procedure.

<sup>376</sup> European Court of Human Rights, Annual Report 2014, 6.

<sup>377</sup> See for example the immediate reactions to the opinion: Leonard F. M. Besselink, 'Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13' *Verfassungsblog* <<http://verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213>> last accessed on 25 April 2016; Pieter J. Kuijper, 'Reaction to Leonard Besselink's ACELG Blog', *Amsterdam Centre for European Law and Governance Blog* <<http://acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselinks-s-acelg-blog/>> last accessed on 25 April 2016; Walter Michl, 'Thou Shalt Have No Other Courts Before Me' *Verfassungsblog*, <<http://www.verfassungsblog.de/en/thou-shalt-no-courts/>> last accessed on 22 April 2016. These instant blog reactions have been later followed by more developed academic analysis, which mostly remained critical to the opinion and its halting effect to the process of accession, see: Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' (2015) 38 *Fordham International Law Journal*; Jed Odermatt, 'A Giant Step Backwards? Opinion 2/13 on the EU's Accession to the European Convention on Human Rights' (2015) *KU Leuven Working Paper No. 150*; Steve Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) 16 *German Law Journal*, and many other, including some also referred to in different parts of this paper.

'bombshell'<sup>378</sup> or as to a 'clear and present danger to human rights protection'.<sup>379</sup> Some of the critics have even proposed to disregard or to overrule the opinion entirely and adopt a so called 'notwithstanding protocol', which should read: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, notwithstanding Art. 6(2) Treaty on European Union, Protocol (No 8) relating to Art. 6(2) of the Treaty on European Union and Opinion 2/13 of the Court of Justice of 18 December 2014'.<sup>380</sup> This is probably the most dramatic and clear-cut proposition in order for the EU to accede to the Convention. However, it is probably not the most likely one especially in the current political situation within the EU.<sup>381</sup>

Perhaps is it neither the most advisable solution and the Opinion 2/13 should be taken seriously and thoroughly examined, which might lead to more nuanced approach in adopting further steps. Already on the day of the Court's opinion the President of the PACE Anne Brasseur called 'on the negotiators to carefully study this opinion, and immediately set to work to overcome the legal hurdles identified by the Court. We have begun a historic process, and I remain convinced that a coherent Europe-wide system of human rights protection is strongly in the interest of all of us'.<sup>382</sup> Daniel Halberstam argues that 'a blanket dismissal of the Court's concerns would (...) be throwing out the baby with the bathwater'.<sup>383</sup> Another compromise is probably necessary for the accession to happen and for thus including the EU to the human rights protection scrutiny under the Convention system.

Reopening of negotiations, especially due to difficulties encountered in the process of reaching the current state of affairs does not promise an easy success. Some parties to the Convention, which are not members to the EU, might not be willing to easily adjust the DAA and accept a new agreement accordant to all the demands set up in the Opinion 2/13. More importantly such adjustments, if they were to fully follow the opinion, might not serve well when it comes to fulfilling the goals behind accession and thus not result in truly enhancing the human rights protection within the EU. Sionaidh Douglas-Scott argues that: 'Accession in compliance with the CJEU's judgment would not provide effective external control of the EU's actions'.<sup>384</sup> Hence, it would be counterproductive. For example, even the European Parliament in the process of preparing the accession admitted that the lack of competence by the CJEU in some areas (like some of the CFSP matters) might be compensated by the external scrutiny by the ECtHR. For the CJEU its lack of such a competence was an argument against anyone else, including the ECtHR, having it. As Steve Peers notices this 'could have serious

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<sup>378</sup> Sionaidh Douglas-Scott, 'Opinion 2/13 on EU accession to the ECHR: a Christmas Bombshell From the European Court of Justice' UK Constitutional Law Blog <<https://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/>> last accessed on 25 April 2016.

<sup>379</sup> Steve Peers, 'The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection' EU Law Analysis Blog <<http://eulawanalysis.blogspot.com.es/2014/12/the-cjeu-and-eus-accession-to-echr.html>> last accessed on 28 April 2016.

<sup>380</sup> See Besselink supra (fn 377), as well as: Leonard Besselink, Monica Claes and Jan-Herman Reestman, 'A Constitutional moment: Acceding to the ECHR (or not)' (2015) 11 European Constitutional Law Review.

<sup>381</sup> Sionaidh Douglass-Scott, 'The Relationship Between the EU and the ECHR. Five Years on from the Treaty of Lisbon' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart 2015).

<sup>382</sup> PACE, 'Let's overcome hurdles to ensure EU accedes to the Human Rights Convention' <<http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5364&lang=2&cat=15>> last accessed on 22 April 2016. Compare as well PACE, Resolution 2029 (2015).

<sup>383</sup> Halberstam supra (fn 361), 107; compare as well for example: Paul Gragl, 'The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR' (2015) 15 European Yearbook on Human Rights 27-51.

<sup>384</sup> Douglass-Scott supra (fn 381), 26.

consequences, leaving the victims of serious human rights violations without an effective remedy at international level'.<sup>385</sup>

Some of the objections to the DAA pointed out by the CJEU are possible to be solved with internal regulations adopted by the EU and its member-states themselves or just through accurate interpretation of the DAA and the EU law.<sup>386</sup> That might lead to limiting the scope of the issues, which need to be renegotiated leaving some questions to be solved within the EU. For example, the CJEU concerns relating to the Protocol 16 giving the EU member-states possibility to circumvent the preliminary reference procedure seem to be based on a threat to the autonomy of EU law which indeed does not stem from an obligation the Convention or its organs impose but from a shift in the incentive structure for the EU Member States. The concerns, rather, are EU-internal problems. Quite understandably, the Convention's system does not offer any safeguard here because it is only indirectly the root of the problem. However, remedy for the CJEU's concerns can be found with the Member States. 'A joint declaration before accession combined with rules in the implementing measures after accession would suffice'.<sup>387</sup>

The adverse impact of the EU's non-accession on the situation of individual seems to be of key importance. The lack of a possibility by an individuals to bring a complaint directly against the EU in the same way that he or she is able to bring a complaint against the EU member-states, since they are and the EU is not a party to the Convention, is indeed one of the 'anomalies of the protection of human rights in Europe'.<sup>388</sup> With the development of its competences and the scope in which the EU can shape the situation of an individual, the Union became a sort of a missing link of the European human rights protection system.<sup>389</sup> After the Opinion 2/13 such a situation has been at least prolonged for an unpredictable period of time. The President of the ECtHR Dean Spielmann noticed that 'the principal victims will be those citizens whom this opinion (no. 2/13) deprives of the right to have acts of the European Union subjected to the same external scrutiny as regards respect for human rights as that which applies to each Member State'.<sup>390</sup>

The reasons behind the accession, which inspired the process since the beginning and which also have been reflected by the EU institutions and in the Preamble to the DAA<sup>391</sup> should be borne in mind. The accession is not a goal in itself, the goal is to achieve stronger human rights protection within the EU. The accession should essentially bring:

'- guarantees of coherence as to approach to human rights in horizontal and vertical Union plan (...);

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<sup>385</sup> Supra (fn 379).

<sup>386</sup> For a more detailed analysis relating to some of those kind of matters see for example Gragl supra (n 383).

<sup>387</sup> Halberstram supra (n 361), 166. *Nota bene* such a solution has been also by the Advocate General Juliane Kokott (view of advocate general kokott delivered on 13 June 2014 para 120).

<sup>388</sup> David Harris, Michael O'Boyle, Edward Bates and Carla Buckley, *Law of the European Convention on Human Rights* (Oxford University Press 2014) 171.

<sup>389</sup> Johan Callewaert, *The Accession of the European Union to the European Convention on Human Rights* (Council of Europe 2014) 14.

<sup>390</sup> European Court of Human Rights, Annual Report 2014 6.

<sup>391</sup> The Preamble of the DAA reads: '(...) Considering that the European Union is founded on the respect for human rights and fundamental freedoms; Considering that the accession of the European Union to the Convention will enhance coherence in human rights protection in Europe; Considering, in particular, that any person, non-governmental organisation or group of individuals should have the right to submit the acts, measures or omissions of the European Union to the external control of the European Court of Human Rights (...)'



- legal binding of the process of enactment as well as application of the Union law by the ECHR, and therefore by the fundamental catalogue of classical rights in Europe;
- better communication between the two human rights protection orders, including the two Courts;
- introduction of an external control of human rights implementation within the Union legal order by a judicial organ independent of the Union – Strasburg Court; this will also allow the Union to have its views and interests represented before this Court;
- facilitation and strengthening of the situation of the rights holder by admitting an application to the Strasburg Court directly against the Union as the alleged perpetrator of human rights violation and to against one or all the Member States (...);
- facilitation of the situation of the applications' author by relieving him or her from the necessity to conduct complicated legal analysis concerning unclear system of relevant sources of law;
- reinforcement of legal security with regard to the execution of the ECtHR judgments which will concern directly the EU as the perpetrator of violations (...);
- reinforcement of the credibility of the EU as an international advocate of human rights, including with reference to states, organisations and institutions cooperating with the Union<sup>392</sup>.

Therefore, it seems advisable that the approach chosen by the EU and its institutions after the CJEU's opinion stalled the process of accession, should to aim at renewing the process and shaping it in a way, which would enable fulfilling to the highest possible extent the reasons behind the accession, hence provide the EU and individuals under its powers with an effective external scrutiny mechanism on the human rights matters. If the negotiations are to be reopened both the Opinion 2/13 and the values behind the accession should serve as benchmarks for them. Before reopening the negotiations perhaps internal reforms of the EU law should be considered (possible within the frames of the EU law and desirable in the light of reasons behind the accession).

Finally, it seems that the EU rather than the CoE should show initiative in solving the deadlock. After all, it is the EU who is obliged by its own law to accede to the Convention. It is also the EU who in a sense withdrew from the previous agreement after it itself drafted it and preliminarily agreed on the terms contained in it. As the Opinion comes from within and is directed towards the EU, the CoE or its member-states which are not parties to the EU, seem to have, at least at present, less reasons to take initiative on this matter.

## F. The Issue of Common Human Rights Standards

This section examines what the common human rights normative standard is between the EU and the Council of Europe (CoE). This section does not focus in detail on specific convergences or divergences in the interpretation of specific rights between CoE treaties and EU law, which would be beyond the

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<sup>392</sup> Zdzisław Kędzia, 'Relationship Between the European Convention of Human Rights and the Charter of Fundamental Rights After the European Union's Accession to the Convention' in Jan Barcz (ed), *Fundamental rights protection in the European Union* (C.H. Beck 2009) 247; see also for example: Johan Callewaert, *The accession of the European Union to the European Convention on Human Rights* (Council of Europe 2014) 14-46.

scope of this short section,<sup>393</sup> beyond using certain convergences and divergences as practical examples. Instead it looks at the overarching relationship between the EU and the CoE on the subject of human rights. In principle, the response to this question is obvious: the European Convention on Human Rights should be the common standard, the thread binding the EU and the CoE together. However, the relationship between the EU and the CoE on the subject of human rights is paradoxical. On the one hand, the EU is massively exposed to the influence of the European Convention on Human Rights (ECHR), but on the other it is also shielded from its effects in various ways and we will explore this subject in some depth in this section. In seeking to establish the common normative standard, the judgments of both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) are extremely important, two judgments in particular, the *Bosphorus v Ireland* judgment of the ECtHR and *Opinion 2/13* of the CJEU will be discussed in detail.

### 1. The Centrality of the European Convention on Human Rights

A good place to start our discussion is Art. 6 of the Treaty on European Union, which sets out a number of human rights parameters for the EU. It states:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...] which shall have the same legal value as the Treaties.

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

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

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

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

Thus, the treaty sets out three sources for EU fundamental rights law, these are:

- a) the constitutional traditions common to the Member States,
- b) the European Convention on Human Rights and
- c) the EU Charter of Fundamental Rights.<sup>394</sup>

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<sup>393</sup> For a thorough account see: Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward, *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014).

<sup>394</sup> Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art. 6; See generally Robert Schutze, 'Three 'Bills of Rights' for the European Union' (2011) 30 Yearbook of European Law 131.

This provision of the treaty has been described as a “codification” of the pre-existing position’,<sup>395</sup> rather than a sea change in the legal situation. The CJEU has had regard to other international treaties as sources of fundamental rights when defining EU law,<sup>396</sup> but the ECHR has been singled out as a special source among the international treaties the CJEU has regard to.<sup>397</sup>

The interplay between these different sources of law creates a cycle of reinforcement within EU fundamental rights law with the European Convention on Human Rights (ECHR) at its core. As we mentioned, the ECHR is expressly recognised as a source of fundamental rights law in the Treaty on European Union. However, it also influences EU fundamental rights law indirectly through the other channels. As all Member States are signatories to the ECHR and have been for a number of decades, it has formed part of their constitutional traditions to varying degrees and thus feeds into EU fundamental rights law through this channel. At the same time, the Charter makes numerous express references to the ECHR linking the Charter and the ECHR together. The preamble to the Charter states:

‘[t]his Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from [...] the European Convention for the Protection of Human Rights and Fundamental Freedoms’.<sup>398</sup>

As the first declaration annexed to the Lisbon treaty notes, the Charter confirms the fundamental rights guaranteed by the European Convention.<sup>399</sup> The Charter also mirrors many of the provisions of the ECHR both textually and in substantive terms. The cross-pollination is expressly recognised in the Charter where it states that:

‘[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention’.<sup>400</sup>

It is also clear from this article that the ECHR forms part of the general principles of law, which the CJEU has regard to when interpreting EU law and making decisions. There is no single instrument setting out what values are fundamental in EU law. This is viewed by some as a source of great richness in the law and by others as unnecessarily complex.<sup>401</sup> Determining the general principles is to an extent and open-ended process,<sup>402</sup> although it has served to reinforce the position of the ECHR in EU law. The cycle of reinforcement is clearly reflected in the jurisprudence of the CJEU, with the ECHR becoming increasingly embedded in the EU’s legal order. The CJEU for its part was initially very reluctant to

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<sup>395</sup> Case C-396/11 *Criminal Proceedings against Radu* [2013] QB 1031 at [AG51].

<sup>396</sup> Case C-4/73 *Nold v Commission* [1975] ECR I-985 at [13]; Case C-374/87 *Orkem v Commission* [1989] ECR I-3283 at [18].

<sup>397</sup> Case C-260/89 *ERT v DEP* [1994] 4 CMLR 540 at [41].

<sup>398</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/02, preamble.

<sup>399</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01, Declaration No. 1.

<sup>400</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/02, art. 52 (3).

<sup>401</sup> Damian Chalmers and Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (3rd edn CUP 2014) 250.

<sup>402</sup> Sionaidh Douglas-Scott, ‘A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis’ (2006) 43 *Common Market Law Review* 629, 639; Guy Harpaz, ‘The European Court of Justice and its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy’ (2009) 46 *Common Market Law Review* 105, 107.

engage with human rights law.<sup>403</sup> However, in the early 1970s, the CJEU recognised that respect for fundamental rights forms an integral part of the general principles of Community law.<sup>404</sup> It began to make express references to the ECHR in the *Rutili* case.<sup>405</sup> Since then, the CJEU has gradually relied on the ECHR more and more and from the mid-90s the CJEU increasingly looked to the Convention for inspiration as to the nature and scope, or even existence, of fundamental rights in Community law.<sup>406</sup>

The CJEU has also embraced the ECtHR's jurisprudence. When determining the meaning and scope of certain rights, the CJEU often takes its lead from the jurisprudence of the ECtHR, as it did in the case of *McB v LE* where the CJEU stated that: 'Art. 7 of the Charter must therefore be given the same meaning and the same scope as Art. 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights'.<sup>407</sup> The CJEU closely follows ECtHR case law and in some instances has changed its own jurisprudence to respond to changes in ECtHR case law. Thus, in *Hoechst v Commission*, the CJEU held that business premises were not protected by Art. 8 of the Convention guaranteeing the inviolability of the home.<sup>408</sup> However, the ECtHR changed its approach to this issue in *Societe Colas Est v France*.<sup>409</sup> There it held that Art. 8 could be construed, in certain circumstances, as including a right to respect for a company's business premises. This in turn prompted the CJEU to change its jurisprudence to align with the development of the ECtHR jurisprudence in *Roquette Freres*.<sup>410</sup> Thus, both the ECHR and the ECtHR's jurisprudence are central sources when defining EU fundamental rights law, influencing it both directly and indirectly. The reliance on the ECtHR standards at the CJEU has a significant reinforcing and amplifying effect upon them. Whereas ECtHR judgments are normally only binding on the individual parties, the CJEU judgments have an *erga omnes* effect flowing out to all of the Member States and binding them.<sup>411</sup>

## 2. A Complex Relationship

There is clearly a strong degree of commonality between the EU and the CoE on the subject of human rights as the foregoing paragraphs have illustrated. However, this relationship is quite complex and paradoxical when one looks beyond the surface. The European Court of Human Rights exercises limited scrutiny over the actions of the EU from a human rights standpoint, thereby reducing the prospects of aligning a common human rights standard. The ECtHR is motivated to limit its scrutiny of the EU for compliance with human rights law by a number of factors. Firstly, the distinct nature of the EU as a separate legal entity has led the ECtHR to naturally limit its scrutiny as it would with any other

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<sup>403</sup> John Murray, 'The Influence of the European Convention on fundamental rights on Community Law' (2010) 33 Fordham International Law Journal 1388, 1394.

<sup>404</sup> John Murray, 'The Influence of the European Convention on fundamental rights on Community Law' (2010) 33 Fordham International Law Journal 1388, 1394; Case C-4/73 *Nold v Commission* [1975] ECR I-985; Case C-11/70 *Internationale Handelsgesellschaft* [1972] CMLR 255 at [4].

<sup>405</sup> Case C-36/75 *Rutili v Minister de l'Interieur* [1975] ECR I-1219 at [32].

<sup>406</sup> John Murray, 'The Influence of the European Convention on fundamental rights on Community Law' (2010) 33 Fordham International Law Journal 1388, 1394.

<sup>407</sup> Case C-400/00 *McB v LE* [2011] 3 WLR 699 at [53].

<sup>408</sup> Case C-46/87 *Hoechst v Commission* [1989] ECR I-2859.

<sup>409</sup> *Societe Colas Est v France* (2004) 39 EHRR 17.

<sup>410</sup> Case C-94/00 *Roquette Freres SA v Directeur General de la Concurrence, de la Consommation et de la Repression des Fraudes* [2002] ECR I-9011; Nuala Mole, 'The complex and evolving relationship between the European Union and the European Convention on Human Rights' [2012] European Human Rights Law Review 363, 365; John Murray, 'The Influence of the European Convention on fundamental rights on Community Law' (2010) 33 Fordham International Law Journal 1388, 1395.

<sup>411</sup> John Murray, 'The Influence of the European Convention on fundamental rights on Community Law' (2010) 33 Fordham International Law Journal 1388, 1397.

international organisation because it is not yet a party to the ECHR. Secondly, the existence of a parallel legal system, both at domestic and European levels, in which EU acts can, at least in principle, be challenged on human rights grounds, has given the ECtHR some peace of mind regarding EU compliance with human rights law. Thirdly, it has been argued that Strasbourg's limited oversight is motivated by a fear that the CJEU would not follow its judgments.<sup>412</sup> The following sections analyse the scope of judicial supervision exercised by the ECtHR and how this affects the convergence of human rights standards between the EU and CoE.

### 3. *Ratione Personae*

Initially when applicants brought cases challenging the actions of the EU (or its forebear the EC), these were rejected on *ratione personae* grounds by the ECtHR. In general, an application may only be brought against a Contracting State for a violation of the Convention for which the State is in some way responsible,<sup>413</sup> or which is in some way imputable to it.<sup>414</sup> This criterion has been used to dismiss a variety of applications including, for example, applications directed against international organisations like the EU.<sup>415</sup> Thus, in the early case of *Confederation Francaise Democratique du Travail v EC*,<sup>416</sup> the applicant confederation alleged violations of Art. 11, 13 and 14 of the ECHR when it was not appointed as a member of the European Coal and Steel Community's Consultative Committee. The French government was responsible for designating the specific representatives, but did not designate the applicant organisation and as a result the EC Council did not endorse their membership of the committee. The European Commission on Human Rights considered that by challenging this move, the applicant was challenging 'an act which has its effects within the internal framework of the European Communities'.<sup>417</sup> Insofar as the application was directed at the European Communities, the European Commission on Human Rights did not have jurisdiction *ratione personae* to address this because the European Communities were not a contracting party to the ECHR.<sup>418</sup>

However, the fact that the EU was exercising some powers on behalf of the contracting States did not mean that they were completely immune from scrutiny. The European Commission on Human Rights, again very early on in its jurisprudence, stated that:

'If a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the

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<sup>412</sup> Paul de Hert and Fisnik Korenica, 'The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights' (2012) 13 German Law Journal 874, 880.

<sup>413</sup> Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (6th edn OUP 2014) 33.

<sup>414</sup> David Harris, Michael O'Boyle, Ed Bates and Carla Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn OUP 2014) 81; Chittharanjan Felix Amerasinghe, *Jurisdiction of Specific International Tribunals* (Brill 2009).

<sup>415</sup> David Harris, Michael O'Boyle, Ed Bates and Carla Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn OUP 2014) 83; see for example *Stephens v Cyprus, Turkey and United Nations* (App No 45267/06) judgment of 11 December 2008.

<sup>416</sup> *Confederation Francaise Democratique du Travail v European Communities* (App No 8030/77) decision of 10 September 1978.

<sup>417</sup> *Confederation Francaise Democratique du Travail v European Communities* (App No 8030/77) decision of 10 September 1978 at [2].

<sup>418</sup> *Confederation Francaise Democratique du Travail v European Communities* (App No 8030/77) decision of 10 September 1978 at [3]; this precedent has been restated in subsequent decisions see for example *Kokkelvisserij v Netherlands* (2009) 48 EHRR SE 18.

first treaty it will be answerable for any resulting breach of its obligations under the earlier treaty'.<sup>419</sup>

Thus, the relationship of oversight between the EU and the Convention organs was not entirely clear. On the one hand, the EU ought to be immunised from scrutiny to an extent by the *ratione personae* principle. On the other hand, both the European Commission on Human Rights and Court of Human Rights were clearly reluctant to forego oversight completely.

#### 4. **Bosphorus v Ireland**

The position was clarified in later judgments like *M and Co v FRG* and *Bosphorus v Ireland*.<sup>420</sup> In *Bosphorus v Ireland*,<sup>421</sup> the ECtHR examined the case of an aircraft impounded by Irish authorities. The aircraft had been leased by a Turkish airline from a Yugoslav airline. The Turkish airline complained that by impounding the aircraft, the Irish authorities had compromised its right to property as guaranteed by Art. 1 of Protocol No. 1 to the ECHR. The aircraft was impounded pursuant to an EC regulation,<sup>422</sup> which was itself implementing a UN Security Council Resolution aimed at strengthening an embargo on the Federal Republic of Yugoslavia.<sup>423</sup>

The ECtHR held that the company's rights under Convention had not been violated. While impounding the aircraft amounted to an interference with the applicant's rights, the interference was justified as it was done in pursuit of Ireland's duty to comply with its international obligations under EC law.<sup>424</sup> In these circumstances, there was a presumption that Ireland had not departed from the requirements of the Convention when it implemented legal obligations flowing from its EU membership. The ECtHR declared that:

'State action taken in compliance with [legal obligations arising from membership of an international organisation] is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides'.<sup>425</sup>

It noted that respect for fundamental rights has become 'a condition of the legality of Community acts' and in carrying out this assessment the ECJ refers extensively to the ECHR and ECtHR judgments.<sup>426</sup> As a result, there was a rebuttable presumption that EC law provided equivalent protection to that of the ECHR system and that a State has acted in compliance with the Convention, where the State had no discretion in implementing the legal obligations flowing from its membership of the organisation.<sup>427</sup>

The result of the judgment was a test, which the ECtHR is meant to apply when an applicant challenges an international organisation's actions before it. The test is comprised of two parts. First, the ECtHR

<sup>419</sup> *X v Federal Republic of Germany* (App No 235/56) decision of 10 June 1958.

<sup>420</sup> *M and Co. v Federal Republic of Germany* (App No 13258/87) decision of 9 February 1990.

<sup>421</sup> *Bosphorus v Ireland* (2006) 42 EHRR 1.

<sup>422</sup> Council Regulation (EEC) 990/93 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) [1993] OJ L 102/14.

<sup>423</sup> UN Security Council, Resolution 820 (17 April 1993) UN Doc S/RES/820.

<sup>424</sup> *Bosphorus v Ireland* (2006) 42 EHRR 1 at [149] - [150].

<sup>425</sup> *Bosphorus v Ireland* (2006) 42 EHRR 1 at [155].

<sup>426</sup> *Bosphorus v Ireland* (2006) 42 EHRR 1 at [159].

<sup>427</sup> *Bosphorus v Ireland* (2006) 42 EHRR 1 at [165].

should examine whether the international organisation in question provides ‘equivalent protection’ to the ECHR. Second, the ECtHR should examine whether the presumption that the international organisation provides such equivalent protection has been rebutted in the concrete case before it because of a manifest deficit in the protection of human rights.

## 5. A Messy Compromise

While the *Bosphorus* decision went some way toward clarifying the scope of the ECtHR’s review of EU activities, it also generated a number of loose ends. Firstly, discretion plays a significant role in the *Bosphorus* test. The motivation for the exception created in *Bosphorus* was that the contracting State lacked discretion over the measures it was implementing, it was simply upholding its obligations under the EU and should not be penalised for this. Thus, logically it only applies where the State is implementing secondary legislation or judicial decisions over which it has no discretion as to how they are implemented.<sup>428</sup> The ECtHR will still evaluate whether a State has violated the Convention when it is applying primary EU law e.g. treaty articles. Thus, in *Matthews v UK*,<sup>429</sup> the applicant, who was a resident of Gibraltar, tried to register to vote in the European elections, but was refused by the British authorities who had not extended the franchise to those elections in Gibraltar. The ECtHR examined whether the UK had violated the applicant’s right to the free expression of opinion in the choice of the legislature and found that it had. The Court’s reasoning for scrutinising these measures lies in two contentions. First, the measures the applicant was complaining about stemmed from international instruments, which were freely entered into by the UK.<sup>430</sup> Therefore the contracting State did have some discretion over whether and how these measures were implemented.<sup>431</sup> Secondly, as the acts in this case concerned treaty articles, these could not be challenged within the EU’s legal system, which generated a greater impetus for the court to review them, as Lock rightly notes ‘the main reason why the *Bosphorus* presumption does not apply to violations originating in the treaty itself is that there is no judicial remedy against them under EC law’.<sup>432</sup>

A key problem with applying the *Bosphorus* test is that it attempts to draw a distinction between law which States do not have discretion over and law over which they do. De Hert and Korenica argue that the border between the Member States’ actions that implement EU law and the Member States’ actions that are not derived from an obligation arising from EU law is becoming increasingly unclear. There is a steady increase in law which is related to the implementation of EU law, making it more difficult to distinguish.<sup>433</sup> The CJEU itself is facing a similar problem in attempting to define the areas that the Charter of fundamental rights applies to.<sup>434</sup> Furthermore, in a post-Lisbon era where national

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<sup>428</sup> Paul de Hert and Fisnik Korenica, ‘The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union’s Accession to the European Convention on Human Rights’ (2012) 13 German Law Journal 874, 882; Tawhida Ahmed, ‘The EU’s Protection of ECHR Standards: More Stringent than the Bosphorus Legacy?’ in James Green and Christopher Waters, *Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi* (Brill 2015) 101.

<sup>429</sup> *Matthews v United Kingdom* (1999) 28 EHRR 361.

<sup>430</sup> *Matthews v United Kingdom* (1999) 28 EHRR 361 at [33].

<sup>431</sup> Paul de Hert and Fisnik Korenica, ‘The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union’s Accession to the European Convention on Human Rights’ (2012) 13 German Law Journal 874, 883.

<sup>432</sup> Tobias Lock, ‘Beyond Bosphorus: The European Court of Human Rights’ Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights’ (2010) 10 Human Rights Law Review 529, 538.

<sup>433</sup> Paul de Hert and Fisnik Korenica, ‘The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union’s Accession to the European Convention on Human Rights’ (2012) 13 German Law Journal 874, 884.

<sup>434</sup> Case C-617/10 *Aklagaren v Akerberg Fransson* [2013] 2 CMLR 46; Case C-418/11 *Texdata Software GmbH* [2014] 1 CMLR 52; Case C-206/13 *Siragusa v Regione Sicilia* [2014] 3 CMLR 13, see also section II.F.8 below



parliaments have an enhanced role in influencing secondary legislation, it becomes difficult to speak of discretion in any kind of absolute terms.<sup>435</sup>

Another key shortcoming in the *Bosphorus* test is the faith it places in the EU legal system. In essence the EU's legal system was deemed to offer sufficient avenues to protect Convention rights with the Charter of Fundamental Rights, consistent references to the Convention in CJEU jurisprudence and the EU's judicial system with its scope for judicial review, preliminary references and principles of State liability, direct and indirect effect.<sup>436</sup> Yet there are some very obvious shortcomings in the EU's legal system, which clearly impact upon Art. 6 rights in the Convention, such as the unduly restrictive *locus standi* rules utilised by the EU in judicial review cases,<sup>437</sup> and the absence of individual control over whether a preliminary reference is sought domestically.<sup>438</sup> The *Bosphorus* test only demands an abstract assessment of whether equivalent protection exists within the EU system, it does not require in depth analysis of whether equivalent protection of human rights is actually provided in practice.<sup>439</sup> This is inconsistent of the ECtHR's usual position that rights must be practical and effective and not theoretical and illusory.<sup>440</sup>

Thus, the *Bosphorus* test itself naturally inhibits scrutiny on the part of the ECtHR, but that is only half the problem. The ECtHR has also been extremely inconsistent in its application of the *Bosphorus* test.<sup>441</sup> In some cases, such as *MSS v Belgium and Greece*, the ECtHR has undertaken a clinical examination of the facts before determining whether to apply the presumption in *Bosphorus*.<sup>442</sup> However, the more common approach is for the ECtHR to engage in a very superficial review of the facts before applying the *Bosphorus* presumption.<sup>443</sup> This light touch and inconsistent approach to

<sup>435</sup> Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art. 12; see also Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

<sup>436</sup> *Bosphorus v Ireland* (2006) 42 EHRR 1 at [159]-[165]; Tawhida Ahmed, 'The EU's Protection of ECHR Standards: More Stringent than the Bosphorus Legacy?' in James Green and Christopher Waters, *Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi* (Brill 2015) 105.

<sup>437</sup> See the rules on *locus standi* which demand that non-privileged applicants satisfy the high threshold of demonstrating individual concern - Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, art 263; Case C-25/6 *Plaumann v Commission* [1963] ECR I-95; Case C-50/00 *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, AG Opinion at [60]; Case C-263/02 *Commission v Jégo-Quéré* [2004] ECR I-3425.

<sup>438</sup> See Joint Concurring Opinions of Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki in *Bosphorus v Ireland*; Nuala Mole, 'The complex and evolving relationship between the European Union and the European Convention on Human Rights' [2012] European Human Rights Law Review 363, 365; Aidan O'Neill, 'The EU and Fundamental Rights' in Aidan O'Neill, *EU Law for UK Lawyers* (Hart Publishing, 2011). The EU legal system also fails to adequately cater for the citizens of Council of Europe Member States who are not members of the EU, but who may be affected by EU legal measures e.g. members of the European Economic Area Agreement such as Iceland and Norway.

<sup>439</sup> Tawhida Ahmed, 'The EU's Protection of ECHR Standards: More Stringent than the Bosphorus Legacy?' in James Green and Christopher Waters, *Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi* (Brill 2015) 105; Paul de Hert and Fisnik Korenica, 'The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights' (2012) 13 German Law Journal 874, 889.

<sup>440</sup> *Airey v Ireland* (1979-80) 2 EHRR 305 at [24].

<sup>441</sup> See generally Tawhida Ahmed, 'The EU's Protection of ECHR Standards: More Stringent than the Bosphorus Legacy?' in James Green and Christopher Waters, *Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi* (Brill 2015); Paul de Hert and Fisnik Korenica, 'The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights' (2012) 13 German Law Journal 874; Tobias Lock, 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights' (2010) 10 Human Rights Law Review 529.

<sup>442</sup> *MSS v Belgium and Greece* (2011) 53 EHRR 2; Tawhida Ahmed, 'The EU's Protection of ECHR Standards: More Stringent than the Bosphorus Legacy?' in James Green and Christopher Waters, *Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi* (Brill 2015) 107-108.

<sup>443</sup> *Biret v France et al.* (App No 13762/04) judgment of 9 December 2008; *Cooperatives des Agriculteurs de Mayenne v France* (App No 16931/04) judgment of 10 October 2006; Tawhida Ahmed, 'The EU's Protection of ECHR Standards: More Stringent than the Bosphorus Legacy?' in James Green and Christopher Waters, *Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi* (Brill 2015) 107; Tobias Lock, 'Beyond Bosphorus: The European Court of Human Rights' Case Law



review effectively amounts to a full confidence in the capacity of the EU's legal order to protect human rights in a comparable manner to the ECtHR. As such it generates a significant barrier to the realisation of uniform standards of human rights across Europe.

A number of critics have also argued that *Bosphorus* creates a double standard for human rights protection. The EU is presumed to provide equivalent protection and this presumption will only be rebutted where the protection is 'manifestly deficient'. Even at the time the judgment was issued, one of the concurring judgments noted that 'the criterion "manifestly deficient" appears to establish a relatively low threshold, which is in marked contrast to the supervision generally carried out under [the ECHR]'.<sup>444</sup> It is not clear what the ECtHR means by the term manifestly deficient,<sup>445</sup> and a number of observers have alluded to the difficulties applicants will face in proving that the protection is 'manifestly deficient'.<sup>446</sup> The deference shown to the EU in *Bosphorus* 'is not a deference the Court has shown to contracting States to the Convention who have a highly developed constitutional and judicial system for protecting human rights, at least equal to that of the EU'.<sup>447</sup> Thus, the EU is held to a lower standard of conduct than a contracting State, which impedes the realisation of common human rights standards between the EU, the CoE and their Member States.

While the ECtHR reached a messy compromise in *Bosphorus*, there was a sense that it was a temporary solution pending EU accession to the ECHR, which would ostensibly clear up many of these issues. As Murray noted, there is probably scope for more meaningful scrutiny of EU action under the ECtHR and this will probably occur post-accession, in his words EU accession will 'plug a considerable *lacuna* in the system of European human rights protection'.<sup>448</sup> While accession is demanded by the TEU, this accession process had a considerable setback in late 2014 which will be discussed in the next section.

## 6. Opinion 2/13

*Opinion 2/13* dealt a significant blow to the realisation of common human rights standards within Europe. In *Opinion 2/13*, the CJEU regarded the EU's accession to the ECHR as a threat to the autonomy of EU law, its supremacy, the principle of direct effect, the conferral of powers, as well as

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on the Responsibility of Member States of International Organisations under the European Convention on Human Rights' (2010) 10 Human Rights Law Review 529, 542.

<sup>444</sup> Joint Concurring Opinions of Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki in *Bosphorus v Ireland*; Kathrin Kuhnert, 'Bosphorus – Double standards in European human rights protection?' (2006) 2 Utrecht Law Review 177, 187.

<sup>445</sup> Kathrin Kuhnert, 'Bosphorus – Double standards in European human rights protection?' (2006) 2 Utrecht Law Review 177, 185; Paul de Hert and Fisnik Korenica, 'The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights' (2012) 13 German Law Journal 874, 886.

<sup>446</sup> Cathryn Costello, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 Human Rights Law Review 87, 102; Tawhida Ahmed, 'The EU's Protection of ECHR Standards: More Stringent than the Bosphorus Legacy?' in James Green and Christopher Waters, *Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi* (Brill 2015) 105; Tobias Lock, 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights' (2010) 10 Human Rights Law Review 529, 543; Paul de Hert and Fisnik Korenica, 'The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights' (2012) 13 German Law Journal 874, 888.

<sup>447</sup> John Murray, 'The Influence of the European Convention on fundamental rights on Community Law' (2010) 33 Fordham International Law Journal 1388, 1399; Paul de Hert and Fisnik Korenica, 'The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights' (2012) 13 German Law Journal 874, 888-889.

<sup>448</sup> John Murray, 'The Influence of the European Convention on fundamental rights on Community Law' (2010) 33 Fordham International Law Journal 1388, 1399-1400.

the principle of mutual trust. These concerns prompted the CJEU to reject the Draft Accession Agreement as being incompatible with the treaties,<sup>449</sup> thereby stalling the accession of the EU to the ECHR for the foreseeable future.

The rejection of the accession agreement has a number of implications for the realisation of common human rights standards within Europe. Firstly, in *Opinion 2/13* the CJEU re-asserted its independence and freedom to interpret fundamental rights in the EU. The CJEU states:

‘The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU’.<sup>450</sup>

Essentially, the CJEU is making a statement about its freedom to interpret fundamental rights law. The CJEU has made similar statements in the past noting that the nature and ambit of fundamental rights in Community law must be determined autonomously and according to Community aims, and that it may interpret international agreements (including the ECHR) according to the Community’s objectives.<sup>451</sup> As the CJEU stated in *Hauer*, ‘the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself’.<sup>452</sup>

This assertion of autonomy has significant impacts on the realisation of common human rights standards. As O’Neill notes ‘the CJEU holds itself out to be the European Supreme Court, finally and authoritatively interpreting – at least for the EU Member States – the provisions of the ECHR when its provisions arise within a field also covered by EU law’.<sup>453</sup> The implications of this are that there are two courts asserting the right to issue final, binding interpretations of the ECHR within EU Member States. The CJEU is claiming a right to issue binding interpretations of the ECHR in the context of EU law, while the ECtHR asserts jurisdiction over anything that falls within the scope of the Convention. If both courts interpreted the law in the same way all of the time and the scope of EU law was clearly demarcated, this would not be that big a problem. However, in practice the scope of EU law is not clear and divergences in interpretation are increasingly common.

## 7. Divergences are Common

In theory, the autonomy of the CJEU to interpret fundamental rights law in a manner at odds with the ECtHR should be severely circumscribed. As a matter of law, the Charter must be interpreted in light of the ECHR and the other sources of fundamental rights law in the EU,<sup>454</sup> for instance the constitutions of Member States, are already heavily influenced by the ECHR and the ECtHR, as we noted above. However, we cannot lose sight of the fact that the EU’s legal order is designed to ensure economic

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<sup>449</sup> *Opinion pursuant to Article 218(11) TFEU (2/13)* [2015] 2 CMLR 21.

<sup>450</sup> *Opinion pursuant to Article 218(11) TFEU (2/13)* [2015] 2 CMLR 21 at [170].

<sup>451</sup> John Murray, ‘The Influence of the European Convention on fundamental rights on Community Law’ (2010) 33 *Fordham International Law Journal* 1388, 1397.

<sup>452</sup> Case C-44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR I-3727, para 3.

<sup>453</sup> Aidan O’Neill, ‘Confusing the protection of human rights in Europe – Strasbourg v Luxembourg? Part 1’ (*EUtopia Law*, 5 September 2011) <<http://eutopialaw.com/2011/09/05/confusing-the-protection-of-human-rights-in-europe-strasbourg-v-luxembourg-part-1/>> accessed 24 February 2016.

<sup>454</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/02, art. 52 (3).

freedoms e.g. free movement of goods, services, people etc. When the CJEU applies fundamental rights law, it has to give due regard to the economic freedoms it is designed to protect, which the ECtHR does not have to do.<sup>455</sup> Thus, the CJEU's impetus to protect the internal market generates conflicts of interest, which the ECtHR does not face.<sup>456</sup> While the CJEU is clearly capable of favouring the fundamental right over the economic freedom,<sup>457</sup> this impetus can drive the CJEU to diverge from the ECtHR's jurisprudence in practice. Sometimes these divergences lead to greater protection on the EU side and at others they lead to lower protection. The interpretations of the prohibition on discrimination and the right to strike between both the CJEU and ECtHR offer cogent examples.

Burri, for example, argues that the concepts of discrimination are more developed in EU law than at the ECtHR, particularly in the case law of the CJEU.<sup>458</sup> EU measures aimed at creating a common market for the free movement of workers have restricted discrimination on the grounds of sex. These directives only permit direct discrimination on the grounds of sex in very limited circumstances, and these exceptions are strictly interpreted by the CJEU.<sup>459</sup> By contrast, the ECtHR applies a different test in cases of direct sex discrimination, whereby discrimination can be permitted when it is objectively justified and States are allowed a large margin of appreciation, leaving more scope for arguments which might justify such discrimination.<sup>460</sup> Thus, in this instance the economic freedoms protected by EU law ensure greater protection than would otherwise be the case, although it does counteract the establishment of a common human rights standard on sex discrimination across Europe.

In other cases, the economic freedoms in EU law have served to curtail rights and have led to divergent standards. Veldman points to the jurisprudence within Europe on the right to strike and argues that there is 'a remarkable contrast in the evolving case law in this field of the CJEU and the ECtHR'.<sup>461</sup> In his article, he compares and contrasts the Strasbourg case law with its counterpart in Luxembourg using the examples of *Viking Line*<sup>462</sup> and *Laval*<sup>463</sup> in the EU and *Demir & Baykara v Turkey*<sup>464</sup> and *Enerji Yapi-Yol Sen v Turkey*<sup>465</sup> at the European Court of Human Rights.

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<sup>455</sup> Albertine Veldman, 'The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR' (2013) 9 Utrecht Law Review 104.

<sup>456</sup> Jason Coppel and Aidan O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 31 Common Market Law Review 669, 692.

<sup>457</sup> See, for example, Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659 and Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609.

<sup>458</sup> Susanne Burri, 'Towards More Synergy in the Interpretation of the Prohibition of Sex Discrimination in European Law? A Comparison of Legal Contexts and some Case Law of the EU and the ECHR' (2013) 9 Utrecht Law Review 80. The author compares cases at the CJEU like Case C-366/99, *Griesmar* [2001] ECR I-9383 with cases at the ECtHR like *Andrle v Czech Republic*, (App No 6268/08) judgment of 17 February 2011.

<sup>459</sup> See, for example, Council Directive 2000/78/EC on establishing a legal framework for equal treatment in employment and occupation, [2000] OJ L303.

<sup>460</sup> Susanne Burri, 'Towards More Synergy in the Interpretation of the Prohibition of Sex Discrimination in European Law? A Comparison of Legal Contexts and some Case Law of the EU and the ECHR' (2013) 9 Utrecht Law Review 80, 102-103.

<sup>461</sup> Albertine Veldman, 'The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR' (2013) 9 Utrecht Law Review 104, 105.

<sup>462</sup> Case C-438/05 *International Transport Workers' Federation v Viking Line* [2007] ECR I-10779.

<sup>463</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; See also the Swedish case decided by the European Committee of Social Rights where legislative amendments introduced following the *Laval* case were deemed to violate the European Social Charter - *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden* (Complaint No. 85/2012) European Committee of Social Rights 3 July 2013.

<sup>464</sup> *Demir and Baykara v Turkey* [GC] (App No 34503/97) judgment of 12 November 2008.

<sup>465</sup> *Enerji Yapi-Yol Sen v Turkey* (App No 68959/01) judgment of 21 April 2009.

In the *Viking* case, for example, a Finnish ferry operator tried to re-register its vessel in Estonia in order to avoid paying higher wages to workers under a collective bargaining agreement negotiated in Finland. The Finnish workers threatened to strike in response to this move and the International Transport Workers Federation issued a circular demanding that affiliated unions not enter into negotiations with Viking. As a result, the company sought an injunction in the English courts demanding that the federation withdraw its circular and that the Finnish workers not interfere with its plan to re-register the vessel. The English court referred a number of questions to the CJEU under the preliminary reference procedure, in particular, whether the action of the trade union fell within the scope of the protection of freedom of establishment and constituted a restriction of that freedom.

The CJEU ruled that the Unions' actions were capable of restricting Viking's right to freedom of establishment under the treaty and therefore fell within the scope of Art. 43 (now Art. 49).<sup>466</sup> It further noted that the social policy interests at stake in this case had to be balanced against the economic freedoms at issue and that the collective action in this case had to be objectively justified under EU law and was subject to a proportionality test.<sup>467</sup> If the collective action did not satisfy this test, the strike could be restricted. Thus, the right to strike was severely curtailed by this case as it expanded the circumstances in which national courts could restrict strike activities where they impact on economic freedoms under EU law.<sup>468</sup>

By contrast in *Demir & Baykara v Turkey*, the applicants, who were civil servants in Turkey, created a trade union and entered into a collective agreement with a local authority. When the local authority failed to meet some of its obligations, the union brought proceedings against it. The action was dismissed on the grounds that domestic legislation did not permit civil servants to form trade unions. The ECtHR held that the restriction on their right to form trade unions was not justified under the ECHR as it did not respond to a pressing social need.<sup>469</sup> Furthermore the annulment of the collective bargaining agreement amounted to a violation of Art. 11. Thus, in this judgment and *Enerji Yapi-Yol Sen*, the ECtHR gave full protection to the right to collective bargaining and collective action under Art. 11 of the ECHR. Indeed, the CJEU's judgment in *Viking* flies in the face of the terms of Art. 53(3) of the Charter, which stipulates that the EU must ensure fundamental rights protection, which at least corresponds to the ECHR, if not a higher standard that it has developed itself.<sup>470</sup>

These divergent interpretations create a genuine issue for the national courts of Member States, who may be faced with similar problems and have to reconcile the divergent approaches of the CJEU and the ECtHR. Admittedly all of this is in the context of provisions covered by EU law and therefore the CJEU's scope for issuing divergent rulings is limited only to the field of EU law. Yet in practice the scope of EU law and the jurisdiction of the CJEU to make pronouncements on fundamental rights are unclear.

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<sup>466</sup> Case C-438/05 *International Transport Workers' Federation v Viking Line* [2007] ECR I-10779 at [72] – [74].

<sup>467</sup> Case C-438/05 *International Transport Workers' Federation v Viking Line* [2007] ECR I-10779 at [75].

<sup>468</sup> For more on this case see Karin Lukas, *Labour Rights in Global Production Networks* (Neuer Wissenschaftlicher Verlag 2013) 62f; Roger Blanpain and Andrzej Marian Swiatkowski, *The Laval and Viking Cases: Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia* (Kluwer 2009).

<sup>469</sup> *Demir and Baykara v Turkey* [GC] (App No 34503/97) judgment of 12 November 2008 at [120].

<sup>470</sup> Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward, *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1581.

## 8. The Scope of EU Law

The outer limits of what falls within the scope of EU fundamental rights law are worryingly indeterminate, as EU law interacts with the legal orders of its Member States in a wide variety of different ways. In the *Akerberg Fransson* case,<sup>471</sup> for example, a Swedish fisherman received both an administrative fine and was subject to criminal prosecution for tax evasion when he failed to correctly report tax information for two years. The fisherman complained that being subjected to both an administrative fine and a criminal penalty amounted to a violation of his right not to be tried or punished twice in criminal proceedings for the same criminal offence under Art. 50 of the Charter of Fundamental Rights. The applicant claimed that Sweden was implementing EU law in this case and the matter therefore fell within the scope of Charter.

While the obligation to submit a tax return was based on EU law, which also allowed Member States to introduce other obligations aimed at the prevention of tax evasion, the actual tax penalties were set out in separate legislation, which was not transposing a directive. By fining and prosecuting Mr. Fransson Sweden was not ‘applying’ or ‘implementing’ the VAT Directive at issue in any immediate sense, as that Directive does not contain measures on enforcement of VAT offences. As Art. 51 of the Charter states that ‘[t]he provisions of this Charter are addressed [...] to the Member States only when they are implementing Union law’,<sup>472</sup> some had argued that the Charter only applied in the context of, for example, transposing a directive into national law. However, a broader interpretation of this provision could be adopted whereby the Charter could be held to apply to broader activity linked incidentally to the implementation of EU law, such as that in the *Fransson* case.<sup>473</sup>

In its judgment, the CJEU stated ‘the tax penalties and criminal proceedings to which Mr Åkerberg Fransson has been or is subject are connected in part to breaches of his obligations to declare VAT’.<sup>474</sup> Furthermore ‘every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion’.<sup>475</sup> Therefore, the CJEU concluded that the measures penalising the applicant under the separate tax law fell within the scope of EU fundamental rights law. Thus, following this case the scope of EU fundamental rights law extends to a very broad category of laws which are more tangentially related to the implementation of EU law.

Some have argued that this was a foreseeable interpretation of the scope of the Charter in light of previous jurisprudence of the CJEU,<sup>476</sup> while others have argued that it does not follow unambiguously from the CJEU’s previous case law.<sup>477</sup> Indeed some subsequent cases, such as *Dano v Jobcenter Leipzig*<sup>478</sup> and *Sindicato dos Bancários do Norte v Banco Português de Negócios*,<sup>479</sup> appear to have

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<sup>471</sup> Case C-617/10 *Aklagaren v Fransson* [2013] 2 CMLR 46.

<sup>472</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/02, art. 51.

<sup>473</sup> Michael Dougan, ‘Judicial Review of Member State Action under the General Principles and the Charter: Defining the “Scope of Union Law”’ (2015) 52 *Common Market Law Review* 1201, 1205-1206.

<sup>474</sup> Case C-617/10 *Aklagaren v Fransson* [2013] 2 CMLR 46 at [24].

<sup>475</sup> Case C-617/10 *Aklagaren v Fransson* [2013] 2 CMLR 46 at [25].

<sup>476</sup> See Panos Koutrakos, ‘Does the United Kingdom have a general opt out from the EU Charter of Fundamental Rights?’ (2014) 39 *European Law Review* 1; Michael Dougan, ‘Judicial Review of Member State Action under the General Principles and the Charter: Defining the “Scope of Union Law”’ (2015) 52 *Common Market Law Review* 1201, 1214-1215.

<sup>477</sup> Bas Van Bockel and Peter Wattel, ‘New wine into old wineskins: The scope of the Charter of Fundamental Rights of the EU After *Akerberg Fransson*’ (2013) 38 *European Law Review* 866, 871.

<sup>478</sup> Case C-333/13 *Dano v Jobcenter Leipzig* [2015] 1 CMLR 48.

<sup>479</sup> Case C-128/12 *Sindicato dos Bancários do Norte v BPN* [2013] ECR I-149.

restricted the application of the Charter,<sup>480</sup> making the actual scope of the Charter even less clear. What is clear is that with the EU asserting a right to interpret the ECHR in the context of EU law and the scope of EU law and the CJEU's jurisdiction over fundamental rights expanding, the potential for clashes with ECtHR jurisprudence and divergences from common standards of human rights are becoming increasingly likely.<sup>481</sup>

## 9. A Race to the Bottom in EU Law?

There is also a very worrying prospect that the EU's pursuit of a level playing field across Europe in different fields risks creating a race to the bottom, with the lowest common standard becoming the European norm.<sup>482</sup> In theory, this should be prevented by the application of Art. 53(3) of the Charter, as we noted above, however in practice the results are quite different. In the case of *Melloni*,<sup>483</sup> the applicant was arrested in Spain under a European Arrest Warrant (EAW) after he had been convicted *in absentia* of bankruptcy fraud in Italy and sentenced to 10 years in prison. The applicant knew he was set to be tried for this offence and sent lawyers to represent him at the trial. However, on being detained in Spain pursuant to the arrest warrant, he protested that he would not be entitled to a retrial in Italy once he returned and as a result could not be surrendered under Spanish law.

The right to a fair trial in the Spanish Constitution requires that, if a person has been convicted in his absence, a surrender for the execution of that conviction must be made conditional on the right to challenge the conviction in order to safeguard that person's rights of defence, even if he had given power of attorney to a lawyer who effectively represented him at the trial.<sup>484</sup> The right to a fair trial is also protected in the Charter. Art. 47 states '[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented'.<sup>485</sup>

Art. 53 of the Charter also made it clear that:

'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

<sup>480</sup> For analysis see Cian Murphy, 'Bulletin on the EU Charter of Fundamental Rights: an introduction (Part 1)' [2016] European Human Rights Law Review 24, 28 and Bas Van Bockel and Peter Wattel, 'New wine into old wineskins: The scope of the Charter of Fundamental Rights of the EU After Akerberg Fransson' (2013) 38 European Law Review 866.

<sup>481</sup> It is worth noting that this generated a further divergence from the ECtHR's jurisprudence on the *ne bis in idem* principle see Bas Van Bockel and Peter Wattel, 'New wine into old wineskins: The scope of the Charter of Fundamental Rights of the EU After Akerberg Fransson' (2013) 38 European Law Review 866, 871-872. Although for a contrasting view that the *Fransson* case was consistent with ECtHR jurisprudence see Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward, *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1583.

<sup>482</sup> The European Court of Human Rights has also been criticised for allowing States too much leeway to interpret Convention rights through the margin of appreciation, with some arguing it is used to apply a lowest common denominator standard – see John Murray, 'The Influence of the European Convention on fundamental rights on Community Law' (2010) 33 Fordham International Law Journal 1388, 1404; Oren Gross & Fionnuala Ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 Human Rights Quarterly 625.

<sup>483</sup> Case C-399/11 *Melloni v Ministerio Fiscal* [2013] 2 CMLR 43.

<sup>484</sup> Case C-399/11 *Melloni v Ministerio Fiscal* [2013] 2 CMLR 43 at [17].

<sup>485</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/02, art. 47.

European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions'.<sup>486</sup>

By contrast the EAW Framework Decisions only allowed States to refuse to surrender a person subject to a European Arrest Warrant in certain circumstances.<sup>487</sup> Where a person who was convicted in his absence was defended and represented by a lawyer, the executing State cannot refuse to surrender (Art. 4a(1)(b)). Thus, the Spanish constitutional court issued a preliminary reference asking:

- (a) whether the Framework decision precluded Spain from making M's surrender conditional on the availability of a retrial?
- (b) whether the framework decision was compatible with the Art. 47 of the Charter?
- (c) whether Art. 53 allowed Spain to make the applicant's surrender conditional on the availability of a retrial?

The CJEU held that the Framework Decision precluded Spain from making the execution of the arrest warrant conditional on the conviction being open to review in Italy and where the applicant had been aware of the trial and represented, the executing State was obliged to surrender him. The Court also held that the Framework Decision was compatible with Art. 47 and 48 of the Charter. The right to a fair trial was not absolute and the applicant could have attended the trial if he wished. As he hadn't attended, he had effectively waived his fair trial rights.<sup>488</sup> Most importantly, in this context, the CJEU held that the national court was not permitted to apply the superior human rights protection in the domestic law to areas that were fully harmonised under EU law. The rationale for this was that it would cast doubt on 'the uniformity of the standard of protection of fundamental rights', it would 'undermine the principles of mutual trust' and 'compromise the efficacy of that framework decision'.<sup>489</sup>

In theory, this approach serves to secure a common human rights standard across Europe in areas that are subject to complete harmonisation under EU law. However, in practice this ruling does not serve the ends of human rights protection. It effectively ensures that only the lowest common denominator of human rights protection within the EU will prevail over higher national levels of protection. Indeed it creates the possibility of further divergences in common human rights standards whereby areas that are not subject to EU harmonisation may benefit from superior fair trial protections, possibly even those introduced by the ECtHR, while areas subject to EU harmonisation may suffer from poorer human rights protection.

This brings us back to *Opinion 2/13*. In that case, the CJEU maintained that accession to the ECHR would undermine the principle of mutual trust.<sup>490</sup> In the CJEU's own words:

'the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional

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<sup>486</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/02, art. 53.

<sup>487</sup> Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

<sup>488</sup> Case C-399/11 *Melloni v Ministerio Fiscal* [2013] 2 CMLR 43 at [52].

<sup>489</sup> Case C-399/11 *Melloni v Ministerio Fiscal* [2013] 2 CMLR 43 at [63].

<sup>490</sup> *Opinion 2/13 of the court (Re accession to European Convention on Human Rights)* [2015] 2 CMLR 21 at [194].

circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law'.<sup>491</sup>

Thus each MS must presume that the other MS is complying with EU fundamental rights law and 'may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU'.<sup>492</sup> One of the CJEU's central objections to accession was that the ECtHR would require a Member State to check that another Member State has observed fundamental rights, which would conflict with the obligation of mutual trust between those Member States and would 'upset the underlying balance of the EU' and 'undermine the authority of EU law'.<sup>493</sup>

Of course the CJEU is completely correct in its assessment, accession to the Convention would certainly undermine the principle of mutual trust and this measure is ostensibly aimed at ensuring common standards across the EU. However, in practice this approach actually undermines the realisation of common human rights protections within the EU. We know for a fact that there are disparities in the levels of human rights protection between different Member States, these have even been pointed out in the specific context of EU law by the ECtHR in *MSS v Belgium and Greece*.<sup>494</sup> In that case an asylum seeker was sent from Belgium back to Greece, where he first entered the EU, under the Dublin Regulation.<sup>495</sup> The applicant was detained in appalling conditions there, which amounted to a violation of the prohibition on torture, inhuman and degrading treatment.

The CJEU later ruled on a very similar case in *R. (NS) v Secretary of State for the Home Department*.<sup>496</sup> In that case asylum seekers were due to be returned to Greece by UK and Irish authorities under the Dublin Regulation. A preliminary reference was sought *inter alia* to determine whether the sending State was obliged to assess the receiving State's compliance with fundamental rights when applying the Dublin Regulation. The CJEU ruled 'it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR'.<sup>497</sup> However, this presumption was rebuttable where the Member State at issue 'cannot be unaware' of the systemic deficiencies in the asylum procedure of a Member State.<sup>498</sup> Thus, while the CJEU entertains the possibility that the presumption can be rebutted, the threshold for doing so is particularly high and Koutrakos notes that the CJEU later held that the identification of systemic deficiencies in the asylum procedure is the only way in which the presumption can be rebutted.<sup>499</sup> The ECtHR by contrast demands 'a thorough and individualised examination of the situation of the person concerned'.<sup>500</sup>

More recently the CJEU has taken an approach closer to that of the European Court of Human Rights in the case of *Aranyosi and Caldaru v Generalstaatsanwaltschaft Bremen*.<sup>501</sup> In that case the

<sup>491</sup> *Opinion 2/13 of the court (Re accession to European Convention on Human Rights)* [2015] 2 CMLR 21 at [191].

<sup>492</sup> *Opinion 2/13 of the court (Re accession to European Convention on Human Rights)* [2015] 2 CMLR 21 at [192].

<sup>493</sup> *Opinion 2/13 of the court (Re accession to European Convention on Human Rights)* [2015] 2 CMLR 21 at [194].

<sup>494</sup> *MSS v Belgium and Greece* (2011) 53 EHRR 2.

<sup>495</sup> Council Regulation (EC) No 343/2003 on 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 [2003] OJ L50/1.

<sup>496</sup> Case C-411/10 *R. (NS) v Secretary of State for the Home Department* [2012] 2 CMLR 9.

<sup>497</sup> Case C-411/10 *R. (NS) v Secretary of State for the Home Department* [2012] 2 CMLR 9 at [80].

<sup>498</sup> Case C-411/10 *R. (NS) v Secretary of State for the Home Department* [2012] 2 CMLR 9 at [106].

<sup>499</sup> See Panos Koutrakos, 'ECJ, Strasbourg and national courts: an exercise in guesswork?' (2015) 40 *European Law Review* 641 citing Case C-394/12 *Abdullahi v Bundesasylamt* [2013] ECR I-813 at [60].

<sup>500</sup> *Tarakhel v Switzerland* (App No 29217/12) judgment of 4 November 2014 at [104].

<sup>501</sup> Case C-404/15 and C-659/15 *Aranyosi and Caldaru v Generalstaatsanwaltschaft Bremen* unreported 5 April 2016 (Judgment currently only available in French German and Dutch).



applicants were subject to EAWs and challenged the warrants on the ground that they faced return to inhuman and degrading detention conditions in Hungarian and Romanian prisons, which are incredibly overcrowded.<sup>502</sup> The CJEU ruled that where there is evidence of a real risk of inhuman or degrading treatment of persons detained in the Member State where the warrant was issued, the executing Member State can defer the execution and seek additional information from the Member State to discount the risk to the individual applicant.<sup>503</sup> If the existence of that risk cannot be discounted within a reasonable period, the executing authority must decide whether the surrender procedure should be brought to an end.<sup>504</sup> This approach is much more promising from a human rights protection perspective. It recognises the differing levels of protection between different Member States and allows this to influence the EAW procedures giving some discretion to the executing state. It also focuses more on the threat to the individual, rather than systemic deficiencies, thereby aligning it more closely with the ECtHR's approach. This judgment clearly shows that the EAW can be flexible and arguably shows that the CJEU's concerns about the influence that ECHR accession will have on mutual trust are overstated.

The CJEU undermines the protection of human rights within Europe through its interpretation of the principle of mutual trust in *Opinion 2/13*. This is one of the reasons why Professor Steve Peers described *Opinion 2/13* bluntly, but accurately, as 'a clear and present danger to human rights protection' in Europe.<sup>505</sup> While the principle of mutual trust may be an expedient tool for harmonisation within the EU, what good is it if it persistently undermines human rights protection? Ultimately, this conflict between preserving mutual trust and ensuring human rights protection need not even arise. The issue is, at its heart, a question of prioritisation for the CJEU, because if you look at the article in the Treaty on the Functioning of the European Union establishing the area of freedom security and justice within the EU, it states:

'The Union shall constitute an area of freedom, security and justice **with respect for fundamental rights and the different legal systems and traditions of the Member States**' (emphasis added).<sup>506</sup>

In cases like *Melloni* and *Opinion 2/13*, the CJEU focuses disproportionately on the establishment of a common area of freedom, security and justice, without placing enough emphasis on ensuring respect for fundamental rights and the different legal systems of Member States. Nowhere in the terms of EU law does it say that the principle mutual trust should override fundamental rights protection. In establishing an area of freedom, security and justice underpinned by mutual trust within the EU, the CJEU has 'forgotten' that it must simultaneously ensure respect for human rights. Preventing Member States from checking whether human rights are actually protected by the other Member States in practice, rather than simply in theory, will not ultimately ensure that this end is achieved and that common human rights standards are actually protected within Europe.

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<sup>502</sup> *Varga and Others v Hungary* (App No 14097/12) judgment of 10 March 2015; *Radulescu v Romania* (App No 32800/12) judgment of 1 April 2014.

<sup>503</sup> Case C-404/15 and C-659/15 *Aranyosi and Caldaru v Generalstaatsanwaltschaft Bremen* unreported 5 April 2016 at [98].

<sup>504</sup> Case C-404/15 and C-659/15 *Aranyosi and Caldaru v Generalstaatsanwaltschaft Bremen* unreported 5 April 2016 at [104].

<sup>505</sup> *Supra* (fn 379).

<sup>506</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, art. 67.

## G. Joint programmes

### 1. Introduction

While the topics of EU accession to the ECHR and the mutual influence of human rights law of both organisations attract the majority of academic attention, other forms of interaction between EU and CoE have insofar gathered sporadic interest in literature. This chapter seeks to explore the background and the current state of the Joint Programmes (JP), which constitute one of the largest areas of cooperation between the CoE and the EU in terms of resources involved and both geographic and thematic scope. Evolving over the course of over 20 years, the JP framework was expanded, modified and adjusted on several occasions, following major developments in relations between the CoE and the EU. The goals of the FRAME project encourage a closer look at the history and the current state of the JP, with a view towards assessing the role they have played insofar and the prospects for their further development towards meeting the needs of both organisations.

### 2. History and Development of Joint Programmes

The history of Joint Programmes begins with the 1987 arrangements between the CoE and the EU, which have opened a new chapter of increased contact and co-operation between both organisations.<sup>507</sup> Moving forward with the concept of joint action in the field of democracy, human rights and rule of law, the EU and the CoE have set out to find a formula for collaboration. The first JP were launched in 1993 with an initial focus on the CEE (Central and Eastern Europe) area.<sup>508</sup> The overarching principles of the JPs have not changed much since their introduction. The EU, drawing upon its considerably larger financial resources, acts as a primary donor of funds and resources for carrying out the JPs, while the CoE, in its capability as an implementing institution with extensive on-the-ground experience, implements the JPs and facilitates all activities therein, including management and evaluation of projects. While the initial idea regarding the financing of the JPs was for both organisations to share the costs on a 50/50 basis, the discrepancy in available funds between the CoE and the EU quickly led to the latter taking on the majority of financial burden. Additionally, the financing of JP was made open to donations from EU and CoE Member States and observers.

The rationale for these arrangements flowed from axiological differences between the organisations at the time, when the EU was seen as an economically-based organisation with little concern for human rights, while the CoE continued to persist as a value-based organisation for which human rights were of direct and primary concern. Another characteristic of the JP which has developed and continued across the years is their thematic and geographic scope. While initially the JP were aimed at new CoE members<sup>509</sup>, over the time the JP have expanded in their scope, including both existing and prospective EU Member States as well as the EU's broadly understood 'neighbourhood'. As new Member States joined the EU, the geographical focus of JPs expanded, yet remained firmly centred around prospective candidates, associated states and the close perihelion of the EU. Several multilateral JP as well as projects specifically aimed either at EU Member States have been carried out

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<sup>507</sup> See chapter II.C of this report for an outline of general parameters of CoE-EU relations.

<sup>508</sup> Martyn Boyd, 'The EU and the Council of Europe: Difference, Duplication or Delegation?' in David Galbreath and Carmen Gebhardt (eds) *Cooperation or Conflict? Problematizing Organizational Overlap in Europe*. (Ashgate 2010) 13.

<sup>509</sup> Albania (since 1993), Ukraine (since 1995), the Russian Federation (since 1996), Latvia, Lithuania, FYROM (since 1997), Armenia, Azerbaijan, Bulgaria, Croatia, Estonia, Macedonia, Georgia (since 1999), Serbia (since 2001), Turkey (since 2001), Bosnia and Herzegovina (since 2003).

over the years, yet in general it can be concluded that the EU has primarily focused its cooperation with the CoE under the JP framework on countries which were part of its enlargement policy and regional external action.

As the relationship between the EU and the CoE entered into new phases, so did the JP framework evolve following important developments in the relations between both organisations. The Joint Declaration of 2001 highlighted the importance of JP and established their place within the larger context of EU-CoE cooperation.<sup>510</sup> Monitoring the current state of the JP was entrusted to the annual CoE-Commission meetings, and the principle of co-financing by both organisations was enshrined, however the Joint Declaration did not specify the co-financing ratio. Strategic coordination of JP was implemented via so-called 'scoreboard' meetings, held on the margins of the annual CoE-EU Senior officials meeting.<sup>511</sup> In addition, on a regular basis, the Council of Europe and the European Commission were to review progress made under the Joint programmes through Steering Committees. In January 2003, the CoE Office of the Director General of Programmes launched the JP website with a list of all current and concluded JP, complete with basic information on their budgets, activities and the unit responsible within the CoE.<sup>512</sup> The website serves to this day as the primary resource of information on JPs.

Throughout the first decade of the XXI century, the JP have gradually expanded in both scope and budget. The 2007 Memorandum of Understanding between the CoE and the EU reaffirmed the importance of JP and contained a paragraph related to their status and future:

'In line with the Joint Declaration on co-operation and partnership between the Council of Europe and the European Commission signed on 3 April 2001, ongoing co-operation will be reinforced in the framework of the joint programmes, which could include regional thematic programmes. The Council of Europe will continue to provide for consultations with Council of Europe beneficiary member countries. Consultations involving the European Commission, the Secretariat of the Council of Europe and as a general rule the Council of Europe member countries concerned will continue to be organised to discuss the priorities of cooperation. Member and observer states which are donors will be invited to take part in this co-operation and its evaluation.'<sup>513</sup>

At the same time, tensions of both intra- and inter-organisational nature began to arise. These tensions reflected several factors present within the CoE and the EU as well as in their mutual engagement. On the EU side, the two entities responsible for facilitating cooperation with the CoE in the context of JP, namely the EEAS (formerly DG RELEX) and the DG DEVCO/EuropeAid have displayed different visions of the nature of relationship between both organisations. The DG RELEX/EEAS assumed a value-based approach, considering the CoE as an overarching strategic partner for furthering common policy goals, while the DG DEVCO saw the CoE primarily as an instrument for implementation.<sup>514</sup> Aside these differences, the EU institutions became increasingly concerned

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<sup>510</sup> Council of Europe, European Union, Joint Declaration on cooperation and partnership between the Council of Europe and the European Commission GR-EU (2001)4 (restricted), 26 March 2001.

<sup>511</sup> PACE, The implementation of the Memorandum of Understanding between the Council of Europe and the European Union. Provisional version. 8.

<sup>512</sup> The website is available at <<http://www.jp.coe.int/>> as of 28 April 2016. It does not cover JPs initiated before January 1999.

<sup>513</sup> Memorandum of Understanding between the Council of Europe and the European Union, 23 May 2007, para 52.

<sup>514</sup> Particip GmbH, 'Evaluation of Commission's cooperation with the Council of Europe. An assessment focussed on EU funding of Joint Programmes. Final Report. Volume I' ix-x.

regarding CoE's implementation of JPs and the actual impact of activities, as well as the issue of visibility of EU's contribution to the JPs. On the CoE side, the disparity in capabilities of both organisations became an increasing issue.<sup>515</sup>

Towards assessing the current state of JP and taking stock of achievements and shortcomings of engagement with the CoE, in 2010 the DG DEVCO commissioned an evaluation of cooperation between the Commission and the Council of Europe. The evaluation was carried out by the consultancy company PARTICIP GmbH, which delivered the final evaluation report in 2012.<sup>516</sup> While the ToR of the framework contract for evaluation assumed an analysis of all aspects of EU-CoE co-operation facilitated by the Commission, in fact the vast majority of the final report pertains to JP. The evaluation covered all JP carried out from 2000 to 2010 with primary objectives outlined as: providing the relevant services of the Commission and the wider public with an overall independent and accountable assessment of the EC's past and current cooperation with the CoE; identifying key lessons from the EC's past overall co-operation, and providing the EC's policy-makers and managers with a valuable aid to evidence-based decision making, and for planning, designing and implementing EU policies.<sup>517</sup> The evaluation was focused on managerial and technical aspects of JP, with a special view towards taking stock of practical aspects of cooperation between various actors within both organisations. The evaluation included an assessment of the impact the JPs have on human rights protection in beneficiary countries, but it was primarily focused on inter-institutional and technical aspects of the JPs. The evaluation found the cooperation between both organisations as highly relevant and sustainable, yet suffering in efficiency due to weaknesses in management which in turn have had impact on effectiveness of JP.<sup>518</sup> Lack of systematic evaluation of JPs made measuring progress difficult and issues of horizontal complementarity and synergy between JP as well as on-the-ground coordination between EU and CoE country offices was raised as well. The main recommendations included: encouraging the CoE to adopt an institution-wide approach to delivering assistance in line with international best practices, strengthening strategic joint priority setting at country level, insisting on and supporting stronger project cycle management of JP, ensuring stability, predictability and reasonable flexibility of the funding for the JP and strengthening the foundation for capacity building activities and establishing their links to results.<sup>519</sup>

These recommendations were, for the most part, accepted fully or partially by both organisations, and moves were taken towards decreasing fragmentation of the JPs, increasing their predictability and improving impact of results on the ground. While the evaluation was still underway, in 2011 the CoE and DEVCO agreed on the visual identity of JPs, which ensured that both organisations' presence was to be adequately visualised.<sup>520</sup> The efforts towards reforming the JP framework resulted in signing a programmatic agreement – 'Statement of Intent' (Sol) - between the EU Commissioner for Enlargement and European Neighbourhood Policy, Štefan Füle, and the Secretary General of the CoE,

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<sup>515</sup> Interview with experts, Poznan, October 2015.

<sup>516</sup> Supra (fn 514) 1.

<sup>517</sup> Supra.

<sup>518</sup> Supra, 80-85.

<sup>519</sup> Supra, 86-89.

<sup>520</sup> Council of Europe, Joint Programmes between the Council of Europe and the European Union in 2011. Implementation of the Memorandum of Understanding between the Council of Europe and the European Union. ODGProg/Inf (2012)9, 29 May 2012.

Thorbjørn Jagland, on 1 April 2014.<sup>521</sup> The scope of the agreement and the fact that it was negotiated and signed by the head of DG ENLARG reinforces the status of JP within the EU policies as instruments of enlargement and neighbourhood policies. The Statement of Intent outlines its aims to provide a specific and predictable cooperation framework built towards reinforcing 'the link between the Council of Europe's standard-setting and monitoring tools and its cooperation activities'<sup>522</sup> as well as '(...) ensuring predictable and flexible long-term CoE-EC engagement through reinforced upstream coordination on assistance to partner countries and through an increased coordination in policy definition and implementation of cooperation in mutual fields of interest.'<sup>523</sup>

The Statement of Intent covers three priority geographical areas: the countries of Enlargement (Albania, FYROM, Montenegro, Serbia and Turkey), the countries covered by the EU Eastern Partnership (Armenia, Azerbaijan, Georgia, Moldova, Ukraine and Belarus) and the countries of the Southern Mediterranean region (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Tunisia and the Palestinian National Authority; the EU-Syria bilateral cooperation has been suspended since May 2012). The Statement of Intent was meant to be followed up by new frameworks specific to each of the three areas. Insofar, such frameworks were established in regard to EU Eastern Partnership and the Southern Mediterranean. In regard to the Eastern Partnership countries, a new modality of cooperation 'Programmatic Co-operation Framework for the countries of the Eastern Partnership' (PCF - EaP), was introduced in December 2014 with an overall envelope of 33.8m EUR over the course of 3 years.<sup>524</sup> The funding of PCF-EaP is split into 90% funding from the EU and 10% funding from the CoE, with the CoE as the implementing partner as per usual JP modalities. The programming of PCF-EaP is based upon EU policy priorities for the EaP and EU human rights country strategies as well as CoE country-specific Action Plans. The PCF-EaP includes five principal priority areas for action: protection and promotion of human rights, ensuring justice, combating threats to the rules of law, addressing challenges of the information society and promoting democratic governance. In regard to the Southern Neighbourhood, the Statement of Intent set out to continue the existing JP approach, with the specific aim to build upon the experiences of one particular JP, namely the 'South Programme I' and with a long-term goal of establishing a co-operation framework akin to the PCF-EaP.<sup>525</sup> In December 2014, a follow-up JP to the 'South Programme I' entitled 'Towards Strengthened Democratic Governance in the Southern Mediterranean' (South Programme - II) was initiated with a budget of 7.37m EUR for the years 2015-2017.<sup>526</sup> Its principal purposes have been outlined as: supporting constitutional processes, the development of new legislation and the setting-up and functioning of human rights and democratic governance structures; promoting the creation and consolidation of a common legal space between Europe and the Southern Mediterranean by raising awareness on key CoE Conventions and other European and international standards; supporting on-going democratic reform processes and foster regional co-operation in the field of human rights, rule

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<sup>521</sup> Council of Europe, European Commission, Statement of Intent for the cooperation between the Council of Europe and the European Commission in the EU enlargement region and the Eastern Partnership and Southern Mediterranean countries (EU neighbourhood region), 1 April 2014.

<sup>522</sup> Supra.

<sup>523</sup> Supra.

<sup>524</sup> European Commission, EU-CoE Programmatic Co-operation Framework for the countries of the Eastern Partnership, ENI/2014/037-347

<sup>525</sup> Supra (fn 521), 4.

<sup>526</sup> Council of Europe, Joint Programmes Website, <<http://www.jp.coe.int/CEAD/JP/Default.asp?TransID=376>> last accessed on 22 April 2016.

of law and democracy through the creation of, and support to, formal and informal networks between Europe and the South Mediterranean, as well as within the region. At the time of preparation of this report a framework agreement was foreseen concerning the Enlargement countries of South East Europe, with preliminary work on the nature and structure of the programme underway.

Meanwhile, both the CoE and the EU underwent internal adjustments towards increasing the quality of cooperation in the context of the JP. The CoE is currently implementing a major reform of its programme management framework towards increasing efficiency and delivering results-based evaluation and performance criteria, while the EU has established a new model of contractual arrangement with international organisations. In June 2015, the CoE and the European Commission concluded the Framework Administrative Agreement which contains provisions regarding technical and financial aspects of co-operation in the context of Joint Programmes such as granting procedures and rules specific to the co-operation between both organisations.<sup>527</sup>

### 3. Statistical information

For the fiscal year 2014, 54 JPs were active.<sup>528</sup> The total financial volume of these active programmes amounted to 88.5m EUR, down from 95.3m EUR in 2013.<sup>529</sup> Across all active JP in the year 2014, the budget share of the EU amounted to 75.6m EUR (86%), while the CoE share corresponded to 12.7m EUR (14%).<sup>530</sup> The annual budgetary envelope for the year 2014 amounted to 29.2m EUR, with the EU share at 24.5m EUR (84%) and the CoE share a 4.7m EUR (16%).<sup>531</sup> To provide some perspective on these numbers, the budget of the EU Fundamental Rights Agency for 2014 was set at 21.3m EUR, while the core budget of the OSCE ODIHR for 2014 was set at 16m EUR. An even more striking figure is the amount of EU contributions to the JP budget set against other extra-budgetary contributions to the CoE finances. In 2014, all EU receipts for JP registered by the CoE amounted to 21.5m EUR, which is just over 50% of the CoE's total income from extra-budgetary sources and 91% of the total EU voluntary contributions (covering JP and other forms of co-operation).<sup>532</sup> The following chart shows the value of the total financial volume of all JP active through the years 2006-2014:<sup>533</sup>

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<sup>527</sup> Council of Europe, European Union, Framework Administrative Agreement between the Council of Europe and the European Union on Actions administered by the Council of Europe and funded or co-funded by the EU, 18 June 2015.

<sup>528</sup> Council of Europe, Joint Programmes between the Council of Europe and the European Union in 2014 – Information Document. GR-EXT(2015)6, 23 March 2015 3.

<sup>529</sup> Supra.

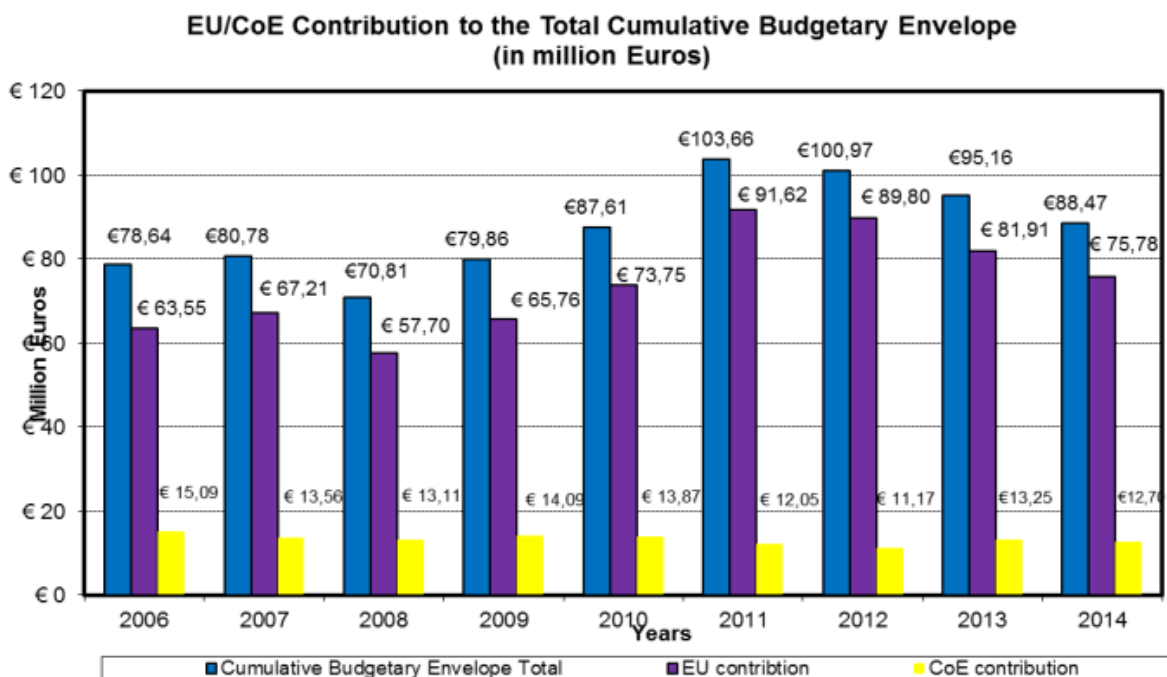
<sup>530</sup> Supra.

<sup>531</sup> Supra.

<sup>532</sup> Supra.

<sup>533</sup> Supra.

Figure 2 EU/CoE Contributions to Joint Programmes 2006-2014

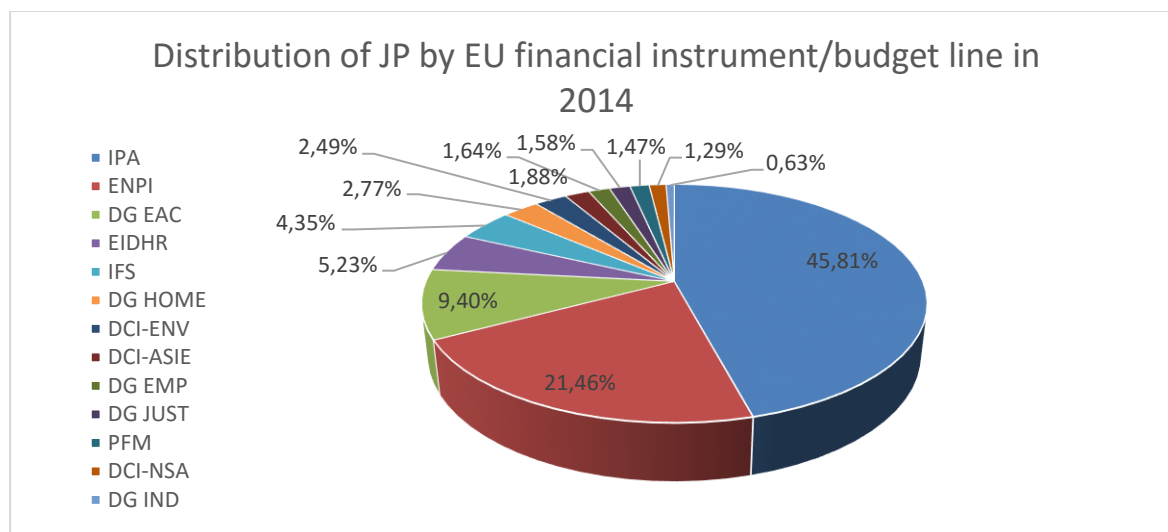


In 2014, the geographical distribution of JPs was heavily slanted towards South Eastern Europe and Turkey – the total volume of ongoing JP concerning these areas was at 40.5m EUR (46% total), with Eastern Europe and the South Caucasus at 20.9m EUR (24% total), multilateral JP at 13.4m EUR (15%), JP aimed at non-Member States (South Neighbourhood and Central Asia) at 8.4m EUR (9%) and JP aimed at EU Member States at 5m EUR (6%).<sup>534</sup> Thematically, the JP were distributed as follows: rule of law at 36.6m EUR (41%), democracy at 32.1m EUR (36%) and human rights at 19.2m EUR (23%).<sup>535</sup> The distribution of EU financial sources used to fund the JP in 2014 is illustrated by the chart below.

<sup>534</sup> Supra, 5-6.

<sup>535</sup> Supra, 8.

Figure 3 Distribution of JP financing by EU instruments/budget lines



As the above chart indicates, the majority of the EU financial contribution to JP is channeled through instruments and budget lines related to external action (IPA, ENPI, EIDHR, IFS, DCI-ENV, DCI-ASIE, PFM, DCI-NSA and DG IND). The contribution from the budget lines of primarily internally-oriented Commission's directorates-general DG EAC, DG EMP, DG HOME, DG IND and DG JUST amounted to just over 16% of the total. One must remember that the internally-oriented DGs feature external actions in the areas of international cooperation relevant to the respective DG's policy areas.

#### 4. JP Modalities

Currently, the JP can be broadly divided into two categories. One comprises the PCF-EaP programmes (15 linked JPs) and the 'South Programme II' JP, which are all entrenched in the agreements enshrined in the 2014 Statement of Intent. The second group comprises of other JP, which follow pre-existing modalities. Priorities and purposes of the JP are set out jointly by the EEAS and the CoE Office of the Directorate General of Programmes (ODGP, formerly Directorate of Strategic Planning), as well as other services as applicable. The final selection and administrative follow-up as well as evaluation and monitoring of JPs is carried out by DG DEVCO. DG ENLARG is also involved in the planning process as far as the JPs concern Enlargement/Neighbourhood countries, which in practice is the case for majority of the JPs. Other actors within the Commission such as DG HOME and DG JUST are occasionally involved if the given JP is related to their policy areas or is proposed to be co-funded from their budgets.

Modalities of JP implementation vary greatly. Horizontal JPs which involve more than one beneficiary country are overseen by project managers both at DG DEVCO and at the CoE ODGP. For country-specific JPs, the EU works through its EUDELs and in case of Enlargement countries, through existing national contracting authority. In Enlargement countries, the CoE typically acts through a dedicated project office, which usually is attached to the CoE country office or with the beneficiary authority, and will liaise on contractual issues with the contracting authority, but also with the EUDEL on major questions regarding the substance and progress of the project. All CoE activities regardless of the character of the JP are backstopped by the CoE Secretariat and the ODGP in Strasbourg.<sup>536</sup> Some JPs

<sup>536</sup> Supra (fn 514), 20.



are organised as so-called joint actions, which are financed or co-financed by the EU on a regular, recurring basis, frequently with a multi-annual framework agreement reinforced by annual agreements for specific activities. However, some JPs are implemented in multiple phases without framework agreements, such as was the case with the JP 'Peer-to-Peer II' (see Appendix I.3 of this report) which was a follow-up to the 'Peer-to-Peer' JP.

The JP consist of various activities agreed upon by both organisations in consultation with relevant authorities of participating states and stakeholders such as the national NHRIs. Typical activities include: trainings, expert opinions and advice, conferences, workshops, seminars, publications and dissemination activities. Some JPs engage in peer-to-peer sharing of best practices and achievements. Overall, the bulk of JP actions are centred on training, education and advice. Material support is rare but present in some JPs, in particular when the EU and the CoE jointly support the establishment of new institutions or facilities. The JPs engage a wide variety of stakeholders, including governmental bodies (ministries and departments), courts, prosecutors, NHRIs, professional associations (journalists, lawyers), NGOs and human rights defenders. Evaluations and assessments of JPs have insofar been conducted on an irregular basis. Prior to the 2012 evaluation of the JPs there were no established practices for evaluating JPs, with some programmes relying on external experts while some conducting purely internal evaluations.<sup>537</sup> In either case, the evaluations were facilitated by the CoE. Following the establishing of the Directorate of Internal Oversight (DiO) within the CoE Secretariat, the evaluations have become a standard feature of every JP with the DiO working together with DG DEVCO on methodology and management of evaluation process.

## 5. Conclusions

The JPs represent a unique example of inter-organisational cooperation in the fields of democracy, the rule of law and human rights. No two other regional organisations have been able to implement an instrument of joint action on such a scale and magnitude as the CoE and the EU. The JP will soon see the 25<sup>th</sup> anniversary of their introduction and their continued existence can be certainly considered a success of EU and CoE. Furthermore, the JP are a dynamic instrument, which has evolved the years, with both organisations being able to look critically at achievements and shortcomings of JP and to adjust towards increased relevance, efficiency, efficacy and sustainability. From the overall perspective of EU's engagement with the CoE, the JPs represent the third vital pillar of this relationship, next to the process of EU accession to the ECHR and the ongoing political co-operation and dialogue between both organisations. Given the current situation after the CJEU opinion 2/13, the importance of JPs as a vehicle for fulfilling common human rights aspirations of the EU and the CoE is all the greater. In fact, while the EU seeks a solution to the stumble in accession to the ECHR, the JPs represent the primary means of achieving the joint aspirations and goals set out by both organisations in the 2007 MoU. With the matter of resolving the accession stumble arguably having now secondary priority on the EU's agenda, the JPs could well become the primary mode of substantive cooperation with the CoE for some time to come.

Yet despite the significance and successes of JPs, they are not free from criticism. The CoE has found itself in the position of a partner with inferior resources yet supposedly superior knowledge and ability, with some within the CoE questioning the 'joint' nature of the JPs and pointing out that in fact

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<sup>537</sup> Interview with experts, Strasbourg, November 2012.

the CoE is being employed by the EU as an arguably inexpensive outsourcing towards meeting EU's policy goals.<sup>538</sup> On the other hand, the EU has criticised the aforementioned shortcomings of project management within the CoE and at low visibility of EU's contribution despite its value. The reforms of the JP framework should hopefully alleviate most of these issues. The adoption of the 2014 Statement of Intent and the 2015 FAA are promising developments, and the 'new opening' of JPs spearheaded by the PCF-EaP programmes and the large 'South II' JP hopefully signal a new era in history of JPs, yet it is too early at this stage to conclude whether the expected improvements were attained. For certain, both the PCF-EaP and South II have attained increased visibility compared to other JPs, with comprehensive websites and use of social media.<sup>539</sup>

One of the most striking critical observations regarding JPs concerns the paradigm of the EU employing the JP as a tool of enlargement and neighbourhood policies, with their geographical scope shrinking as new Member States join the EU and thus cease to be primary beneficiaries of JPs. The new arrangements regarding the JPs established via the 'Statement of Intent' in 2014 reinforce this *status quo* with the 'new wave' of JP (PCF-EaP and South II) aimed at South Mediterranean and Eastern Partnership. While some JPs engage EU Member States to a limited degree, the 28 countries remain at best secondary beneficiaries of the most extensive form of CoE-EU cooperation. Up until now, the EU could have presented such status quo as a consequence of the fact that the 'internal' sphere of engagement with the CoE was to be addressed by the EU accession to the ECHR. However, with prospects for speedy accession being bleak, the EU could do well to revisit the role of the JPs and reflect on whether they shouldn't be reoriented towards engaging EU Member States to a greater degree than they have been so far.

## H. Chances and opportunities

1. The interest of the EU in cooperation with the Council of Europe has been growing in parallel with the increasing role of fundamental rights within the EU. Today, the EU recognizes the partnership with the Council of Europe in the area of human rights and democracy as particularly important. From the Joint Communication of the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy to the European Parliament and the Council: Action Plan on Human Rights and Democracy (2015-2019), one can gather that like the United Nations is the EU key partner at the multilateral level, the Council of Europe takes a similar position at the regional level.

2. A Memorandum of Understanding signed in 2007 between the European Union and the Council of Europe (MoU) provides the policy foundation for the current state of relations between both organisations. By reaching this agreement, both Organisations successfully took an important threshold-test in the process of creating a cohesive European space of human rights, democracy and the rule of law. The MoU has outlined common goals, objectives and principles. It has lessened fears of possible institutional competition which might have had a disintegrating impact on the European scene. Finally, MoU has also identified areas and modalities of cooperation between both organisations to the benefit of people in Europe.

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<sup>538</sup> Supra (fn 138), 28.

<sup>539</sup> The PCF-EaP website is currently available at <<http://pjp-eu.coe.int/en/web/eap-pcf/home>> and the South II website is available at <<http://pjp-eu.coe.int/en/web/south-programme2/home>> as of 26 April 2016.

3. Although oriented to the future, the MoU, as any other agreement, is also a testimony of its birth-time. While approaching the 10th anniversary of this document, it is justified to revisit its content and progress of its implementation. The last 10 years have brought several changes in the mutual relations between the EU and the Council of Europe, on the one hand, and the approaches to human rights, on the other hand. The report provides an in-depth and comprehensive analysis in this regard, emphasizing inter alia that:

a. The MoU reaffirms the central role of EU - CoE joint programmes, the history of which goes back to 1993, in reinforcing cooperation between both organisations.

b. The scope of biannual priorities guiding cooperation of the EU with the CoE in the framework of the MoU has expanded and the last of these documents for 2016-2017 covers the entire range of human rights issues listed in the MoU. This is an important development, since previous biannual priorities omitted certain important areas, such as racism, xenophobia and intolerance. In this context, it is to be pointed out that none of the EU's policy documents analysed in this report reflect the CoE's active engagement with regard to the rights of migrants and the rights of people with disabilities. These gaps and inconsistencies are unfortunate, for both of these issues should play a significant role in EU human rights policy, in light of the migrant crisis on the one hand, and the EU's accession to the UN Disability Convention on the other hand.

c. However, the MoU itself takes a selective and unequal approach to various categories of human rights. It focuses primarily on civil and political rights, such as freedom of expression or prohibition of torture, or on general concerns, such as rights of minorities, discrimination, intolerance, racism, cultural diversity, intercultural dialogue, and education. References to core ESC rights, such as labour rights, right to health, right to adequate standards of living or right to social security are missing. In the light of the current Action Plan on Human Rights and Democracy (2015-2019), which attaches significantly more weight to economic, social and cultural rights than previous EU policy documents, this question deserves to be rectified. Yet, the report emphasizes that even under the present MoU several aspects of safeguarding these rights have been included into EU-CoE Joint Programmes.

d. Institutionally, the MoU is seen as a source of the limitation of the Fundamental Rights Agency mandate to the observance of fundamental rights solely within the framework of the EU policies, law and practice. In the light of the experience gathered and taking into account cooperation agreement between the FRA and the CoE, which provides the basis for working effectively together towards common goals, such a limitation seems to be not only unnecessary, but also interfering with the potential of FRA eventually at the expense of the human rights protection.

4. Besides the process of EU accession to the ECHR and the ongoing political co-operation and dialogue, EU-CoE Joint Programmes constitute the third vital pillar of cooperation between both organisations. Their focus: progress in the fields of democracy, rule of law and human rights at the country level make them a vehicle for transferring common policies in reality. The continuing process of their assessment reveals some points that need to be addressed. Because of an imbalance in financing (the EU as the main contributor), some commentators tend to see the Joint Programmes as an 'inexpensive' outsourcing towards meeting EU's policy goals. Yet, these observations should be put against the background of resource statistics of both organisations: the budget of the EU for the year 2016 is set at 155b EUR, compared to the total budget of the CoE set at 422m EUR. On the other hand, there are some critical voices from the EU about low visibility of its contribution. The Joint

Programmes framework is, however, evolving, embracing some new initiatives, such as Programmatic Cooperation Framework for Armenia, Azerbaijan, Georgia, Republic of Moldova, Ukraine and Belarus or South II (the Southern Mediterranean). This gives not only new impetus to cooperation between the EU and CoE, but may also facilitate addressing problems that have occurred.

5. One of the critical challenges to the EU and the CoE is to work together towards a cohesive European framework of human rights that would enhance the impact of relevant standards Europe-wide and made stronger their institutional protection at the regional level. Several steps have been taken in this regard by the Member States, policy making and judicial bodies of both organisations. Progress achieved is unquestionable. The impact of the Council of Europe heritage in the area of human rights on EU human rights laws and policies is widely recognized and welcomed. The CoE does not only contributes to the development of EU human rights law and policy through the adoption of legal standards, but also by providing information and expertise. Exchanges between bodies and officials of both organisations, training provided to EEAS staff by the Council of Europe, and the use of the recommendations made by the Council of Europe's monitoring bodies all are examples of channels of mutual enrichment and influence.

6. The EU legislative bodies and the Court of Justice tend to draw on the conventions and jurisprudence of the CoE as a source of inspiration for their own law-making and judicial interpretations respectively. Yet, although more than 50 CoE conventions are open for accession by the EU, only in a few cases the EU benefited from this opportunity (see chapter II.E.1). It is to be hoped that ratification of the CoE legal instruments by the EU will be an increasingly important factor in building cohesive EU-CoE approaches in the areas of human rights, democracy and the rule of law. In particular, in the areas of trafficking of human beings, children's rights, data protection and women's rights, there are signals that the ratification of the relevant instruments is under consideration by the EU.

7. Cooperation between the EU and the CoE has reached a new legal dimension with the adoption of Lisbon Treaty in which the Union commits itself to become a party to the European Convention on Human Rights. Moreover, giving the EU Charter of Fundamental Rights the status of the Union's primary law, this Treaty made the interpretative linkage of the Charter with the European Convention a legal commitment of the EU Member States and the relevant EU institutions.

8. The accession to the ECHR should not only serve the strengthening of a cohesive human rights system in Europe but also enhance the protection of the rights-holders within the EU. It turns out, however, that despite expected advantages of this step and dedicated efforts aimed at the elaboration of accession instruments, the ratification process has encountered significant hurdles. In its Opinion 2/13, the CJEU regarded some elements of the Draft Accession Agreement as a threat to the autonomy of EU law, its supremacy, the principle of direct effect, the conferral of powers, as well as the principle of mutual trust. For that reason, the CJEU has recognized the Draft Accession Agreement as incompatible with the EU treaties and thereby stalled the accession of the EU to the ECHR for the foreseeable future. The impact of this decision is analysed in details in the chapter II F of this report.

9. Thus, the highly complex issue of the rapprochement of the human rights protection systems of the CoE and the EU has entered a new phase featured by dilemmas that might be difficult to overcome in the near future. No surprise that the CJEU's Opinion has not been welcomed by many advocates of a coherent Europe-wide human rights system. While a period for a 'second thought' is obviously needed, it is, however, important to find the way to overcome the current difficulties rather

sooner than later. It seems that the ball is now in the EU garden as the CJEU's Opinion comes from within and is directed towards the EU. Moreover, it seems that the Lisbon Treaty itself demands from the EU to go the extra mile and take again the initiative to move beyond the existing stalemate.

## Appendix I – case studies

### 1. The role of Venice Commission ‘Democracy through Law’ and its cooperation with the European Union

#### a) *The legal status and nature of the Venice Commission*

In May 1990, eighteen countries acting in accordance with Council of Europe Resolution (90) 6 on the basis of a partial agreement established the European Commission for Democracy through Law, commonly known as the ‘Venice Commission’.<sup>540</sup> The Commission was designed as an independent consultative institution whose main function is to provide assistance on issues of constitutional law, including the functioning of democratic institutions, human rights, electoral law and constitutional justice. The Resolution stated that the Commission should be a fundamental instrument in the area of developing democracy in Europe.

The Commission was initially established for a period of two years, however, it quickly became obvious that there was a need for such independent advice on constitutional matters in Europe on a more permanent basis. As a result, the Deputy Ministers of the CoE decided to extend the mandate of the Venice Commission in the framework of the Partial Agreement in December 1992.

Under a resolution of the CoE’s Committee of Ministers adopted on 2 August 1951, ‘partial agreements’ create a form of cooperation which involves only selected Member States of the Council that decide to participate in the undertaking. The will of the CoE to engage in cooperation with non-member states and other entities was reflected in Statutory Resolution (93) 28, which was passed by the Committee of Ministers in 1993. This Resolution distinguished between three types of agreements:

- 1) a partial agreement: concluded, as indicated above, by some member States of the CoE;
- 2) an enlarged partial agreement: involving some member States of the CoE and one or more non-member states;
- 3) an enlarged agreement: adopted by all CoE’s member States and one or more non-member states.<sup>541</sup>

This decision opened the door to changing the composition of the Venice Commission and allowed non-members of the CoE and other organisations to participate in its work, it was also crucial for expanding the Venice Commission’s cooperation with other partners from outside the CoE. Resolution (93) 28 specifically empowered the Council of Ministers to invite the European Community to participate in the agreements of the aforementioned types.<sup>542</sup> On this basis, the Venice Commission gradually embraced non-CoE country partners, the European Community and other organisations. Later on, when the last remaining CoE member states decided to join the Venice Commission,<sup>543</sup> its

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<sup>540</sup> Austria, Belgium, Cyprus, Denmark, Finland, France, Greece, Ireland, Italy, Luxemburg, Malta, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey.

<sup>541</sup> A list of partial and enlarged agreements within the Council of Europe is available at <<http://conventions.coe.int/Treaty/Commun/ListeTousAP.asp?CL=ENG>>.

<sup>542</sup> See: CoE Committee of Ministers Statutory Resolution (93) 28 on partial and enlarged agreements, Chapter VI.

<sup>543</sup> Monaco in 2004 and Montenegro in 2006.

founding document was eventually transformed into an 'enlarged agreement' through Statutory Resolution (2002)3 'Revised Statute of the European Commission for Democracy through Law', adopted by the Committee of Ministers on 21 February 2002 (hereinafter referred to as the 'Statute'). Dallara observes that completed in this way, the process of opening the Venice Commission to various categories of partners shows the growing role and recognition of the importance of this body. This was the final step for the institutionalization of the [Venice Commission] within the CoE and, more in general, in the EU international community.<sup>544</sup>

Currently, there are five categories of involvement in the activity of the Venice Commission:

- 1) 60 member states (including all CoE members);
- 2) 5 observer states;
- 3) 1 associate member (Belarus);
- 4) 2 states with a special cooperation status (South Africa and Palestinian Autonomy);
- 5) 2 international partners – so called 'participants' in the work of the Commission (EU and OSCE/ODIHR).<sup>545</sup>

The Venice Commission is closely connected to the Council of Europe, but is not a statutory organ of it. It has been described as a Council of Europe 'body'. Its status is governed by the principles of institutional autonomy and the independence of its members. Although members are nominated by the member states, they act in their individual capacity as independent experts. This is determined by the Art. 2 of the Statute according to which they shall not receive or accept any instructions from the states. Nor can they be recalled before the end of their tenure. Most of the members have expertise as judges, prosecutors, professors of law or high State officials. Some have gone on to become judges in European courts after they have completed their term of service at the Venice Commission.

Despite the evolution described, the initial concept underlying the creation of the Venice Commission - to establish an independent, professional body acting in the legal field, providing legal, not political opinions and advice - has been maintained throughout the last 26 years. In other words, the Commission is a body which is engaged in the legal discussion, but not in the political debate at both country and international levels.

It is obvious, however, that the Commission is not acting in a vacuum. Its work is linked to the political sphere insofar as legal, and especially constitutional matters, are connected with politics. In this wider sense, the Commission is often called on to examine requests for opinions submitted by political bodies, at the State level or representing the CoE. However, the political origins of requests do not determine in any way the content of the substantive position taken by the Commission. In its opinions, the Commission uses only legal argumentation, considering the political context of the case only as a kind of background information.<sup>546</sup>

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<sup>544</sup> Cristina Dallara, 'Transnational legal institutions as source of European normative power: The role of the Venice Commission in two Rule of Law reversal attempt cases.' Paper prepared for the ECPR General Conference, Science Po – Bordeaux (2013) 5.

<sup>545</sup> Algeria (2007), Brazil (2009), Chile (2005), Israel (2008), Kazakhstan (2011), Kyrgyzstan (2004), Kosovo (2014), Mexico (2010), Morocco (2007), Peru (2009), the Republic of Korea (2006), Tunisia (2010) and the USA (2013).

<sup>546</sup> Hanna Suchocka, 'Stanowisko Komisji Weneckiej dotyczące pozycji ustrojowej sądownictwo konstytucyjnego w demokratycznym państwie prawa' (2016) 1 Ruch Prawniczy, Ekonomiczny i Socjologiczny 5-8.

In the past, the political organs of the CoE have attempted to establish a kind of a political umbrella over the Venice Commission, but it has succeeded in maintaining its autonomy and preserving the independence of its members and thus defended its authority. This has eventually been beneficial not only to the implementation of the Commission's mandate, but also to the overall mission of the Council of Europe.

### *b) The main tasks of the Venice Commission*

Art. 1 of the Statute states that the specific field of action of this body 'shall be the guarantees offered by law in the service of democracy'.

The two elements: 'democracy' and 'law' are interlinked in the Commission's mandate and perceived as interdependent and mutually supportive. They are also clearly expressed in the Commission's official name: 'democracy through law'.

According to Art. 1 of its Statute, the Venice Commission shall fulfil the following objectives:

- strengthening the understanding of the legal systems of the participating states, notably with a view to bringing these systems closer;
- promoting the rule of law and democracy;
- examining the problems raised by the working of democratic institutions and their reinforcement and development.

The idea of setting up an international body with such a mandate was encountered some political opposition. But, the collapse of communism helped to overcome the initial scepticism.<sup>547</sup> Batole argues

'The coincidence of its establishment with the fall of the Berlin Wall facilitated the involvement of the Commission in the development of the democratic constitutional reforms in the countries of the Central and Eastern Europe as far as they moved in the direction of the adherence to the Council of Europe and to the European Union and were and are interested, year by year, in keeping safe this membership'.<sup>548</sup>

Also the newly emerging countries in this region needed urgent constitutional assistance. For that reason, in the last 25 years the majority of Venice Commission's opinions have been devoted to Central and Eastern Europe. But, the scope of the activity of this body has not been limited to the post-communist countries only.<sup>549</sup>

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<sup>547</sup> Gianni Buquicchio, Simona Granata-Menghini, 'The Venice Commission Twenty Years On. Challenges Met but Challenges Ahead in Marjolein van Roosmalenm, Ben Vermeulen, Fried van Hoof, Merten Oostling (eds) *Fundamental Rights and Principles – Liber amicorum Pieter van Dijk* (Intersentia 2013) 241.

<sup>548</sup> Sergio Bartole, 'International Constitutionalism and Conditionality. The Experience of the Venice Commission' (2014) *Rivista AIC* 5.

<sup>549</sup> For example the following opinions: CDL-AD(2003)022-Opinion on the Implications of Legally-binding EU Charter of fundamental rights on Human Rights Protection in Europe; CDL-AD (2008)010 – Opinion on the Constitution of Finland; CDL-AD(2013)010 – Opinion on the draft New Constitution of Iceland; CDL-AD(2005)017 Opinion on the compatibility of the Laws 'Gasparri' and 'Frattini' of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media; CDL-AD(2013)038 - Opinion on the Legislation on Defamation in Italy; CDL-AD(2002)032 – opinion on the



It goes without saying that the process of democratic transition has a political character. Its main aim is to replace an authoritarian system with a democratic one. In this process, however, there is often a temptation to look for shortcuts, which can result in measures if not *contra legem*, then at least *praeter legem*. Law is sometimes perceived as an inconvenient constraint in the process of building democracy. The experience of many countries going through the process of political transformation in Europe since 1990 has proven the correctness of this observation, especially in the context of reforms of the judiciary or vetting procedures (so called lustration). For that reason, the main responsibility of the Venice Commission has been to offer guidance on how to build democracy within the framework of law, and more specifically on the basis of the rule of law.

Opinions of the Venice Commission do not have a legally binding character. In spite of this and the lack of formal ‘sanctions’ for non-implementation of the opinions, States usually take them into account in their constitutional law and in ordinary legislation.<sup>550</sup> Proposals and guidance contained therein have been positively echoed by interested States in the majority of cases.

Benoit-Rohmer and Klebes have observed that:

‘[t]he Commission specializes in drafting and reviewing constitutions, and has done outstanding work in this field. [...] On a wider front, it takes an interest in laws on constitutional courts, electoral laws, laws on national minorities and, more generally, all laws on the operation of democratic state institutions. It is also required to study transnational themes and prepare legal opinions for the Assembly or the Committee of Ministers – including opinions on the interpretation of Council of Europe treaties.’<sup>551</sup>

Although the original mission of the Venice Commission was specifically related to ‘constitutional assistance’ and ‘emergency constitutional aid’ to states in transition, during the last ten years, the number and the type of activities performed by the network has significantly increased, behind its original function of advisor on constitutional matters. In fact, it is playing an increasingly global role in developing knowledge and producing documents, opinions and guidelines on various judicial and governance issues.<sup>552</sup>

### *c) Points of reference for Venice Commission’s opinions*

A profound political transformation must be followed by constitutional changes, which are necessary for the creation of a new political system. A common tendency in all Central and Eastern European countries after the collapse of communist rule was to build on the traditional democratic principles recognised by the Western democracies in the course of their constitutional development.

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Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein; CDL-AD(2002)018 – Opinion on the draft Law of Luxembourg on Freedom of Expression in the Media; CDL-AD (2009)057 – Interim Opinion on the draft Constitutional Amendments of Luxemburg. One of the newest examples is an opinion prepared on the request of the Parliamentary Assembly of the CoE on the draft of constitutional amendments in France on the state of emergency and deprivation of nationality (CDL-AD(2016)006).

<sup>550</sup> The opinions are not always taken into account. One difficult example was the situation in Liechtenstein where the referendum decided against the proposals included into the Venice Commission opinions (CDL-AD(2002)032).

<sup>551</sup> Florence Benoît-Rohmer, Heinrich Klebes, *Council of Europe Law - Towards a Pan-European Legal Area* (Council of Europe 2005) 78.

<sup>552</sup> *Supra* (fn 543), 10.

The general principles of the so-called socialist constitutionalism ran contrary to the Western perception of democracy. This system was characterised by:

1. rejection of the separation of powers and its replacement with the principle of unity of power based on the leading role of the communist party,
2. recognition of the state will as an essential factor in determining individual freedom [rejection of the liberal concept], and
3. rejection of political pluralism.

This clearly shows that ‘socialist constitutionalism’ was an attempt to construct a system that was alien to the main principles of European constitutional heritage. Practice amply demonstrated its consequences.

Therefore, the constitutional development in Central and Eastern Europe during the 1990s has been determined by three major factors:

1. abandoning the recent (socialist) constitutional doctrine,
2. reorientation of the constitutional system towards the well-established European standards,
3. reconciliation of some local constitutional traditions and expertise with the European standards.

By and large, these factors featured in the constitutional reforms of the new democracies. This can be said about both the countries which had previously been part of the Soviet Union itself, such as the Baltic States and Ukraine, and those which were part of a broader Soviet satellite system, such as Poland, Hungary, the Czech Republic, Slovakia, Romania etc.

However, at the beginning of transformation, the reorientation towards European constitutional standards became the most common and vivid tendency. As a consequence, the role of the Venice Commission as a source of information, guidance and advice, as well as a *de facto* monitoring tool assisting states in constitutional reforms became central. Primarily, its task was to help Central and Eastern European partners to get acquainted with and internalise the European constitutional legacy by interpreting the specific content of the so-called European standards in the areas of democracy, the rule of law and human rights.<sup>553</sup> A by-product of this exercise was the development of commonly shared criteria for the evaluation of the accession documents of the interested States applying for membership in the Council of Europe and the European Union or relevant for the continuity of participation in the European arrangements<sup>554</sup>.

Thus, the point of reference for the Venice Commission has always been European law, especially the European Convention of Human Rights (hard law) and the jurisprudence of the European Court of Human Rights, as well as the constitutional legacy of European democracies. The Commission also takes into account the wide area of so-called European soft law including recommendations of the Committee of Ministers at the Council of Europe, recommendations and resolutions of the Parliamentary Assembly and its commissions. In addition, the Venice Commission benefits from the

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<sup>553</sup> Supra (fn 546), 242.

<sup>554</sup> See Jean Petaux, *Democracy and Human Rights for Europe. The Council of Europe's Contribution* (Council of Europe 2009) 106.

relevant United Nations documents since all European countries are members of this organisation and according to the principle that regional law should be coherent with international law.

Despite these generally coherent sources of reference, the Venice Commission has been confronted with complex challenges in its evaluative and advisory functions vis-à-vis countries in transition. The list of problems with democracy in post-communist states encompass a broader range of topics for discussion than a simple analysis of the rules governing free elections and the organisation of state organs would entail. The newly established democratic procedures and institutions in the post-communist states were weaker than in well-established democracies, and, for obvious reasons, more susceptible to a number of problems.<sup>555</sup> These countries often suffered under deficits in political culture and traditions that are common in consolidated democracies. It is understandable since countries in this part of Europe usually did not have the historical opportunity to collect relevant experience. Most of them were unable to develop their own political system at a time when the democratic systems of Western Europe were stabilising. Sometimes, the Venice Commission was confronted with the difficult problem of applying European standards to some of the institutions of the concerned countries, strongly rooted in the communist heritage, such as the State Prosecutor's Office in Russia or Ukraine. There was also a low level of awareness of the separation of powers and the related system of checks and balances and the need to internalise these principles at all levels of government. Seeing this as an essential factor in determining how power is exercised, the Venice Commission has, therefore, always examined not only the letter of the law, but also how it is practically implemented in a given political surrounding.<sup>556</sup>

#### *d) The status of the EU within the Venice Commission and the normative framework of cooperation between them*

A common understanding of democracy, the rule of law and human rights provides a solid foundation for long-term cooperation between the Venice Commission and the European Union in the context of the Commission's mandate. Moreover, experience shows that the European Union and the Venice Commission have a similar focus and both embrace:

1. constitutional justice – the Commission has paid a lot of attention to the establishment, development and functioning of constitutional courts in the new democracies;
2. the independence of the judiciary, including the appointment and status of judges, as well as relevant institutional and procedural safeguards;
3. free elections, freedom of the media and freedom of speech.

These substantive commonalities are obviously helpful when it comes to setting up a formal framework for cooperation. The European Union's status as a 'participant' in the work of the Venice Commission derives from Art. 2 (6) of the Venice Commission's Statute: 'The European Community shall be entitled to participate in the work of the Commission'. The same provision also establishes

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<sup>555</sup> This is apparent, for example, in the report of the Venice Commission of the Council of Europe, concerning the rule of law – CDLAD (2011) 003rev.

<sup>556</sup> Hanna Suchocka, 'Challenges to democracy in Central and Eastern Europe' (2015) 50 *Revista catalana de dret public* 50.

that the European Community (now Union) can become a member of the Commission ‘according to modalities agreed with the Committee of Ministers’. Although these rules date back to the ‘pre –EU’ situation, after the EU replaced the European Community its situation has continued to be the same in two ways:

1. the Statute has not been amended with regard to the EU;
2. the EU has not requested the Council of Ministers to agree to its membership in the Venice Commission.

Hence, the EU has maintained its status as a ‘participant’ in the work of the Commission. This formula is very general. There are no clear stipulations which could help to precisely determine its meaning. Fears are sometimes expressed that this situation might give rise to some uncertainty as to the actual room (legal status) for the EU’s action within the Venice Commission. However, experience has proven that this lack of precise rules does not create any particular obstacles to the input of the EU in the work of the Venice Commission. Moreover, the following forms of EU involvement have become a well-established and accepted practice:

- 1) participation in the plenary sessions and sub-commissions – usually two representatives of the EEAS take part in sessions - one representative of the European Commission’s Legal Service who since March 2012 is accompanied by a representative of the European External Action Service;<sup>557</sup>
- 2) participation in the debates;
- 3) submission of requests for the Commission’s opinion;
- 4) submission of requests for the Commission’s legal assistance (a different form of guidance than ‘opinions’);
- 5) meetings between the EU’s ambassadors and the Commission’s delegations during country missions.

This means that the EU can actually contribute to the substantive work of the Venice Commission. However, its representatives do not act as rapporteurs of the Venice Commission and they do not take part in the country missions of the Venice Commission. They also cannot vote in Commission elections for, nor be elected to, the Venice Commission’s organs. These entitlements are reserved only for the members.

To date, the Venice Commission has received two formal requests for opinions from the European Commission, notably in the cases of Bosnia and Herzegovina<sup>558</sup> and of Bolivia.<sup>559</sup>

In the case of Bosnia and Herzegovina, the European Commission formally requested an opinion on: ‘how the judicial framework, the division of powers and the existing co-ordination mechanisms affect legal certainty and the independence of the judiciary in Bosnia and Herzegovina’. In this context, the Venice Commission was represented in the meetings of the International Consultative Group on the judiciary held in the framework of the European Union and Bosnia and Herzegovina’s Structured

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<sup>557</sup> In 2011 the President of the Committee for citizenship, governance, institutional and external affairs of the Committee of region participated.

<sup>558</sup> Opinion on legal certainty and the independence of the Judiciary in Bosnia and Herzegovina - CDL-AD (2012)014.

<sup>559</sup> Opinion on the draft code of constitutional procedure of Bolivia - CDL-AD (2011)038.

Dialogue on the work of the judiciary, which was an integral part of the Stabilisation and Association Process.

In the case of Bolivia, the President of the Chamber of Deputies of this country requested that the EU Delegation forward to the Venice Commission a request for an opinion on the draft Code on Constitutional Procedure. The European Union and the Venice Commission had previously concluded a joint programme of cooperation on the development of constitutional reforms in Bolivia.

In addition to EU formal requests, on a number of occasions EU representatives have triggered national requests to the Venice Commission. For example, the Venice Commission was asked to express its views in the context of the enlargement policy on:

- a) the negotiations on the status of Kosovo in 1998/99;
- b) the negotiations leading to the Ohrid Framework Agreement in ‘the former Yugoslav Republic of Macedonia’ in 2001;
- c) the negotiations on the State Union between Serbia and Montenegro in 2002/03, judicial reforms in Serbia;
- d) the negotiations on the Montenegro independence referendum in 2006.

In the ongoing process of Serbian accession to the EU, many of the requests for opinions of the Venice Commission have been initiated by the Government of Serbia, perhaps upon the invitation of the EU.<sup>560</sup>

After the Lisbon Treaty, the EU has also drawn on the Commission assessments concerning the observance of the ‘European standards’ of democracy and the rule of law in EU member states. Three cases should be mentioned here: the constitution making processes in Hungary (2011-2013) and Romania (2012-2013),<sup>561</sup> as well as the legislative steps taken by the Polish authorities after the parliamentary elections in October 2015, which have affected the status and functioning of the Constitutional Tribunal in Poland.<sup>562</sup>

As these examples show, in such situations, the opinion of the Venice Commission is being taken by EU institutions as an essential contribution to their own assessment. It is also evident that the reaction of the governments concerned is informed, not only by strong legal arguments brought forward by the Commission, but also by the related action taken by competent EU organs. Thus in a press release from the EU, it stated ‘The [EU] Commission will keep the matter under close review [...] and will take into account whether the amendments will be implemented in line with the Venice Commission’s opinions’. Hoffmann-Riem emphasises that in both cases (Hungarian and Romania) the Venice Commission turned out to be a key-player and the ‘technical-executive arm’ for the EU, despite the fact that there was no formal request by the EU for an opinion.<sup>563</sup> It is noteworthy that the Hungarian

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<sup>560</sup> Supra (fn 543), 23.

<sup>561</sup> See the Venice Commission’s opinions: CDL-AD (2011) 016 concerning Hungary, CDL-AD (2012) 026 concerning Romania.

<sup>562</sup> See the Venice Commission’s opinion: CDL-AD(2016)001.

<sup>563</sup> Wolfgang Hoffmann-Riem, ‘The Venice Commission of the Council of Europe - Standards and Impact’ (2014) 25 *The European Journal of International Law* 594.

case was the first one in which the EU Commission explicitly referred to the Venice Commission as a relevant and crucial ally.<sup>564</sup>

The Venice Commission is also involved in the implementation of specific projects in the framework of different EU – CoE Joint Programmes.<sup>565</sup> For example in 2012, the Commission following cooperation with different countries of Central Asia in the framework of a Joint Programme ‘Rule of law in Central Asia’ developed a cooperation programme in the electoral field with the Central Electoral Commission in Kazakhstan. The Venice Commission also developed several activities in Tunisia and Morocco in the framework of the joint programme between the European Commission and the CoE on ‘Strengthening democratic reform in the Southern Neighbourhood’.<sup>566</sup>

It should also be pointed out that representatives of the Venice Commission, especially the President and Secretary-General, participate in the meetings of various EU bodies and cooperate with the EU on a number of country related projects. For example, in 2011 the Venice Commission got involved in the implementation of the Eastern Partnership Program founded by the EU on the strengthening of electoral administrations in Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.

In 2014, the Venice Commission’s President briefed the European Parliament on the assessment of the new Tunisian constitution adopted in January 2014 carried out by the Venice Commission. The Venice Commission’s President has also been involved in regular consultations with EU bodies on a broad range of topics concerning EU policies and its relations with the EU member states, states aspiring to the EU membership, and neighbourhood states.<sup>567</sup>

The Commission maintained regular and frequent high level and working level contacts with the European Union, in particular with respect to constitutional issues in Bosnia and Herzegovina, the Republic of Moldova, Romania, Turkey and Ukraine, but also in the Arab countries as a consequence of the Arab spring. The EU Commissioners for Human Rights, for Enlargement and Eastern European Neighbourhood Policy along with the Special Representatives in Bosnia and Herzegovina and in Kosovo sought the advice of the Venice Commission on questions pertaining to their mandates.<sup>568</sup>

Cooperation with the EU has contributed to the expansion of the Commission’s outreach and influence as its opinions not only provide direct guidance to the countries concerned, but also contribute to policy development and decision-making within the EU itself. The impact of the Venice Commission - EU cooperation can be seen especially in two situations:

- a) in developing partnerships between the EU and third countries, as well as in the context of EU-accession plans by third countries;
- b) where the EU considers that European standards of democracy, the rule of law and/or human rights might be at risk in the EU member states.<sup>569</sup>

The Venice Commission offers assistance to countries adjusting their laws, institutions and procedures with a view to matching them with the criteria for EU accession. Moreover, the membership of the

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<sup>564</sup> Supra.

<sup>565</sup> Detailed information in this respect is published every year in the Annual activity reports of the Venice Commission. See above ch II.G.

<sup>566</sup> Council of Europe, Annual Report of the Venice Commission for 2013 85.

<sup>567</sup> See: Council of Europe, Annual Report of the Venice Commission for 2011, Council of Europe, Annual Report of the Venice Commission for 2013.

<sup>568</sup> See: Council of Europe, Annual Report of the Venice Commission for 2013.

<sup>569</sup> See Supra (fn 546), 8-9.

applicant country in the Venice Commission can be perceived as an indicator of adherence to the relevant standards.<sup>570</sup> The case of Serbia is a good example here. The Annual Progress Report from 2014 prepared by the European Commission on Serbia states that:

'[t]he Constitution is largely in line with European standards. Some provisions remain to be put in line with the recommendation of the Venice Commission, in particular concerning the role of parliament in judicial appointments, the political parties' control over parliamentary office, the independence of key institutions and the protection of fundamental rights, including data protection'.<sup>571</sup>

Altogether, one can conclude that the confirmation of Serbia's status as a candidate for European Union membership in March 2012 has been facilitated by cooperative efforts between the EU and the Venice Commission.

Sometimes the European Commission explicitly calls on the Venice Commission to help bring about changes that need to be accomplished in the legal system prior to EU membership.

The Venice Commission works on delicate matters. It has to deal with sovereign States and even legal criticism based on the interpretation of European standards deriving from common European heritage might meet resistance and be construed as interfering with state sovereignty. The Committee responds to this challenge with the clear methodology adopted in its work, but especially in the process of the elaboration of guidelines and opinions for individual states which consists in dividing between:

- 1) matters which constitute the fundamentals of the European democratic tradition (European standards) and, therefore, must be interpreted in a mandatory way.<sup>572</sup> This is the case, for example, with regard to standards of constitutional justice and the independence of the judiciary based on the principle of the division of powers and the mechanism of checks and balances.
- 2) matters which belong within the margin of appreciation of states. The Commission is sensitive to differences in political cultures and the traditions of different countries, which may influence the democratic order. Its advice is based on the recognition of this diversity. While the fundamental standards cannot be put into question, there is always room for various modalities of their implementation in good faith.<sup>573</sup>

This methodological position provides a functional basis for the Venice Commission – EU partnership. Soft-law and commentaries elaborated by the Venice Commission are important not only for the member countries, but also for countries and institutions cooperating with the Venice Commission. Hoffman-Riem notes that

'These states accept the normative bases of the [Venice Commission's] work and its practices. It is clear that they want to be seen as belonging to a community of states committed to the ideals of human rights, democracy, and the rule of law under a

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<sup>570</sup> Wolfgang Hoffmann-Riem, 'The Venice Commission of the Council of Europe - Standards and Impact' (2014) 25 *The European Journal of International Law* 579.

<sup>571</sup> European Commission, 'Serbia Progress Report' 2014.

<sup>572</sup> Sergio Bartole, 'The Role and Contribution of the Venice Commission to the EU Integration Process and the EU Neighbourhood Policy' CDL-UDT(2011)017.

<sup>573</sup> Jeffry Jowell, 'The Venice Commission – Disseminating Democracy through Law' (2001) *Public Law* 675.

framework shaped by the Venice Commission. Put differently, states are looking for more than just suggestions on how to develop their own legal systems – they also want to share in the esteem that comes with being part of a community founded on human rights, democracy, and the rule of law. As a reputation- enhancing community, the Venice Commission affords states the opportunity to add to their esteem by contributing to the Commission’s work, as well as by the way in which they handle recommendations as part of their sovereign responsibility to their respective legal systems and societies’.<sup>574</sup>

### *e) Conclusions*

Over the past number of years, there has been a noticeable increase in ties and cooperation between the EU and the Venice Commission. The question arises as to why the EU has not decided to move from its status of ‘participant’ in the work of the Commission to a formal and full membership. As it has already been mentioned, this is possible under the Commission’s statute.

We would argue that this change might give a new impetus to cooperation between the two actors and enhance the professional status of the EU representatives at the Venice Commission. As an independent professional body, composed of lawyers, judges, and academics, the Commission’s power derives from autonomy and independence. As the EU holds the status of ‘participant’, it is not obliged to fulfil the criterion of independence of its representatives. For that reason, the EU is represented at the Venice Commission not by independent professionals, but by EU officials. There is a tangible imbalance between the professional and autonomous character of the Commission and the political (or sometimes even bureaucratic) role of the EU representatives. This can be clearly seen in difficult discussions concerning individual states.<sup>575</sup> The suggested change of the status of the EU in the Venice Commission might have a bearing in particular in situations where the EU would like to use the opinion of the Venice Commission as a neutral contribution to a possible infringement procedure against a country, which is a procedure of a strongly political character.

The EU in such situations acts in a double role: a) inside the Commission, as a participant in its work, and b) outside the Commission within the EU’s own political structures and procedures (like the infringement procedure) to ensure compliance by its member states with the EU’s fundamental values and principles in the area of democracy, the rule of law and human rights.

Over the last number of years, the Venice Commission’s opinions have been used by the EU in three difficult cases, notably Hungary, Romania and Poland. On the one hand, it shows the importance of the role of the Venice Commission. But, on the other hand, it could also be seen as a source of hazards related to the involvement in political processes within which the Commission does not appear as an actor. It is vital, therefore, for both the Venice Commission and the EU to take all the necessary steps to protect the Venice Commission’s independence, political neutrality and authority. This is not only a matter of objective facts, but also of the perception of the formal and practical status of the Venice Commission.

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<sup>574</sup> Supra (fn 570), 596.

<sup>575</sup> It was for example the case in the discussion on Romania during the plenary meeting in Venice in December 2012. The Romanian Minister of Foreign Affairs reacted strongly to the European Commission delegate’s speech, asking the president of the Commission to underline that the Opinion is a document of the Venice Commission and that this is a technical body and cannot be used by another political body, such as the EU Commission.



For these reasons, changing the status of the EU inside the Venice Commission from a participant to a full member would open the way for the EU to appoint professionals, such as judges, lawyers or academics to the Venice Commission, but allow them to act in their own personal capacity. This would make the EU references to the Commission's assessments and opinions more powerful. This situation could also reinforce the position of the Commission as a professional body, with its opinions always rooted in law, not on political bases.

Keeping in mind that the jurisprudence of the European Court of Human Rights is a point of reference for the Venice Commission's rapporteurs in most cases, active professional participation on the part of the EU could be also a good step in facilitating the ratification of the ECHR by the EU as envisaged by the Lisbon Treaty. The described approach should give an answer to the question 'why the road from Luxembourg to Strasbourg leads through Venice'.<sup>576</sup>

## 2. Legal influence of the European Convention on Human Rights on the European Union – right to an effective remedy and right to a fair trial

### a) Introduction

This case study presents the influence of the European Convention on Human Rights (and its interpretation by the European Court of Human Rights) on the European Union system of fundamental rights on an example of two basic procedural rights: right to an effective remedy and right to a fair trial.

Before the adoption of the Charter of Fundamental Rights the EU system lacked a bill of rights, but it does not mean that human rights were not protected within the EU (and earlier, the EC). Already in 1969, in the famous *Stauder*<sup>577</sup> case, the ECJ included fundamental rights to the general principles of the Community law protected by the Court. Measures incompatible with observance of human rights recognized as general principles were therefore not acceptable in the EC.<sup>578</sup>

In its later jurisprudence the ECJ pointed to the main sources of inspiration and guidelines for the protection of fundamental rights within the: 'constitutional traditions common to the Member States'<sup>579</sup> and 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories'.<sup>580</sup> In practice, ever since the *Rutili*<sup>581</sup> case, the ECJ often relied on the provisions of the ECHR and the jurisprudence of the ECtHR.<sup>582</sup> Both the ECJ and the CFI considered the ECHR as a 'special source of inspiration' for the general principles of EU law.<sup>583</sup>

<sup>576</sup> Lauri Bode-Kirchhoff, 'Why the Road from Luxembourg to Strasbourg Leads Through Venice' in Kanstantsin Dzehtsiarou et al. (eds) *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and ECHR* (Routledge 2014), 55.

<sup>577</sup> Case 29/69 *Stauder v Stadt Ulm* [1969] ECR I-419.

<sup>578</sup> Case C-299/95 *Friedrich Kremzow v Republik Österreich* [1997] ECR I-02629 para 14.

<sup>579</sup> Case 11/80 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR I-1125.

<sup>580</sup> Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR I-985.

<sup>581</sup> Case 36/75 *Rutili v Ministre de l'intérieur* [1975] ECR I-1219.

<sup>582</sup> See for example Case C-368/95 *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689 and Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-06279.

<sup>583</sup> Paul Craig and Grainne de Burca, *EU Law. Texts, Cases and Materials* (5<sup>th</sup> Edition Oxford 2011) 366-367.

The case study will briefly present the history of the recognition of the right to an effective remedy and the right to a fair trial by the Court of Justice of the EU and the milestone judgments of the CJEU concerning these rights. It will also compare the scope of these rights within the EU and the CoE systems.

### ***b) Right to a fair trial and right to an effective remedy in the European Convention on Human Rights***

Before analysing the case-law of the ECJ it is necessary to cite the provisions of the ECHR related to the right to a fair trial, which became a source of inspiration for the EU court.

The right to a fair trial is guaranteed by Art. 6 (1) of the ECHR:

‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.’

Paras 2 and 3 of Art. 6 guarantee the presumption of innocence and minimum rights of those charged with a criminal offence.

According to the jurisprudence of the ECtHR, Art. 6(1) secures the right to a court, including the right of access, procedural guarantees and the implementation of judicial decisions.<sup>584</sup> Additionally, this provision guarantees a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The European Convention on Human Rights also safeguards the right to an effective remedy in Art. 13:

‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’

These provisions of the ECHR, as well as the related case-law of the ECtHR, strongly influenced the understanding of justice-related rights by the CJEU (previously European Court of Justice) and the General Court (previously the Court of First Instance).

### ***c) Recognition of the right to fair trial and related rights by the Court of Justice***

The right to a fair hearing was first considered by the ECJ in two cases from 1980.

First of them was the *Pecastaing*<sup>585</sup> case, which was initiated by a reference for a preliminary ruling by a Belgian tribunal. The referring court made direct references to the right to a fair hearing and Art. 6 of the ECHR. In its judgment the ECJ found that there was no need to consider if it was necessary to

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<sup>584</sup> *Hornsby v Greece* (App no 18357/91) judgment of 19 March 1997.

<sup>585</sup> Case 98/79 *Josette Pecastaing v Belgian State* [1980] ECR I-691.

ensure compliance in the Community legal system with the requirements of Art. 6 ECHR in that particular case. The ECJ pointed out that the directive applicable in the case ‘may be considered as fulfilling (...) the requirements of the “fair hearing” set out in Art. 6 of the Convention at least with regard to the arrangements for appeals to the courts (...)’.<sup>586</sup> For these reasons, the ECJ stated that it was unnecessary to give a reply to a question submitted by the national court.

In the second case, *van Landewyck*<sup>587</sup>, one of the parties (Fedetab) claimed that the conduct of the Commission in the case was an infringement of Art. 6(1) of the ECHR. Citing the case-law of the ECtHR, the Commission pointed out, that ‘one of the criteria for the existence of a “tribunal” laid down by the European Court of Human Rights is its independence of the executive’. The Commission further observed ‘that since the executive power of the Community is in fact vested in it is at least doubtful whether, not being independent of that power, it can constitute a tribunal within the above-mentioned sense’. The ECJ found the arguments of Fedetab irrelevant and stated that: 1) ‘The Commission is bound to respect the procedural guarantees provided for by Community law’ and 2) The Commission ‘cannot, however, be classed as a tribunal within the meaning of Art. 6’ of the ECHR.

These two cases are important because the ECJ clearly recognized the existence of a fair hearing standard flowing from Art. 6 (1) of the ECHR. Although, in both cases, the ECJ finally decided both cases solely based on Community procedural guarantees, it has taken the Convention standard into consideration. However, it did not explicitly identify the right to a fair trial as a general principle of the Community law.

In 1986, the ECJ recognized the principle of effective judicial control as a general principle in the *Johnston* case.<sup>588</sup> The case was initiated by a reference for a preliminary ruling. The national court has asked, *inter alia*, ‘whether Community law, and more particularly directive no 76/207, requires the Member States to ensure that their national courts and tribunals exercise effective control over compliance with the provisions of the directive and with the national legislation intended to put it into effect’.<sup>589</sup> In its judgment, the ECJ first referred to the Community provision applicable to the case, but then added that:

‘The requirement of judicial control stipulated by that article reflects a general principle of law which underlines the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. (...) [A]s the Court has recognized in its decisions, the principles on which that Convention is based must be taken into consideration in Community Law’.<sup>590</sup>

The ECJ then interpreted the relevant directive in the light of the general principle requiring effective judicial control.

What is interesting in the *Johnston* case is that, unlike the above-mentioned cases from 1980, none of the parties (or the Advocate General in his opinion) referred to the relevant provisions of the ECHR. In its decision to recognize the right to an effective remedy as a general principle of the EC law, the ECJ

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<sup>586</sup> Supra, para 21-22.

<sup>587</sup> Joined cases 209 to 215 and 218/78 *Heintz van Landewyck SARL and others v Commission of the European Communities* [1980] ECR I-3125.

<sup>588</sup> Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR I-1651.

<sup>589</sup> Supra, para 13.

<sup>590</sup> Supra, para 18.

pointed to both of the main sources of inspiration for the protection of fundamental rights (constitutional traditions and the ECHR). Some authors claim that the *Johnston* case was not really a landmark case,<sup>591</sup> especially if one takes into account that the applicable directive clearly provided for a judicial remedy. It is true that the use of the right to an effective remedy in the *Johnston* case was still indirect, for as Cherednychenko explains, that right was ‘being used as an interpretative aid to the written provisions of the Community law against which a Member States’ derogation was to be tested’.<sup>592</sup> Still, the ECJ took the opportunity to unequivocally confirm both, the special significance of the ECHR<sup>593</sup> and the right to an effective remedy in that case.<sup>594</sup>

The shift towards a direct use of the right to a fair trial and the right to an effective remedy can be observed on the example of cases concerning the actions of EU institutions. In particular, in cases concerning the right to legal process within a reasonable period.

In the *Baustahlgewebe*<sup>595</sup> case the appellant before the ECJ claimed, *inter alia*, that because the duration of the proceedings was excessive, the CFI infringed the right to a hearing within a reasonable time as laid down in Art. 6 (1) of the ECHR. Before deciding on that point the ECJ first explained that in appeals it has jurisdiction, *inter alia*, to ‘verify whether a breach of procedure adversely affecting the appellant's interests was committed before the Court of First Instance and must satisfy itself that the general principles of Community law and the Rules of Procedure applicable to the burden of proof and the taking of evidence have been complied with’.<sup>596</sup> The ECJ then stated that:

‘It should be noted that Article 6(1) of the ECHR provides that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights (...), and in particular the right to legal process within a reasonable period, is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law’.<sup>597</sup>

The ECJ concluded that in an appeal, it can consider pleas on such matters concerning the proceedings before the CFI.<sup>598</sup>

According to the appellant, the time taken for the proceeding was excessive (approximately five years and six months). The ECJ pointed out that although that period is considerable, ‘the reasonableness of such a period must be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the

<sup>591</sup> See for example Nikos Vogiatzis, ‘The Right to Extra-Judicial Redress in EU Law after the EU’s Accession to the ECHR: The Legal Framework, Challenges and the Question of Prior Involvement of the CJEU’ in Vasiliki Kosta, Nikos Skoutaris and Vassilis P Tzevelekos (eds) *The EU Accession to the ECHR* (Oxford 2014) 50.

<sup>592</sup> Olha O. Cherednychenko, ‘Fundamental Rights, Contract Law and the Protection of the Weaker Party’ (2007) 5 *European Legal Studies* 207.

<sup>593</sup> See the citing of the *Johnston* case in subsequent judgments of the ECJ, for example in Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-02925 para 41.

<sup>594</sup> See also judgment in the case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987] ECR I-4097 para 14.

<sup>595</sup> Case C-185/95 *Baustahlgewebe GmbH v Commission of the European Communities* [1998] ECR I-08417.

<sup>596</sup> *Supra*, para 19.

<sup>597</sup> *Supra*, para 20-21.

<sup>598</sup> *Supra*, para 22.

applicant and of the competent authorities'.<sup>599</sup> These elements, which allow for determining if the case was decided in a reasonable time, were established by the ECtHR. In its judgment, the ECJ directly referenced four cases of the Strasbourg court related to that right: *Erkner and Hofauer v Austria*,<sup>600</sup> *Kemmache v France*,<sup>601</sup> *Phocas v France*<sup>602</sup> and *Garyfallou AEBE v Greece*.<sup>603</sup>

After analysing the four areas of the circumstances specific to the case, the ECJ held, that 'the proceedings before the Court of First Instance did not satisfy the requirements concerning completion within a reasonable time'.<sup>604</sup>

There are four reasons for which the *Baustahlgewebe* case is noteworthy. Firstly, the ECJ recognized that the principle that proceedings must be disposed of within a reasonable time is a general principle of Community law. Secondly, in an appeal, the ECJ can consider pleas on such matters concerning the proceedings before the CFI. Thirdly, this case shows an extensive use of the principles established by the ECtHR concerning the determination of reasonableness of the time in a particular case. Those principles were not only invoked, but also applied by the ECJ. Fourthly, the ECJ directly relied on one of the elements of the right to a fair trial in determining a case.<sup>605</sup>

Similarly, the CFI heard cases, in which the parties of the dispute submitted that the Commission was required to comply with the requirements of Art. 6 (1) of the ECHR. For example, in the *SCK and FNK v Commission*<sup>606</sup> the applicants claimed that the Commission failed to comply with the requirement of a 'reasonable time' laid down in Art. 6(1) of the ECHR (the administrative procedure before the Commission took more than 45 months).<sup>607</sup> The CFI first noted, that:

'It is a general principle of Community law that the Commission must act within a reasonable time in adopting decisions following administrative proceedings relating to competition policy (...). Accordingly, without there being any need to rule on the question whether Art. 6(1) of the European Convention on Human Rights is, as such, applicable to administrative proceedings before the Commission relating to competition policy, it is necessary to consider whether, in this case, in the proceedings preceding the adoption of the contested decision, the Commission offended against the general principle of Community law requiring it to act within a reasonable time.'<sup>608</sup>

The Court of First Instance, invoked the case-law of the ECtHR related to the determination of the reasonableness of the time in a particular circumstance of each case.<sup>609</sup> After conducting an analysis of all the relevant contexts, the CFI found that the Commission did act in accordance with the principle requiring it to act within a reasonable time in the administrative procedure preceding the adoption of the contested decision.<sup>610</sup>

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<sup>599</sup> Supra, para 29.

<sup>600</sup> *Erkner and Hofauer v Austria* (1987) 9 EHRR 464 para 66.

<sup>601</sup> *Kemmache v France* (1991) 14 EHRR 520 para 60.

<sup>602</sup> *Phocas v France* ECHR 1996-II, 546, para 71.

<sup>603</sup> *Garyfallou AEBE v Greece* ECHR 1997-V 1821, para 39.

<sup>604</sup> Case C-185/95 *Baustahlgewebe* para 47.

<sup>605</sup> Case 385/07 *Der Grune Punkt – Duales System Deutschland GmbH v Commission of the European Communities* [2009] ECR I-6155.

<sup>606</sup> Joined cases T-213/95 and T-18/96 *Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v Commission of the European Communities* [1997] ECR II-01739.

<sup>607</sup> Supra, para 43.

<sup>608</sup> Supra, para 56.

<sup>609</sup> Supra, para 57.

<sup>610</sup> Supra, para 58-69.

The CFI therefore applied the standards of the ECtHR inspired by Art. 6 (1) of the ECHR, but by stating that an obligation to act within a reasonable time is a general principle, it did not have to analyse the problem of applicability of that provision to administrative proceedings.<sup>611</sup>

Summarising the cases presented in this sub-chapter one can note that before the adoption of the CFREU the Court of Justice recognized a number of justice-related rights as fundamental rights guaranteed as general principles of the Community law: right to a fair hearing, right to an effective judicial control and right to legal process within reasonable time.

In its judgments, the ECJ also recognized such elements of the right to a fair trial as: right to judicial review by an independent and impartial judicial body, right to reply in adversarial proceedings, presumption of innocence, right of access to a lawyer and right to call witnesses.<sup>612</sup>

In some cases, the Court of Justice ruled on these fundamental rights and found them inapplicable, in other, only relied on them indirectly. However, in its considerations, the ECJ often relied on the ECHR and the jurisprudence of the ECtHR. The ECJ often underlined the ‘special significance’ of the ECHR as a source of inspiration for the protection of fundamental rights as general principles of Community law.<sup>613</sup>

#### d) *Charter of Fundamental Rights of the European Union*

The Charter of Fundamental Rights of the European Union was first proclaimed in 1999 in Nice. However, for the first decade it did not have a binding force. With the entry into force of the Lisbon Treaty, the CFREU not only gained a binding force, but according to Art. 6 (1) TEU, it now has the same legal value as the Treaties.

Title VI of the Charter guarantees several justice-related rights. In particular, Art. 47 CFREU protects the right to an effective remedy and to a fair trial. This provision reads:

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.’

The explanations relating to Art. 47 of the CFREU clearly point to the corresponding provisions of the ECHR as the basis of the right to a fair trial. The first paragraph is based on Art. 13 of the ECHR, second paragraph, on Art. 6(1) of the ECHR. The third paragraph guarantees the right to legal aid, which,

<sup>611</sup> See also Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij NV (LVM) (C-238/99 P)*, *DSM NV and DSM Kunststoffen BV (C-244/99 P)*, *Montedison SpA (C-245/99 P)*, *Elf Atochem SA (C-247/99 P)*, *Degussa AG (C-250/99 P)*, *Enichem SpA (C-251/99 P)*, *Wacker-Chemie GmbH and Hoechst AG (C-252/99 P)* and *Imperial Chemical Industries plc (ICI) (C-254/99 P) v Commission of the European Communities* [ECR 2002] ECR I-08375 para 166-172.

<sup>612</sup> Koen Lenaerts, Piet Van Nuffel, *European Union Law* (Sweet and Maxwell 2011) 844.

<sup>613</sup> *Supra* (fn 578), para 14.

although not directly protected by the ECHR, has been recognized as an important guarantee of an effective access to court by the ECtHR already in 1979.<sup>614</sup>

Although Art. 47 of the CFREU was largely based on Art. 6 and 13 of the ECHR as well as on the jurisprudence of the ECtHR, the scope of the rights as guaranteed by the ECHR and the CFREU is different.

Firstly, the Art. 6 (1) of the ECHR applies only to cases concerning the determination of civil rights and obligations or of any criminal charge. Although the ECtHR interprets these notions broadly,<sup>615</sup> some issues remain outside the scope of the Convention, for example cases related to voting rights.<sup>616</sup> Art. 47 of the CFREU is not similarly restricted and that provision applies not only to 'protection of fundamental rights or general principles of EU law (...) [but] to all the rights of individuals guaranteed in the system'.<sup>617</sup>

Secondly, according to the explanations to Art. 47 of the CFREU is more extensive 'since it guarantees the right to an effective remedy before a court', while the corresponding Art. 13 of the ECHR only guarantee that right 'before a national authority', therefore not necessarily a court.

### e) *Post-Charter references to the ECHR in the case-law of the CJEU*

With the entry into force of the Lisbon Treaty, the CFREU gained a binding force. However, the Treaties still refer to the ECHR. According to Art. 6 (3) TEU:

'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.<sup>618</sup>

According to Art. 52 (3) of the CFREU:

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

Because of these provisions, even though the EU now has its own bill of rights, the CJEU still refers to the Convention and to the jurisprudence of the ECtHR.

In one of the first cases concerning Art. 47 of the CFREU, the CJEU decided a case initiated by a reference for a preliminary ruling by a German court.<sup>619</sup> The question of the national court concerned the right of a legal person to effective access to justice. The CJEU reminded that Art. 47 (3) of the CFREU

<sup>614</sup> *Airey v Ireland* (1979-80) 2 EHRR 305.

<sup>615</sup> For the notion of a 'criminal charge' see in particular *Engel and others v the Netherlands* (1976) 1 EHRR 647.

<sup>616</sup> *Pierre-Bloch v France* (1998) 26 EHRR 301 para 50-52.

<sup>617</sup> Nina Pótorak, *European Union Rights in National Courts* (Wolters Kluwer 2015) 103.

<sup>618</sup> See above ch II. F.

<sup>619</sup> Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECRI-13849.

‘must be interpreted in its context, in the light of other provisions of EU law, the law of the Member States and the case-law of the European Court of Human Rights’.<sup>620</sup>

The CJEU first analysed the relevant provisions of the CFREU and then reviewed the case-law of the ECtHR regarding the right of access to a court and legal aid.<sup>621</sup> The CJEU stated that according to the ECtHR ‘the grant of legal aid to legal persons is not in principle impossible, but must be assessed in the light of the applicable rules and the situation of the company concerned (...)’ and concluded that ‘the principle of effective judicial protection, as enshrined in Article 47 of the Charter, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle (...)’.<sup>622</sup>

This case clearly show that the CJEU might still draw inspiration from the case-law of the ECtHR related to the right to fair trial.<sup>623</sup> This practice is necessary for the proper application of Art. 52 (3) CFREU, cited above. If the meaning and scope of rights protected by the CFREU shall be, at the minimum, the same as those laid down by the ECHR, the Court of Justice should always carefully analyse the current jurisprudence of the ECtHR in order to ascertain the level of protection of the ECHR.

However, the CJEU is also clear that despite the provisions of Art. 6 (3) TEU and 52 (3) CFREU, the ECHR ‘does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law’.<sup>624</sup>

Finally, in some cases, the CJEU omits the references to the ECHR, in particular, when the parties refer to Art. 6 and 13 of the ECHR. In such cases, the CJEU might remind that ‘the principle of effective judicial protection is a general principle of EU law, to which expression is now given by Art. 47 of the Charter’ and that ‘the Charter provision guarantees various elements of that principle’, in particular, ‘the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented’. Since Art. 47 of the CFREU ‘secures in EU law the protection afforded by Art. 6(1) of the ECHR. It is necessary, therefore, to refer only to Art. 47’.<sup>625</sup> By similar statements, the CJEU underlines the importance of the CFREU as the bill of rights of the EU. However, similar statements will only be acceptable in view of Art. 52 (3) CFREU if according to a settled case-law, the level of protection guaranteed by the Charter is at least the same as that guaranteed by the Convention.

## f) Conclusions

The European Convention on Human Rights and the jurisprudence of the European Court of Human Rights has served as a special source of inspiration for the general principles of EU law. In the period preceding the adoption of the CFREU, the European Court of Justice regularly made referenced to both Art. 6 and Art. 13 of the ECHR in order to construct the elements of the EU system of justice-related guarantees.

As this case study shows, in some cases, the Court of Justice ruled on these fundamental rights and found them inapplicable, in other, only relied on them indirectly. However, in its considerations, the

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<sup>620</sup> Supra, para 37.

<sup>621</sup> Supra, para 45-51.

<sup>622</sup> Supra, para 52 and 59.

<sup>623</sup> See also Case C-292/10 *G v Cornelius de Visser* [2012] ECR XI-0000 para 58-59 and Case C-334/12 *Oscar Orlando Arango Jaramillo and others v European Investment Bank (EIB)* [2013] para 42-43.

<sup>624</sup> Case C-501/11 *P Schindler Holding Ltd and others v European Commission* [2011] ECR II-4819 para 32.

<sup>625</sup> Case C-199/11 *Europese Gemeenschap v Otis NV and others* [2012] ECR I-000 para 46-48.



ECJ often relied on the ECHR and the jurisprudence of the ECtHR. The ECJ often underlined the ‘special significance’ of the ECHR as a source of inspiration for the protection of fundamental rights as general principles of Community law.<sup>626</sup>

Although Art. 47 of the CFREU was largely based on Art. 6 and 13 of the ECHR as well as on the jurisprudence of the ECtHR, the scope of the rights as guaranteed by the CFREU, in comparison to the ECHR, is broader. Even so, after the entry into force of the CFREU the legal influence of the Convention standard related to the right to an effective remedy and the right to a fair trial remains strong. The CJEU clearly stated in one of its judgments that Art. 47 CFREU must be interpreted in its context, in the light of, i.a., the case-law of the European Court of Human Rights.<sup>627</sup> References to the ECHR and the case-law of the ECtHR are necessary for the proper application of Art. 52 (3) CFREU, which provides that the meaning and scope of rights protected by the CFREU shall be, at the minimum, the same as those laid down by the ECHR. In order to ascertain the level of protection of the ECHR, the Court of Justice should always carefully analyse the current jurisprudence of the ECtHR related to the right in question.

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<sup>626</sup> Supra (fn 578), para 14.

<sup>627</sup> Supra (fn 619), para 37.

### 3. Joint Programme – Peer to Peer II

*Disclaimer: the authors of this section have contributed to an independent external evaluation of the ‘Peer-to-Peer II’ Joint Programme on Council of Europe’s behest in November 2012. The following case study is based upon the outcome of this evaluation.*

#### a) The Outline of the ‘Peer-to-Peer II’ JP

##### (1) General aim of the Joint Programme

The CoE-EU Joint Programme ‘Peer-to-Peer II’, which ran from March 2010 to June 2012, was aimed at promoting national non-judicial mechanisms for the protection of human rights with particular focus on the prevention of torture. Its overall objective, as envisioned jointly by the EU and the CoE, was ‘To help avoid, put an end to or compensate for human rights violations in Council of Europe Member States which are not EU members, as well as, to the extent possible, Belarus.’ ‘Peer-to-Peer II’ was a follow-up project to a previous JP ‘Peer project - Setting up an active network of independent non-judicial Human Rights Structures in the Council of Europe Member States which are not members of the European Union’, whose goal was envisioned as ‘To assist National Human Rights Structures (NHRS) in developing competencies concerning European human rights standards and practice and promote their joint initiatives aimed at networking, mutual exchange of information and sharing of best practices.’<sup>628</sup> Both JPs were organised towards facilitating direct contact between beneficiaries and peer-to-peer exchange in order to enhance cooperation, mutual learning process, dissemination of good practices, encouragement and support among and between the NHRIs from EU non-Member States and Member States with the Council of Europe and the European Union as partners in a common endeavour.

##### (2) Objectives of the JP – the evolving perspective

###### (a) First phase: networking and strengthening of NHRIs (JP ‘Peer Project’ 2008-2009)

The first JP ‘Peer Project’ was oriented at facilitating substantive cooperation among European NHRIs and promoting compliance with the Paris Principles, in particular in non-EU Member States, with a view to finding effective solutions to human rights violations. The JP sought to enable national structures to improve their performances in terms of:

- raising human rights awareness in their countries;
- detecting potential or existing human rights problems;
- proceeding to efficient investigations where this is in their mandate;
- engaging in constructive dialogue with the authorities to avert or solve problems
- of human rights protection;

<sup>628</sup> CoE-EU Joint Programmes website, ‘Peer Project. Logframe and Activities.’  
<<http://www.jp.coe.int/CEAD/JP/Default.asp?TransID=125>> last accessed on 4 February 2016.

- triggering rapid mobilisation of international partners if necessary.

The JP also intended to support the creation of NHRIs at national, regional (within the country) or local level, where they did not exist.<sup>629</sup>

*(b) Second phase: continuation and expansion - focus on National Preventive Mechanisms against Torture (JP 'Peer to Peer II' 2010-12)*

The second JP ('Peer-to-Peer II') had two objectives. While the overarching aims of the first JP were continued, the second JP adopted a two-track approach. The first track (continuation) was aimed at facilitating networking between and among NHRIs and thus enhancing their capacities. The underlying rationale for the second specialised track was to contribute to the prevention of torture and any other cruel, inhuman or degrading treatment or punishment, as enshrined in the UDHR and other international instruments, as well as in the ECHR and the European Convention for the Prevention of Torture. In this context, the JP has paid primary attention to setting-up and strengthening of National Preventive Mechanisms (NPM) as envisaged by the 2002 Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, since the existing NHRIs have assumed the function of an NPM in many CoE Member States, both dimensions of the Peer-to-Peer II JP were closely linked and activities related to both tracks did overlap.

**(3) Target groups, methodology and format of activities**

The primary beneficiaries of the JP were NHRIs in CoE Member States which were at the time not members of the EU. Such geographical focus was the result of EU's engagement in the JP being facilitated through the European Instrument for Democracy and Human Rights (EIDHR), whose aim is to provide support for the promotion of democracy and human rights in non-EU countries.<sup>630</sup> The 'Peer-to-Peer II' JP carried over the format of networking involving NHRIs from both EU non-members and EU members from the 'Peer Project' JP. However, particular emphasis has been placed on the development of preventive capacities to counter torture. National Preventive Mechanisms have been developed mainly as a specific profile within the existing NHRIs. The methodological approach largely benefited from the experience of the 'Peer Project' JP. It has been, however, enriched by activities aimed at capacity building, namely the 'On-site Exchange of Experiences' and several miscellaneous activities. In addition, the JP has facilitated direct cooperation between participating NPMs with a view to further developing local institutional capacities and skills of the staff.

**(4) Partners at the national level**

The underlying concept of both 'peer-to-peer' JPs was to engage NHRIs from Member States of the Council Europe. Among them, both the primary beneficiaries (NHRIs from non-EU Member States) and NHRIs from EU Member States were to participate in order to facilitated exchange and cooperation between institutions with a varied degree of experience and capabilities. This concept was based on

<sup>629</sup> Council of Europe, 'Joint European Union – Council of Europe Programme. Setting up an active network of independent non-judicial human rights structures. Description of the Programme' CommDH/NHRI(2008)12 21 April 2008.

<sup>630</sup> European Commission, 'European Instrument for Democracy and Human Rights (EIDHR) Strategy Paper 2007 – 2010'.

the assumption that knowledge and experience flow from those who possess them to those who suffer some deficits in available know-how or resources. Therefore, although the implementation of the JP was primarily oriented on NHRIs in EU non-members, participating NHRIs from EU Member States benefitted from the JP as well. One of the tools to diagnose the standing of the NHRIs is the accreditation process under the UN auspices. It is based on the assessment of the compliance of the legal set-up of NHRIs and their practice with the Paris Principles.<sup>631</sup> According to these criteria, NHRIs have been categorised in three status groups:

- a) status 'A' means that the NHRI is fully in compliance with the Paris Principles;
- b) status 'B' means that the NHRI is partially in compliance with the Paris Principles;
- c) status 'C' means non-compliance with the Paris Principles.

In the light of the accreditation process, the target NHRIs can be divided in four following groups:

- a) 8 NHRIs with status 'A': Albania - People's Advocate, Armenia - Human Rights Defender, Bosnia and Herzegovina - Human Rights Ombudsman, Croatia - Ombudsman<sup>632</sup>, Georgia - Public Defender's Office, Russian Federation - Commissioner for Human Rights in the Russian Federation, Serbia - Protector of Citizens, Ukraine - Parliamentary Commissioner for Human Rights;
- b) 2 NHRIs with status 'B': Republic of Moldova - Human Rights Centre of Moldova, The Former Yugoslav Republic of Macedonia – Ombudsman;
- c) 2 NHRIs which have at the time not underwent the accreditation process: Montenegro - Human Rights and Freedoms Ombudsman, Turkey - Ombudsman (*in statu nascendi* at the time).

Some activities of the JP were aimed not only at NHRIs in the target countries but also in EU Member States, e.g. the 'On-site Exchange of Experiences' activities organised in Poland. The JP has extensively engaged the civil society (NGOs) in the general NHRI-oriented leg of its activities, inviting its various representatives to participate. Due to a very focused theme of the NPM-oriented leg and relative lack of dedicated civil society actors concerned solely with the topic of torture prevention, the NGO involvement wasn't very strong overall, yet in some cases the NHRIs were able to engage NGOs in the activities related to prevention of torture, such as it was the case in Serbia in 2011, where the Serbian NHRI/NPM issued a public call for cooperation to Serbian civil society.

## (5) International partners

The 'Peer-to-Peer II' JP engaged the UN Sub-Committee of the Prevention of Torture (SPT), the European Committee for the Prevention of Torture (CPT) and one of the key NGOs engaged in the prevention of torture, namely International Association for the Prevention of Torture (APT), as implementing partners. Consultations meetings between the Programme Team and the SPT and APT took place in Switzerland.

<sup>631</sup> UN General Assembly, Resolution 48/134 (20 December 1993).

<sup>632</sup> At the time of the implementation of the JP, Croatia was not yet an EU Member State.

## (6) Financing

The 'Peer-to-Peer II' JP was co-financed by the Council of Europe and the European Union with the amount of 1.6 million Euro, of which roughly 80% was contributed by the European Commission via the EIDHR, while the remaining budget was covered by the CoE. In addition, at the initiative of the Programme Team, its NPM-oriented leg of activities has been supported by the CoE Human Rights Trust Fund with the amount of EUR 480k. Beyond that, the Governments of Liechtenstein and Germany also provided voluntary contributions to the financing of the Project.

## (7) Management, monitoring, and evaluation

The first 'Peer project' JP was coordinated by the NHRI Unit located in the Office of the Commissioner for Human Rights of the Council of Europe. The responsibility for the management of the 'Peer-to-peer II' JP was vested initially with the NHRI Unit but in 2009 it was transferred to the Directorate General Human Rights and Rule of Law (DG I) of the CoE Secretariat. The JP was managed by a three-person team (Project Supervisor, a Project Manager and a Project Assistant). The Association for the Prevention of Torture (APT) was the implementing partner for the JP. The NHRI leg of the Joint Programme benefited from expertise of Professor Stefano Valenti from University of Padua. Additionally, Ms. Silvia Casale from the UK, former President of both the CPT and the SPT, served as Project Advisor. Contact Persons were appointed by each of the cooperating NHRIs to interface with the Programme Team and other participants of the JP. Every year, meetings of the heads of NPMs accompanied by the Contact Persons were held to evaluate the past JP activities and design the future ones. These meetings were attended by CPT and SPT representatives. Three such annual meetings were convened, providing an opportunity for stock-taking of the JP and NPMs' input into programming of future activities. The annual meeting of the heads of NPMs was followed by a meeting of the Contact Persons, to work more on technical details of co-operation. The evaluation of the JP was facilitated by issuing a call for external consultancy, which resulted in prof. Zdzisław Kędzia from Adam Mickiewicz University (Poznan, Poland) preparing an assessment of the JP in November 2012.

### *b) Implementation of the 'Peer-to-Peer' II JP*

#### (1) Types of activities

The substantive activities of the JP can be divided into four major groups according to their overall aim, with each of these groups dedicated to different goals and including varied types of activities. In addition, the JP encompassed miscellaneous and technical activities such as document translations, external consultancy and evaluation of the JP. An overview of each identified group follows below.

*(a) Activities related to the establishing new NHRI/NPM*

These activities were aimed at enhancing the process of establishing NHRIs conforming with Paris Principles and NPMs conforming with OPCAT. The activities in this field included: participation of the Programme Team members in the OSCE Human Dimension Review Conference in Warsaw, Poland (October 2010), support for establishing an NPM in Ukraine<sup>633</sup> and in Italy.<sup>634</sup>

*(b) Activities related to supporting existing NHRI/NPM*

These activities were aimed at knowledge transfer, training and capability enhancements of target institutions, in particular in the areas of regional human rights protection standards and UN OPCAT standards of preventing torture and degrading treatment. This group of activities formed the bulk of substantive content of the JP, and fell into the following major categories:

- a) Workshops – five thematic workshop sessions were carried out for NHRIs and nine for NPMs. The themes of each particular Workshop were selected by the Programme Team from a list of topics proposed by the participating Institutions during the initial phase of the JP in 2010. Each workshop session was carried out with participation of the Programme Team, beneficiary institutions, JP partners (APT/CPT/SPT) and other stakeholders (i.a. representatives of OSCE, UNDP and independent experts).
- b) On-site exchange of experiences – A total of eight on-site experience exchanges were carried out, six of them engaging NPM staff from a single beneficiary Institution (a pilot exchange in Estonia and exchanges in Poland, Spain, Armenia, Albania and Georgia) and two multilateral exchanges (engaging institutions from Albania, Slovenia, Serbia and FYROM). The on-site exchanges were organized per request from hosting Institutions. During the exchanges, host NPM staff and experts had the opportunity to share experiences, best practices and methods, both in theoretical analysis of NPM's functioning vis-a-vis OPCAT standards (as interpreted by the SPT) and in practical experience of a preventive visit to a place of detention. In this framework, a team of experts worked on the ground together with the staff of the NPM. Initially, the team of experts carried out visits to the places of detention and engaged with their staff and detainees towards demonstrating standards and methods of work to the participating NPM staff. Subsequently, the same team coached the visits and interviews carried out by the NPM staff. The practical part of the on-site exchange was followed up by a detailed joint debriefing. A wide range of publications – both working materials, confidential debriefing papers (for participants only) and general summaries were circulated in conjunction with the on-site exchanges.

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<sup>633</sup> The Programme Team was officially requested by the Ukrainian authorities to provide support in creating a new NPM body within the structure of the existing Ukrainian NHRI. The Programme Team, along with experts from APT/CPT/SPT held roundtable discussions in October 2011 with the Ukrainian Ombudsperson's office, Ukrainian civil society and the Ukrainian authorities. This activity was followed up by two meetings with relevant representatives of Ukrainian institutions in 2012, during which various models of NPMs were discussed in an attempt to find the optimal solution for the proposed office. As result, since July 2012 the Ukrainian NHRI has efficiently exercised the function of an NPM, and in October 2012 the Ukrainian parliament formally established the NPM.

<sup>634</sup> A consultation meeting on 'Prospects for the ratification of the OPCAT and the setting-up of an NPM in Italy' was held on 26 March 2010 Padua. Italian politicians, civil society representatives and Government officials as well as many representatives of the European NPM Network discussed a road map to prepare for the ratification of OPCAT by Italy.

- c) Independent Medical Advisory Panel (IMAP) – A separate leg of activities within the Joint Programme was dedicated towards establishing an expert body, drafted from experienced physicians and experts on medical facets of torture. The Panel was formed in March 2011 and has since provided advice and support to the NPM network. Composed of 8 medical doctors with a wide range of expertise linked to torture prevention, the IMAP was established to advise NPMs in response to queries addressed to the IMAP via the NHRI Unit of the Council of Europe. Members of the IMAP were selected by the Programme Team and acted in individual, independent capacity. Both the questions forwarded to the IMAP and summaries of its advice were brought to the knowledge of the European NPM Network by way of the European NPM Newsletter. A confidential Debriefing Paper and public ‘Operational Guidelines of the IMAP’ were drafted by the Programme Team and IMAP members.
- d) Substantive consultations, meetings and conferences – several joint meetings aimed at exchange of experiences, best practices and knowledge were carried out. These activities included: consultation meetings with Russian Public Monitoring Commissions (April 2010), Inter-NPM meeting on issues related to deportation flights with NPM representatives from France, Germany, Spain Switzerland and the United Kingdom (July 2011), participation in a consultation meeting ‘Methodology for visits by members of national parliaments to places of detention of irregular migrants and asylum seekers in Europe’ held by PACE in Strasbourg in April 2012, Participation in a discussion panel ‘The triangular working relationship between SPT, CPT and NPM: inspection in the field of detention on a global, regional and domestic level’ held by the Netherlands NPM in June 2012 and roundtable meetings with Russian Federation NHRI/NPM and local Russian NHRIs (September 2010, November 2011).

*(c) Activities related to promotion of networking*

The third major branch of the project was devoted to building and strengthening an efficient network of multilateral cooperation between existing NHRI/NPM institutions. Following activities were carried out within this branch:

- a) Annual meetings of the Network – these meetings were carried out twice: in December 2010 and December 2011. Participants included: representatives of NHRIs and NPMs, the Programme Team and representatives of participating institutions (CPT/SPT/APT). The meeting’s agenda included: evaluation of the progress of the Joint Programme so far, discussion on obstacles/issues encountered, review of Joint Programme activities and upcoming developments within the JP.
- b) Meeting of the European Group of National Human Rights Institutions on establishment of a European Group Secretariat and coordination meetings with the APT/SPT about the NPM Project – a multilateral event held by the UN in February 2011.
- c) Participation in ‘Cooperation and Coordination Meeting between the FRA and NHRIs’ organised by the FRA (April 2012).

(d) *Activities related to awareness raising*

The fourth major branch of the project was devoted to increasing the knowledge on the role and necessity of NPMs in the societies in target countries and raising general awareness as to their existence and functioning. Following activities were carried out within this branch:

- a) Participation in the OPCAT Global Forum 'Preventing Torture, Upholding Dignity: from Pledges to Actions' organised by the APT (November 2011)
- b) Participation in the Fundamental Rights Conference 'Dignity and rights of irregular migrants' (November 2011)
- c) Lecture on torture prevention monitoring bodies and the European NPM JP to academia and students of Essex University's LLM on International Human Rights Law (January 2012)

Publication of an annual compendium of human rights activities of participating NHRIs was planned within the JP. Due to difficulties in finding qualified translators and analysts, the compendium was not completed within the timeframe of the JP. Additionally, the JP was supported by two ongoing publications funded from the project's budget and distributed by the Council of Europe:

a) The Regular Selective Information Flow (RSIF), a bi-weekly newsletter on CoE human rights activities aimed at NHRIs. The idea behind the RSIF was to keep the National Human Rights Structures permanently updated of Council of Europe norms and activities by way of regular transfer of information. The RSIF included information on case law of the European Court for Human Rights and developments related to it, on execution of the judgments of the ECtHR and on human-rights related work of other CoE institutions. The RSIF outlived the 'Peer-to-Peer II' project and continued to be published in cooperation with the Versailles St Quentin Institutions Publiques research centre (Versailles St-Quentin-en-Yvelines University, France) until the end of October 2015.<sup>635</sup>

b) The European NPM Newsletter, a bi-monthly review of information deemed relevant by the Programme Team for National Preventive Mechanisms (NPMs) in the Council of Europe region. The Newsletter ceased to be published at the end of the 'Peer-to-Peer II' project.

(2) *Evaluation of Impact*

In questionnaires carried out during the evaluation, the participating institutions have unanimously indicated that the 'Peer-to-Peer II' JP made a significant impact on their capacities. Their observations taken together with an analysis of debriefings and narratives of the JP allow to identify the following areas in which the activities of the JP have been most successful:

a) Transfer of knowledge – the participating institutions were granted the opportunity to acquire significant amounts of knowledge and information during the Workshops. The substantive content of the Workshops has been rated overall as highly satisfactory to satisfactory, and in several instances the Institutions have expressed regret at not being able to send more of their representatives to attend. Practical experiences during on-site events – the on-site events have been unanimously rated as highly satisfactory. The Institutions which

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<sup>635</sup> Archived issues of the RSIF are available at <[http://www.coe.int/t/dgi/hr-natimplement/rsif\\_en.asp](http://www.coe.int/t/dgi/hr-natimplement/rsif_en.asp)>.



took part in these events have highly praised the methodology of the JP and its impact on their capabilities.

b) Networking – in almost every case, participating Institutions have indicated that the networking aspect of the JP was one of its greatest achievements. The establishment of both formal and informal networks of contacts and exchange of experiences was highly valued and praised as an important vehicle for the further improvement of these Institutions.

c) Institution building – due to political factors in play, the outcome of this aspect of the Project was largely uncertain at its start. The JP was able to actively contribute to the processes which led to establishment of the Ukrainian NPM and to the ongoing process of establishing one in Italy. However, one of the principal objectives of the JP, namely contributing to establishment of an NHRI in Belarus, was not met due to lack of cooperation from Belarusian government.

d) Awareness raising – awareness raising was considered a secondary objective in the JP narrative, and was difficult to evaluate due to lack of substantive indicators of its impact. While the Project Team has taken stride to make progress in this area, several obstacles have been encountered, not the least ones related to the visibility of the Project and its online presence.

### *c) Conclusions*

The design and planning of the ‘Peer-to-peer II’ JP serve as an example of thoughtful and consequent building up upon a previous JP. Taking the existing concept of a networking-oriented framework for cooperation, the project was expanded to include a new substantive goal of supporting the NPMs in beneficiary countries. The objectives of the JP were both clear and flexible, and could be easily evaluated based on progresses made such as the contribution to establishing the Ukrainian NPM and on feedback from beneficiaries.

Management of the project followed a typical setup for horizontal JPs which engage stakeholders from multiple CoE Member States, with centralised management team in Strasbourg coordinating the joint activities of beneficiary institutions. The involvement of SPT, APT and CPT, despite their varied level of participation in the programme, was a good practice which ensured raising the added value of the JP. The management team was able to adequately monitor the Programme and adjust it as needed.

One characteristic feature of both the ‘Peer-to-Peer II’ JP and its predecessor is the remarkably low-key engagement of the EU bodies and institutions. While the overarching planning of the JPs was carried out with the involvement of DG DEVCO/EuropeAid, the project itself saw very little involvement from the EU institutions. Apart from the beneficiaries participating in events organised by the FRA, no other actions were carried out which would engage stakeholders from the EU domain. One can easily identify potential interest in the JP among actors from the Commission (DG HOME, DG JUST) or the advantage of greater involvement by the FRA. However, both ‘Peer-to-peer’ JPs represent what can be seen as a typical modality of the JPs prior to the 2014 Statement of Intent, namely that of the EU acting solely as an initiator and donor of the projects, with no major engagement in the substance of the activities carried out as part of JPs.

As far as the substance of the project is concerned, it was able to achieve highly satisfactory results in all three principal areas: supporting and strengthening the functioning of NHRIs in line with

international and European standards (including the Paris Principles), assisting the newly established NPMs in the development of competencies concerning European human rights standards and practices, promoting networking, mutual exchange of information and sharing of best practices between NHRIs/NPMs. In the first area, the programme was able to supplement the knowledge and expertise of the NHRIs and assist them in capacity building. In the second area, the 'Peer-to-peer II' JP was able to assist the existing NPMs and support the creation of new ones, with the particular achievement of contributing to the establishment of the Ukrainian NPM. A notable success of the JP were the on-site exchanges of experience and practices, which helped aligning the programme with the situation on the ground and the problems faced by NPMs in practice. In the third area, the JP was able to facilitate networking among both primary and secondary beneficiaries and encourage sub-regional cooperation between NHRIs/NPMs facing similar challenges and obstacles.

The biggest shortcoming of the 'Peer-to-Peer II' JP was the fact that despite strong foundations and existing achievements, no subsequent iterations of the project have been carried out so far. It is unclear what the reasons for lack of a subsequent follow-up were, but perhaps a not insignificant factor was the fact that the person who was the driving force between both 'Peer-to-peer' JPs left the post at the relevant CoE unit in 2012. Unfortunately, the ongoing publications of the project (the newsletter and the RSIF) were also ultimately not sustained, with the NPM newsletter ceasing publication at the end of the JP and the RSIF ultimately having its last issue published in 2015. This situation illustrates one of the recurring issues which dodged the JP framework, namely the lack of sustainability. While certainly not every JP warranted follow-up iterations, the 'Peer-to-peer' series would greatly benefit from a third iteration which could further the achievements of the previous two.

Another issue which was somewhat typical of the JPs at the time was the relatively low visibility of the Programme. While the relevant information on its activities and publications were all made available on the websites of the CoE, one can hardly describe them as easily accessible or visible. While media and journalists in target countries were informed of the JP activities, there was little in the way of ensuring that the greater picture of joint contribution of the CoE and the EU to improving the protection of human rights was made visible to societies in beneficiary countries.

It is encouraging that exactly these issues are hopefully being addressed within the new JP framework following the 2014 Statement of Intent. Both the Programmatic Cooperation Framework and the South II JP are envisioned to feature enhanced sustainability and visibility, as well as cross-fertilisation between JPs concurrently active in given area.

### III. Cooperation with the Organisation of Security and Cooperation in Europe

#### A. Mapping the Organisation of Security and Co-operation in Europe

##### 1. Introduction

The Organisation for Security and Co-operation in Europe is in many respects unique among entities analysed in FRAME project Work Package 5. Unlike the UN, the CoE or non-European regional organisations, the OSCE does not function on basis of a ratified international treaty and has no legal personality. Some academics discuss whether the OSCE can be considered a fully-fledged international organisation<sup>636</sup> owing to its specific legal status, but considering the high degree of institutionalisation and the scope of OSCE's activities this report will consider it on the same footing as the EU and other organisations analysed in FP7-FRAME Work Package 5.<sup>637</sup> Several of OSCE features, such as the reliance on the concept of 'soft-law' voluntary political commitments instead of 'hard law' treaties and conventions, its concept of human dimension and the autonomous character of OSCE's human rights institutions set it apart from other international actors. Finally, of all multilateral environments considered in FRAME research, the OSCE is perhaps to the greatest degree influenced by the political situation among its Participating states. While the EU sees frequent friction between Member States, sub-regional groups and EU bodies, none of those dynamics match the current tension between OSCE Participating states. This is exacerbated by the fact that unlike it is the case with the EU, which has begun to move away from the paradigm of requiring unanimous agreement in its decision-making, the intergovernmental processes within the OSCE continue to rely on all Participating states adopting a common position. The political dynamic within the OSCE is widely seen as one of its defining traits, and has resulted in ebbs and flows in OSCE history, as the organisation saw periods of increased dialogue and co-operation between Participating States as well as times of heightened tension emerging from European crises such as the 1999 NATO bombings of Serbia, the 2008 Georgian-Russian war and most recently the crisis in Ukraine from 2014 on.<sup>638</sup> The unique character of OSCE invites a closer look at primary bodies, agencies and venues of the organisation in order to shed a light on the scope and complexity of its operations. An attempt to map and analyse the entirety of OSCE work related to human rights goes well beyond the scope of this report. For sake of both serviceableness and brevity, the analysis focuses on an array of critical bodies and mechanisms which have the biggest influence on shaping the OSCE human dimension system and where the EU is present in a meaningful capacity.

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<sup>636</sup> Jan Klabbers, *An Introduction to International Organizations Law* (Cambridge 2015) 11.

<sup>637</sup> Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity* (Martinus Nijhoff Publishers 2015) 991.

<sup>638</sup> David J. Galebreath, *The Organization for Security and Co-operation in Europe* (Routledge 2007) 129.

## 2. Organisation for Security and Co-operation in Europe – General Information

The Organisation for Security and Co-operation in Europe is an intergovernmental organisation focused on security and related policy areas. Its composition, legal nature and historical development are distinctively different from other regional organisations. The majority of OSCE Participating states are geographically located in Europe, while some lie beyond the traditional boundaries of the continent. While most OSCE activities pertain to matters of security in Europe and in this regard it is considered a regional organisation, the presence of North American and Central Asian Participating states has profound impact on politics and policies of the OSCE, not the least by the virtue of having both the US and Russia present. The OSCE has never attained legal personality as its founding instruments are not international treaties in the understating of the Vienna Convention on the Law of Treaties. This feature sets OSCE apart from majority of organisations and has profound impact on its operations. Under the national law of the respective host countries, the OSCE Secretariat, the OSCE Parliamentary Assembly (OSCE PA) and the three so-called ‘autonomous institutions’: Office for Democratic Institutions and Human Rights (ODIHR), High Commissioner on National Minorities (HCNM) and Representative on Freedom of the Media (RFOM) enjoy various degrees of legal capacity as well privileges and immunities at the level customarily enjoyed by the international organisations in the United Nations system. However, only one OSCE field mission enjoys treatment equivalent to that of the United Nations: the OSCE Mission in Kosovo (OMIK), which is an element of the United Nations Mission in Kosovo (UNMIK).

The lack of legal personality of the OSCE has had increased negative impact on its activities, due to *i.a.* the inability to conclude legally binding agreements between OSCE as a whole and Participating states who host various OSCE bodies, difficulties in entering into agreements on cooperation with other international organisations (such as the EU), uncertainties as to legal status and liability of field operations or down-to-earth yet relevant issues with opening bank accounts and registering vehicles.<sup>639</sup> These problems have exacerbated during OSCE activities in Ukraine during the ongoing crisis,<sup>640</sup> however no solution to the situation appears attainable due to political situation within the OSCE.

The genesis of OSCE lies with the 1973 Conference for Security and Co-operation in Europe (CSCE) which took place in Helsinki. Before that landmark event, a long process of quiet and conference diplomacy, launched on a West Germany’s initiative of establishing a forum for East-West conversation on security in Europe, took place.<sup>641</sup> This process culminated with the Helsinki Final Act (HFA), signed by 35 states, including all European countries except Albania plus United States and Canada in August 1975.<sup>642</sup> The President of the Council of the European Communities signed the HFA on behalf of the EC. The HFA is not an international treaty, and has no legally binding nature. Despite its nature, the HFA was a major achievement in relations between The West and the Communist Bloc. The HFA contains the so-called ‘Helsinki Decalogue’, envisioned as principles for co-operation of signatory states, laid out as follows:

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<sup>639</sup> OSCE PA, ‘Food-for-Thought Paper: The OSCE’s Lack of an Agreed Legal Status – Challenges in Crisis Situations’ April 2015.

<sup>640</sup> See case study on OSCE-EU cooperation in Ukraine, ch IV.D.

<sup>641</sup> Bjørn Møller, ‘European Security: The Role of the Organisation for Security and Co-Operation in Europe’, Working Paper 30 Regional and Global Axes of Conflict, (2008) 2 Crisis States Working Papers Series 3-4.

<sup>642</sup> CSCE, Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1 August 1975.

1. Sovereign equality, respect for the rights inherent in sovereignty,
2. Refraining from the threat or use of force,
3. Inviolability of frontiers,
4. Territorial integrity of states,
5. Peaceful settlement of disputes,
6. Non-intervention in internal affairs,
7. Respect for human rights and fundamental freedoms,
8. Equal rights and self-determination of peoples,
9. Cooperation among states,
10. Fulfilment in good faith of obligations under international law.

The diplomatic process continued with several follow-up conferences (Belgrade 1977-1978, Madrid 1980-1983, Vienna 1986-1989). In 1990, a CSCE Summit in Paris adopted the Paris Charter for a New Europe, a document reflecting the geopolitical changes that began a year earlier.<sup>643</sup> The Charter highlighted the collective affirmation of human rights by signatories, placing a section entitled 'Human Rights, Democracy and Rule of Law' on a prominent position following its preamble.<sup>644</sup> The Charter laid out the outline of institutionalisation of the CSCE, which has insofar functioned on markedly *ad hoc* basis with no permanent structures. This entailed, inter alia, the creation of the Council, the Secretariat and the Office for Free Elections, which has later evolved into ODIHR. The Paris Charter for a New Europe was signed both by the then EU presidency and the President of the Commission.

The process of institutionalisation of the OSCE progressed over the next two years and in 1994 during the Budapest Summit the CSCE participants took the decision to change the name of the organisation to 'Organisation for Security and Co-operation in Europe' and to proclaim it as a regional organisation in line with provisions of the Chapter VIII of the UN charter.<sup>645</sup> The change of name took effect on 1 January 1995. Currently, the OSCE has 57 participating states<sup>646</sup> and 11 partners for co-operation. The latter form two regional groups: Mediterranean States<sup>647</sup> and Asian States<sup>648</sup> with Australia functioning as a partner for co-operation outside of regional groups. The partners for co-operation are equivalent to observer states in treaty-based international organisations and participate in various OSCE events and works, including in OSCE Ministerial Council meetings.<sup>649</sup> The OSCE maintains close cooperation with partner organisations. Currently, the highest level of cooperation exists between the OSCE and the UN, the EU, the CoE and NATO. The OSCE maintains partner relations at various levels with several other international and regional organisations.

The official representation of the OSCE and co-ordination of the work of its institutions lies with the **Chairperson-in-Office**. The chairpersonship rotates on an annual basis and is held by the Minister of

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<sup>643</sup> Organisation for Security and Co-operation in Europe (OSCE), Charter of Paris for a New Europe, 21 November 1990.

<sup>644</sup> Supra 3-4.

<sup>645</sup> Organisation for Security and Co-operation in Europe (OSCE), Budapest Document 1994. Towards a Genuine Partnership in a New Era, 21 December 1994.

<sup>646</sup> All European states, Canada, United States, Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, United States, Uzbekistan.

<sup>647</sup> Algeria, Egypt, Israel, Jordan, Morocco, Tunisia.

<sup>648</sup> Japan, South Korea, Thailand, Afghanistan.

<sup>649</sup> Organisation for Security and Co-operation in Europe (OSCE), Factsheet on OSCE Partners for Co-operation, 20 May 2011.

Foreign Affairs of a participating state which holds the chairpersonship in a given year. The rotation is alphabetical and currently (as of March 2016) held by Germany with the German MoFA acting as the OSCE CiO. The CiO is supported by the incoming CiO and the CiO for the previous year, with all together forming the so-called OSCE Troika. Administrative functions of the OSCE are handled by the Secretariat, located in Vienna and headed by the **Secretary General**. The Secretariat provides operational support to the OSCE and assists the Chairmanship in its activities by offering expertise, providing analysis and drafting decisions.

The finances of the OSCE are split into two major areas: the general budget, made up of participating states' contribution and extra-budgetary resources. The general budget of the OSCE for the year 2016 is set at 141.107.600 Euro at is identical to the 2015 budget.<sup>650</sup> The budget has steadily declined since 2007, when it was set at Euro 186.2m and is currently the lowest since 1998, when it was set at EUR 118.7m. The situation of general budget is one of the greatest issues within the OSCE, with the political deadlock between Participating states preventing moves towards reversing the decline. In light of this, the vital role of extra-budgetary contributions is evident, as they do not fall under political deliberations of participating states. While the international organisations cannot, as per OSCE rules, contribute in their own name to the general budget, they may provide extra-budgetary contributions both in money and in kind.

### 3. Political situation within the OSCE

Every international organisation is subject to various political factors emerging from differing agendas, aims and capabilities of their members. Neither the EU, nor the UN or the CoE are free from political tensions which influence their internal and external policies. While many of such frictions, such as the so-called North – South divide at the UN or various political alignments and tensions within the EU do have substantial impact on the organisation as a whole, the influence of geopolitics on the OSCE is perhaps most severe at the moment. While initially the CSCE was highly successful in bringing conflicted sides of the East-West faceoff to one table and throughout the 90s was able to pursue dialogue between Participating states, towards the end of the final decade of the XX century the OSCE found itself in increasing turmoil brought about by differences between Participating states, in particular between Russia and its traditional allies on one hand and the Western European states and the U.S. on the other.<sup>651</sup> The situation began to deteriorate in 1999 during the conflict in Kosovo, where Russian expectations for the OSCE to prevent NATO involvement collided with the position of the NATO Member States. The subsequent outbreak of the second war in Chechnya led to the onset of political crisis within the organisation which persists to this day.

One can directly identify how the phases of the political crisis influenced the OSCE budget over the years, with the 2001 budget being the first one lower than in the previous year, and the next decline setting off after the 2008 Russo-Georgian war. The OSCE slid into what many see as an institutional crisis, with political deadlocks preventing a reform of the organisation and halting advancement in several areas, not the least in the scope of political commitments.<sup>652</sup> During the 2012 OSCE Ministerial

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<sup>650</sup> Permanent Council of the OSCE, Decision No.1197 Approval of the 2016 Unified Budget, PC.DEC/1197, 31 December 2014.

<sup>651</sup> Dov Lynch, 'The State of the OSCE' in *Russia, the OSCE and European Security* (2009) 12 The EU-Russia Centre Review 9-11.

<sup>652</sup> Christian Nünlist and David Svarin, 'Introduction' in Christian Nünlist and David Svarin (eds), *Overcoming the East-West Divide. Perspectives on the Role of the OSCE in the Ukraine Crisis* (Center for Security Studies, ETH Zurich and foraus – Swiss Forum on Foreign Policy 2014) 9.

Council meeting in Dublin, the Participating States adopted a decision on initiating a comprehensive reform, dubbed the 'Helsinki+40' process.<sup>653</sup> The process was envisioned as 'an inclusive effort by all participating States to provide strong and continuous political impetus to advancing work towards a security community, and further strengthening co-operation in the OSCE on the way towards 2015, a year that marks four decades since the signing of the Helsinki Final Act.'<sup>654</sup> The Helsinki+40 process was expected to achieve a major breakthrough by 2015, but political disagreements as to its content have impaired and delayed progress on substantial reforms. In the meantime, the OSCE was able to achieve an arguable success in its reaction to the crisis in Ukraine. The OSCE Special Monitoring Mission (SMM) to Ukraine, established in March 2014, was an example of timely and rapid response to an emerging crisis. Notwithstanding the challenges and shortcomings of OSCE's deployment in Ukraine, the SMM is a remarkable achievement and reminder of the importance of the OSCE, as the organisation was able to facilitate dialogue between the Participating States and reach an agreement on action towards mitigating the crisis in Ukraine.<sup>655</sup> It must be noted that then abovementioned impediments of political nature do not affect the OSCE autonomous institutions (ODIHR, HCNM and RFoM) to such major degree, owing to their relative independence and established mandate. However, the political deadlocks also prevent any major reform or upgrade of these institutions, locking them in the established status quo.

#### 4. Instruments of the OSCE human dimension system

The OSCE defines its component related i.a. to protection and promotion of human rights as the 'human dimension', as opposed to the politico-military and economic and environmental dimensions. The human dimension is centred around an array of political commitments undertaken by the Participating States. These commitments follow two fundamental principles of the human dimension. The first is that the commitments and responsibilities undertaken in the field of the human dimension apply in their entirety and equally in each and all of the participating states and thus indivisible and universal. The second is the principle that human dimension commitments are matters of direct and legitimate concern to all Participating states both individually and collectively, and the responsibility for implementation of commitments falls not just on each Participating state separately, but on the entire OSCE collectively.<sup>656</sup> The OSCE political commitments are elaborated in various forms, from conference or summit concluding acts to documents of the OSCE Council, yet all share the same nature of voluntary political obligations and are agreed to unanimously by all OSCE participating states. Their unique character of the OSCE human dimension sets it apart from other international and regional human rights systems, which are either based around a core of legally binding documents, such as treaties or conventions or around non-legally binding instruments which lack mechanisms for monitoring of their implementation. The specific nature of OSCE human dimension has not been deferential to its importance. To quote Alston and Goodman:

'The non-binding diplomatic nature of the Helsinki Process led many observers to question its utility. Whatever contribution the process ultimately made to the demise

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<sup>653</sup> See: Organisation for Security and Co-operation in Europe (OSCE), Ministerial Council Decision on the OSCE Helsinki+40 Process, 7 December 2012.

<sup>654</sup> *Supra*, 1.

<sup>655</sup> Erwan Fouéré, 'The OSCE marks 40 years since the Helsinki Final Act: Its principles are more valid than ever.' (2015) CEPS Essay No. 196.

<sup>656</sup> Audrey Glover, 'Human Dimension of the OSCE-From Standard-Setting to Implementation' (1995) 6 Helsinki Monitor 31.

of Communism, it clearly played an important role, especially in the second half of the 1980s and early 1990s, in legitimating human rights discourse within Eastern Europe, providing a focus for nongovernmental activities at both the domestic and international levels, and developing standards in relation to democracy, the rule of law, “human contacts”, national minorities, and freedom of expression which went beyond those already in existence in other contexts such as the Council of Europe and the UN. To a large extent, its formally non-binding nature enabled the CSCE standard-setting process to yield more detailed and innovative standards than those adopted by its counterparts.<sup>657</sup>

Currently, the OSCE human dimension is enshrined in over 30 documents of various nature.<sup>658</sup> The commitments contained therein can be grouped into following major thematic areas:

1. Nature of the Human Dimension
2. Implementation of Commitments
3. Restrictions and derogations
4. Democratic society (incl. elections, democratic institutions and rule of law)
5. Civil and political rights
6. Economic, Social and Cultural Rights
7. Rights of National Minorities
8. Roma and Sinti
9. Indigenous Populations
10. Refugees, Returnees, Displaced and Stateless Persons
11. Migrant Worker’s Rights

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<sup>657</sup> Philip Alston, Ryan Goodman *International Human Rights* (Oxford 2013) 974-975.

<sup>658</sup> Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1 August 1975; Concluding Document of Madrid — The Second Follow-up Meeting, Madrid, 6 September 1983; Concluding Document of Vienna — The Third Follow-up Meeting, Vienna, 15 January 1989; Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990; Charter of Paris for a New Europe/Supplementary Document to give effect to certain provisions contained in the Charter of Paris for a New Europe, Paris, 21 November 1990; Document of the Cracow Symposium on the Cultural Heritage of the CSCE Participating States, Cracow, 6 June 1991; Report of the CSCE Meeting of Experts on National Minorities, Geneva, 19 July 1991; Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 3 October 1991; Document of the Second Meeting of the CSCE Council, Prague, 30-31 January 1992; Concluding Document of Helsinki — The Fourth Follow-up Meeting, Helsinki, 10 July 1992; Document of the Third Meeting of the CSCE Council, Stockholm, 14-15 December 1992; Document of the Fourth Meeting of the CSCE Council, Rome, 30 November-1 December 1993; Concluding Document of Budapest, 6 December 1994; Lisbon Document, Lisbon, 3 December 1996; Document of the Sixth Meeting of the Ministerial Council, Copenhagen, 18-19 December 1997; Document of the Seventh Meeting of the Ministerial Council, Oslo, 2-3 December 1998; Istanbul Document, Istanbul, 19 November 1999; Document of the Eighth Meeting of the Ministerial Council, Vienna, 27-28 November 2000; Document of the Ninth Meeting of the Ministerial Council, Bucharest, 3-4 December 2001; Document of the Tenth Meeting of the Ministerial Council, Porto, 6-7 December 2002; Document of the Eleventh Meeting of the Ministerial Council, Maastricht, 1-2 December 2003; Document of the Twelfth Meeting of the Ministerial Council, Sofia, 6-7 December 2004; Document of the Thirteenth Meeting of the Ministerial Council, Ljubljana, 5-6 December 2005; Document of the Fourteenth Meeting of the Ministerial Council, Brussels, 4-5 December 2006; Document of the Fifteenth Meeting of the Ministerial Council, Madrid, 29-30 November 2007; Document of the Sixteenth Meeting of the Ministerial Council, Helsinki, 4-5 December 2008; Document of the Seventeenth Meeting of the Ministerial Council, Athens, 1-2 December 2009; Astana Commemorative Declaration, Astana, 2 December 2010.



12. Persons with Disabilities
13. Children
14. Armed Forces Personnel
15. Persons in Detention or Prison
16. Prevention of Gender-Based Persecution, Violence and Exploitation
17. Prevention in Drugs and Arms Trafficking and Other Organised Crime
18. Prevention of Terrorism
19. International Humanitarian Law

While the political commitments of the human dimension are not enforceable domestically and the OSCE does not feature a judiciary body entrusted with safeguarding their implementation, a so-called human dimension mechanism was established in order to facilitate monitoring and implementation of commitments by participating states. The Human Dimension Mechanism features two instruments: The Vienna Mechanism (established in the Vienna Concluding Document of 1989)<sup>659</sup> and the Moscow Mechanism (established at the last meeting of the Conference on the Human Dimension in Moscow in 1991)<sup>660</sup>, the latter partly constituting a further elaboration of the Vienna Mechanism. The Vienna Mechanism provides a set of procedures which allows participating States to initiate an exchange of information regarding the human dimension in other OSCE states. This includes bringing forth questions regarding the situation in an OSCE state, requesting information, holding bilateral discussion and discussing the issues raised during OSCE meetings and conferences. The Vienna Mechanism was activated on several occasions between 1989 and 1992.<sup>661</sup> The Moscow Mechanism features an expanded list of procedures linked to the Vienna Mechanism, including a list of independent experts nominated by participating States, a possibility of a State suggesting for another State to invite an ad hoc mission of said experts, and in case of a State refusing to establish a mission of experts or if the requesting State considers the issue unresolved, a request for establishment of a mission of rapporteurs. Apart from the expanded Vienna procedure, the Moscow Mechanism provides independent procedures: a voluntary invitation of a mission of experts by an OSCE state, the establishment of a mission of experts or rapporteurs by a decision of the Permanent Council or the Senior Council following a request from an OSCE state, and establishment of an emergency mission of rapporteurs in case of a serious threat to the human dimension per request of at least 10 agreeing OSCE States. At the time of completion of this report, the Moscow Mechanism has been used seven times.<sup>662</sup>

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<sup>659</sup> Organisation for Security and Co-operation in Europe (OSCE), Concluding Document of the Third Follow-up Meeting, Vienna, 4 November 1986 to 19 January 1989.

<sup>660</sup> Organisation for Security and Co-operation in Europe, Moscow Mechanism, collected excerpts from relevant OSCE documents constituting the Moscow Mechanism available at <<http://www.osce.org/odihr/20066>>.

<sup>661</sup> During 1989-1990, the UK invoked the Vienna Mechanism in relation to human rights abuses in Romania, Czechoslovakia, the GDR and Bulgaria; Turkey invoked it against Bulgaria over treatment of its Muslim minority; Hungary invoked it against Romania over treatment of the Hungarian minority in Transylvania; in 1991 it was used to draw the attention to the civil war in Yugoslavia, and the military actions of Soviet forces in Lithuania; in 1992 Austria invoked the mechanism with respect to Turkey's treatment of its citizens of Kurdish descent in south eastern Turkey; in 1992 the Russian Federation activated the first phase of the mechanism (exchange of information) with regard to Estonian citizenship legislation.

<sup>662</sup> Twice in 1992 by the 12 states of the European Community and the United States on the issue of reports of atrocities and attacks on unarmed civilians in Croatia and Bosnia-Herzegovina and by Estonia to study Estonian legislation and to compare it and its implementation with universally accepted human-rights norms (1992); Twice in 1993: by Moldova to investigate

## 5. **Parliamentary Assembly of the Organisation for Security and Co-operation in Europe**

The OSCE Parliamentary Assembly (OSCE PA) consists of 323 representatives of national parliaments from OSCE Participating States, who meet three times in a year.<sup>663</sup> The OSCE PA was established with the aim of promoting parliamentary involvement in the activities of the OSCE and facilitating inter-parliamentary dialogue and co-operation. It does not have the power to enact binding laws, while it may adopt declarations and recommendations, these instruments do not reflect political commitments of Participating States. The relationship between the PA and the intergovernmental OSCE bodies is highly informal and the former's ability to influence the latter has been frequently observed as limited.<sup>664</sup> Unlike the PACE, OSCE PA does not have any creation competences and cannot exercise any formal procedure of oversight over other elements of the OSCE system.<sup>665</sup> Since 1993, the OSCE PA is involved in electoral observation activities of the OSCE and has sent over two thousand Parliamentarians to monitor elections worldwide. The emerging overlap in election monitoring work between OSCE PA and ODIHR was resolved by a co-operation agreement signed by both institutions in 1997.<sup>666</sup>

## 6. **The OSCE Summits, the Ministerial Council and the Permanent Council**

The intergovernmental decision-making process within the OSCE and its actors are a unique arrangement. The overarching rule of consensus within the OSCE is that of a unanimous agreement required in all decisions on intergovernmental level, not unlike the principle of unanimity required in the EU's CFSP.<sup>667</sup> This requirement determines the dynamics within the organisation, for one participating State is able to effectively veto any decision. The principal element of the OSCE's decision-making process lies with the OSCE Summits, which represent the highest political level of OSCE. The Summits are periodic meetings of Heads of State/Government of OSCE participating States and deal with setting strategic priorities and policies of the OSCE. Insofar, the CSCE/OSCE has held seven Summits: Helsinki in 1975, Paris in 1990, Helsinki in 1992, Budapest in 1994, Lisbon in 1996, Istanbul in 1999 and Astana in 2010. There are no pre-existing rules dictating the frequency of Summits, any participating State may propose a Summit to be held, but the decision must be adopted

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current legislation, interethnic relations and the implementation of minorities' rights on the territory of Moldova and by the CSCE Committee of Senior Officials vis-a-vis Serbia-Montenegro, to investigate reports of human rights violations (this mission was unable to fulfil its task because of the Federal Republic of Yugoslavia's lack of co-operation), Once in 1999 by the Russian Federation in relation to NATO's military operation in the former Federal Republic of Yugoslavia; once in 2002 by 10 OSCE participating States (Germany, the United States, Austria, Canada, the United Kingdom, Greece, Ireland, Italy, Norway, Sweden), in relation to Turkmenistan, to examine concerns arising out of investigations resulting from the reported attack on 25 November 2002 on President Niyazov, and to investigate all matters relating to the conduct of the investigation; once in 2011 by 14 participating States of the OSCE (Germany, the United States, Canada, Denmark, Finland, the United Kingdom, Iceland, Norway, the Netherlands, Poland, Romania, Slovakia, Sweden, and the Czech Republic) to investigate the situation in Belarus after the presidential election of 19 December 2010.

<sup>663</sup> Two of these meetings are held in Participating States on a rotating basis, the third meeting takes place in Vienna.

<sup>664</sup> Robert S. Oliver, 'The OSCE Parliamentary Assembly' (1996) 7 Helsinki Monitor 142-143.

<sup>665</sup> In 1999 the OSCE PA issued a Declaration requesting for the power to appoint the OSCE Secretary General to be transferred to itself. This declaration was not taken up by the intergovernmental bodies of the OSCE.

<sup>666</sup> Organisation for Security and Co-operation in Europe (OSCE), Co-Operation Agreement Between the OSCE Parliamentary Assembly and The OSCE Office for Democratic Institutions and Human Rights, Copenhagen 2 September 1997.

<sup>667</sup> See supra (fn 10), 69-71.

by all States unanimously. The final documents of the OSCE Summits (such as the HFA, CPNE or the Astana Declaration) represent decisions and commitments of highest level and importance for further developments within the OSCE. The highest permanent decision-making body of the OSCE is the Ministerial Council, which consists of Ministers of Foreign Affairs of participating States. The Ministerial Council meets annually in every year when no Summit takes place. The Council reviews the current OSCE activity, undertakes strategic decisions towards implementing aims and goals set during the Summits and elaborates political commitments related to every dimension of the OSCE. Regular consultation and decision-making related to day-to-day operations of the OSCE is entrusted in the Permanent Council, consisting of ambassadorial-level representatives of all participating States. The Permanent Council meets weekly in Vienna and is chaired by the ambassador of the country which currently holds the rotating OSCE chairpersonship. Finally, decision-making related to military and security affairs is also entrusted in the Forum for Security Co-operation (FSC), which consists of ambassadorial-level representatives of all participating States who meet weekly in Vienna under a rotating FSC chairpersonship.

## 7. The Office for Democratic Institutions and Human Rights

The OSCE Office for Democratic Institutions and Human Rights evolved from the Office for Free Elections and began functioning in its current shape in 1992, headquartered in Warsaw. It is one of OSCE's so-called autonomous institutions, understood as it having a degree of independence in decision-making and policy-setting from the intergovernmental mechanisms and bodies of the OSCE.<sup>668</sup> Currently, the ODIHR has doesn't have a legal personality and no explicit legal status under Polish domestic law. While Poland continues to recognise the status of ODIHR's employees and premises as equal to those of the United Nations as per the 1946 Convention on the Privileges and Immunities of the United Nations<sup>669</sup>, currently such recognition is purely customary and has no grounds in any normative act. In 2009 the Polish government undertook an attempt to regulate the status of ODIHR and its employees by means of a statute of the parliament, but these attempts have not materialised insofar.<sup>670</sup>

The ODIHR is headed by a Director, appointed for a renewable three-year term by the OSCE Ministerial Council at a recommendation from the Permanent Council. The ODIHR is the OSCE's primary institution responsible for assisting participating States in fulfilling their human dimension commitments. The current mandate of the ODIHR, as laid out in the 1992 Helsinki Document, is to ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote principles of democracy and to build, strengthen and protect democratic institutions, as well as promote tolerance throughout society.<sup>671</sup> ODIHR is tasked with assisting OSCE participating States to ensure full respect for human rights and fundamental freedoms; to abide by the rule of law; to

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<sup>668</sup> Kurt P. Tudyka, 'The margin beyond intergovernmentalism. The Organisation for Security and Cooperation in Europe' in Bob Reinalda and Bertjan Verbeek (eds) *Autonomous policy making by international organisations* (Routledge 2003) 115.

<sup>669</sup> UN General Assembly, Convention on the Privileges and Immunities of the United Nations, 13 February 1946.

<sup>670</sup> Government of Republic of Poland, Legislative Council, 'Opinia z 15 stycznia 2009 r. o projekcie ustawy o Biurze Instytucji Demokratycznych i Praw Człowieka Organizacji Bezpieczeństwa i Współpracy w Europie oraz o Sekretariacie Wspólnoty Demokracji RL-0303-1/09' (Opinion dated January 15th 2009 on the project of statute on OSCE's ODIHR and Community of Democracies) <<http://radalegislacyjna.gov.pl/dokumenty/opinia-z-15-stycznia-2009-r-o-projekcie-ustawy-o-biurze-instytucji-demokratycznych-i-praw>> last accessed on 20 February 2016.

<sup>671</sup> Organisation for Security and Co-operation in Europe (OSCE), CSCE Helsinki Document 1992 – The Challenges of Change, Helsinki 9-10 July 1992 23-28.

promote principles of democracy; to build, strengthen and protect democratic institutions; and to promote tolerance throughout their societies. It organizes the yearly OSCE Human Dimension Implementation Meeting, three supplementary meetings and a seminar, which provide an opportunity for the OSCE community to review Participating States' progress in the human dimension and give other stakeholders, including international and regional organisations as well as civil society a platform to communicate.

The current overarching policy areas of ODIHR are: elections, democratisation, human rights, tolerance and non-discrimination, Roma and Sinti Rights. In respect to elections, ODIHR carries out observing missions jointly with the OSCE PA. The OSCE activity in monitoring elections has over the decades become its arguably most visible and recognisable activity. In fact, the specialisation and expertise achieved by ODIHR in this field is frequently held as a benchmark of monitoring mechanisms. In the field of human rights, ODIHR works by providing assistance to Participating states and facilitating cooperation between national governments, NHRIs, civil society and other international organisations. In 2014, the primary human rights issues identified by ODIHR were: death penalty, freedom of assembly, human rights defenders, human rights in counter-terrorism and situation in Ukraine. ODIHR carries out its mandate through a varied array of activities. The most visible of them are the annual Human Dimension Implementation Meetings, which are a platform for OSCE participating States, Partners for Co-operation, NHRIs, civil society and other stakeholders to assess implementation of the OSCE human dimension, discuss issues, share good practices and elaborate recommendations. Representatives of international and regional organisations participate in the HDIM, however, unlike e.g. the CoE or the UN, who are represented in their own capacity, the EU is represented by the rotating presidency. The 2015 HDIM was held in Warsaw and addressed topics such as: freedom of media and expression, challenges to human rights in the ae of new ITC and IT technologies, freedom of assembly and associations, NHRIs, human rights education, tolerance and non-discrimination, independence of the judicial system, rule of law, prevention of torture, death penalty, human rights in counter-terrorism, democracy, citizenship and political rights, freedom of movement, migrants and migrant workers, human trafficking, hate crimes, freedom of religion and belief, Roma and Sinti issues, national minorities.

Apart from the abovementioned activities, ODIHR carries out legislative assistance, training, education and capacity building actions, monitors the state of human rights in Participating States, publishes various publications (including handbooks and guidelines) related to protection of human rights and facilitates various events aimed at dialogue and exchange of best practices among stakeholders. Its 2016 unified budget is set at c.a. 16m Euro. However, the ODIHR is not limited to core budget as established by the Ministerial Council as part of the general OSCE budget, and may accept extra-budgetary contributions from both States and other international organisations.<sup>672</sup> The Russian proposal of a stronger linkage between the ODIHR budget and the general OSCE budget and the West's opposition to such notion remains one of flashpoints of political conflict within the OSCE.<sup>673</sup> The current arrangement allows ODIHR to operate with far greater freedom and efficiency than if it was limited solely to its core budget. However, despite substantial support from several Participating States and as of recently, of the European Commission, the scope of ODIHR activities remains largely dependent on its financial capabilities. To provide some perspective on the issue, ODIHRs annual

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<sup>672</sup> David J. Galbreath, *The Organization for Security and Co-Operation in Europe (OSCE)*. (Routledge 2007) 52.

<sup>673</sup> David Lane and Stephen White, *Rethinking The 'Coloured Revolutions'* (Routledge 2013) 65.

budget is below that of the EU's FRA (21m EUR for 2016), while the geographical and thematic scope of ODIHRs mandate is arguably far wider.

## 8. Other OSCE institutions and structures

Beyond the core bodies and instruments of the OSCE, protection and promotion of human rights is present in majority of OSCE work and is the primary or secondary focus of great deal of institutions and structures formed within the OSCE. An exhaustive review of all OSCE human rights mechanisms is beyond the scope of this report, however, a few specialised entities within the OSCE sphere warrant mentioning:

### *a) The OSCE Representative on Freedom of the Media*

The OSCE Representative on Freedom of the Media (RFoM) was established by the OSCE Permanent Council in November 1997 as an autonomous institution tasked with monitoring developments relevant to freedom of media and expression in Participating States.<sup>674</sup> The Representative is an independent expert appointed by the Ministerial Council unanimously upon the recommendation of the CiO after consultation with Participating States. The RFoM serves for a three-year term which may be extended once. He or she is headquartered in Vienna and has permanent staff of 15. The RFoM's role is to provide early warning and rapid response to violations of freedom of expression and freedom of media in the OSCE region. The Representative works through various means, including quiet diplomacy, providing advice on media law report, raising awareness of violations of journalists' rights, publishing guides and handbooks and conducting visits to Participating States. In the recent years, the RFoM has increasingly raised the issues of freedom of media and expression on the internet, including within social networks. The RFoM is one of few international institutions mandated exclusively with protecting the freedom of the media (the other being i.a. the UN Special Rapporteur on Freedom of Opinion and Expression) and co-operates closely with similar institutions, issuing an annual joint declaration on freedom of expression worldwide.<sup>675</sup>

### *b) The High Commissioner on National Minorities*

During the OSCE Helsinki Summit in 1992, the Participating States established the High Commissioner on National Minorities (HCNM) as an autonomous institution mandated to act as conflict prevention instrument.<sup>676</sup> The mandate of the HCNM does not cover all minorities-related topics, instead it is narrowed down to acting as an early warning-rapid response institution for dealing with ethnic tensions which might have security implications within the OSCE sphere. The Commissioner is an independent expert appointed by the OSCE Ministerial Council unanimously upon the

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<sup>674</sup> OSCE Permanent Council, Decision No. 193 Mandate of the OSCE Representation on Freedom of the Media, 5 November 1997.

<sup>675</sup> The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration On Freedom of Expression And Responses To Conflict Situations, 4 May 2015.

<sup>676</sup> Organisation for Security and Co-operation in Europe (OSCE), CSCE Helsinki Document 1992 – The Challenges of Change, 9-10 July 1992-12.

recommendation of the CiO for a three-year term, which may be extended once. The HCNM has its headquarters in The Hague. The HCNM focuses on preventive actions, conducted via quiet diplomacy and entrenched independence and confidentiality. Apart from the general focus on short-term action and conflict prevention, the HCNM engages also in long-term activities, such as fostering international standards and good practices related to minorities. The HCNM has published several recommendations and guidelines related to human rights of minorities, such as The Hague Recommendations Regarding the Education Rights of National Minorities (October 1996)<sup>677</sup>, The Lund Recommendations on the Effective Participation of National Minorities in Public Life (September 1999)<sup>678</sup> or The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations (June 2008)<sup>679</sup>.

## 9. Conclusions

When considering the OSCE as a partner for the EU and assessing their cooperation in the field of human rights, two major factors need to be kept in mind. The first is that the autonomous institutions of the OSCE (ODIHR, HCNM and RFoM) are largely independent from the intergovernmental bodies based in Vienna. Working within their mandates, the autonomous institutions are free to pursue their aims and goals as well as cooperate with other international and regional organisations. While tensions within the OSCE do impede on the autonomous institutions (not the least by limiting their budgetary capabilities as the OSCE is for some time unable to reach an agreement on expanding its budget), they The second factor to be considered is that the reaction of OSCE and its autonomous institutions to the expanding scope of EU's activity in the field of human rights has been markedly different than that of the CoE. While the overlap between ODIHR and EU is growing, there is little friction or competitiveness between both organisations.<sup>680</sup>

The second factor, not unlike as it is the case with the CoE, are the financial capabilities of the OSCE. With its budget shrinking over the recent years and political deadlock preventing any major reversing of the trend. This challenge for the OSCE is at the same time an opportunity for its partners, as extra-budgetary donations which circumvent the general budget and support on-the-ground are increasing vital to the continued success of OSCE's activities. This has all the more relevance to the ODIHR and other autonomous bodies, as their budgets are small compared to capabilities of the EU or the CoE. In 2009, the then-Secretary General of the OSCE reflected upon the comparison between the three European organisations, stating:

'The EU is the elephant in the room. But we can think of the EU as the elephant, the Council of Europe as the dog and the OSCE as the flea. And of course, the flea can bite the dog that bites the elephant.'<sup>681</sup>

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<sup>677</sup> Organisation for Security and Co-operation in Europe, The Hague Recommendations Regarding the Education Rights of National Minorities & Explanatory Note, 1 October 1996.

<sup>678</sup> OSCE, The Lund Recommendations on the Effective Participation of National Minorities in Public Life, 1 September 1999.

<sup>679</sup> OSCE, The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations, 2 October 2008.

<sup>680</sup> Interviews with OSCE/ODIHR representatives.

<sup>681</sup> David J. Galbreath and Malte Brosig, 'OSCE', in Knut E. Jørgensen and Katie V. Laatikainen (eds) *Routledge Handbook on the European Union and International Institutions: Performance, Policy, Power* (Routledge 2013) 277.

While such statement is perhaps too disingenuous to the efforts of all three organisations, the disparity in available resources is a factor that needs to be taken into consideration throughout any assessments of cooperation between the EU and the OSCE.

## B. Mapping the EU: Major EU Human Rights Stakeholders involved directly or indirectly with the OSCE

The following section will briefly introduce the primary EU institutions, agencies and other bodies or stakeholders which are involved in the cooperation with the OSCE. For more detail about the competences of the individual institutions, agencies and other bodies, please see *supra* II.B.

The **European Council**, in its capacity as the primary agenda setter of the EU, has in the past frequently addressed cooperation with the OSCE, focusing on security (in particular the Ukraine crisis) and democracy (in particular election observation) and not mentioning human rights aspects specifically.<sup>682</sup> Strategy development for EU human rights cooperation with the OSCE is consequently carried out by the **Foreign Affairs Council**, based on the preparatory work of **COHOM** and **COSCE**. The Strategic Framework and Action Plans, as well as most of the EU human rights guidelines explicitly refer to the OSCE as a partner for human rights cooperation, and detail the specific areas and ways in which both organisations should engage.<sup>683</sup> The Council is responsible for coordinating EU action and ensuring consistency.<sup>684</sup> COSCE prepares the issues discussed in the OSCE and coordinates a common European position on them.

The **EEAS** is one of the main partners for ODIHR in terms of policy-setting and strategic matters.<sup>685</sup> On the ground, the **EU Delegation to the International Organisations in Vienna** coordinates EU action and represents the EU externally. Although the EU is not a full member of the OSCE and consequently does not have voting rights, it is treated as a 'virtual member' that can participate fully in every other way.<sup>686</sup> If an issue under discussion falls within the scope of EU competences, the EU delegation can intervene like a full Member State, it can represent the common position of the EU Member States in decision-making bodies and represent the EU in non-decision-making bodies. The representative of the EU Delegation is regarded as part of the delegation of the EU Presidency and sits next to the head of mission of the latter in meetings of OSCE decision-making bodies.<sup>687</sup> The EU Delegation also actively participates in the annual Human Dimension Implementation Meetings (HDIMs) and organizes side events.<sup>688</sup> In meetings at the level of Heads of State or Government or at ministerial level, the EU is

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<sup>682</sup> Note, however, that the security concept of the OSCE also includes a human rights dimension, and that for example a Human Rights Assessment Mission was deployed for the presidential and parliamentary elections in Ukraine.

<sup>683</sup> See for more detail *supra* III.C.

<sup>684</sup> TEU art. 16(6).

<sup>685</sup> Interview with an ODIHR official, Warsaw, 21 February 2016.

<sup>686</sup> Michele Comelli and Raffaello Matarazzo, 'Rehashed Commission Delegations or Real Embassies? EU Delegations Post-Lisbon' (2011) IAI Working Papers 1123, 10.

<sup>687</sup> Rules of Procedure of the Organisation for Security and Co-operation in Europe, 1 November 2006, Doc No MC.DOC/1/06, para IV.1.(C)(11).

<sup>688</sup> For example, in 2015 the EU Delegation organized a side-event on Human Rights Defenders; in 2014 it organized two side events on freedom of expression and on freedom of assembly respectively. See: OSCE, 'Overview of Side Events' (2015) available at <[www.osce.org/odihr/181746?download=true](http://www.osce.org/odihr/181746?download=true)> and (2014), available at <[www.osce.org/odihr/123499?download=true](http://www.osce.org/odihr/123499?download=true)>.



represented by the **HR/VP**, the **President of the European Council** or by the **President of the Commission**.<sup>689</sup>

The EU and the OSCE engage in regular dialogue, among others at the ministerial level, the level of the **Political and Security Committee**, and at staff level.<sup>690</sup> The EU Special Representative for Human Rights takes part in meetings with OSCE representatives and participates in OSCE conferences.<sup>691</sup> On the ground, **EU Delegations in OSCE Member States** and **EU CSDP missions** cooperate with field missions of the OSCE.<sup>692</sup> **EU Special Representatives** whose mandate covers areas of OSCE operations are held to cooperate and coordinate closely with the OSCE in their work towards conflict prevention and resolution.<sup>693</sup>

In the **European Commission**, the Directorate-General for Neighbourhood and Enlargement Negotiations (DG NEAR), the Directorate-General for International Cooperation and Development (DG DEVCO) and the Directorate-General for Justice and Consumers (DG JUST) are the primary interlocutors for ODIHR, particularly with regard to operationalisation and technical matters.<sup>694</sup> In addition, the **FRA** cooperates closely with the OSCE, in particular with ODIHR and with the Human Dimension Committee of the Permanent Council. For example, FRA participates actively in the annual HDIMs,<sup>695</sup> it involves ODIHR officials in its Working Party on Improving Reporting and Recording of Hate Crime and in the Working Party on Roma Integration.<sup>696</sup> Given the similar budgets of FRA and ODIHR, there is much common ground for cooperation, for example with regard to election observation, the rights of Roma, and tolerance issues.<sup>697</sup>

## C. The position of the EU vis-à-vis the OSCE

### 1. Introduction

Compared to the relationship between the EU and the CoE, the EU's engagement with the OSCE has invited relatively scarce attention from academia.<sup>698</sup> Research carried out on the topic has been mostly

<sup>689</sup> EU Delegation to the International Organisations in Vienna, 'OSCE & EU', <[http://eeas.europa.eu/delegations/vienna/eu\\_osce/index\\_en.htm](http://eeas.europa.eu/delegations/vienna/eu_osce/index_en.htm)>.

<sup>690</sup> See Supra.

<sup>691</sup> EU Annual Report on Human Rights and Democracy in the World in 2014, 22 June 2015, Doc No 10152/15, 110.

<sup>692</sup> See Supra.

<sup>693</sup> See Council Decision (CFSP) 2015/598 of 15 April 2015 appointing the European Union Special Representative for Central Asia, OJ [2015] L 99/25, art 2(e) and art 3(1)(h); Council Decision (CFSP) 2015/332 of 2 March 2015 extending the mandate of the European Union Special Representative for the South Caucasus and the crisis in Georgia, OJ [2015] L 58/70, art 2(a) and art 3(c).

<sup>694</sup> Interview with an ODIHR official, Warsaw, 20 February 2016.

<sup>695</sup> FRA, 'UN, OSCE & other international organisations', <<http://fra.europa.eu/en/cooperation/osce-un-international-organisations#OSCE>>.

<sup>696</sup> FRA, 'Annual activity report 2014' (2015), 20-21.

<sup>697</sup> Interview with an ODIHR official, Warsaw, 20 February 2016.

<sup>698</sup> Some of the the most important literature on the topic includes: Niels van Willigen 'Effective multilateralism between unequal partners. The EU and the OSCE.' in Edith Drieskens and Louise G. Van Schaik (eds) *The EU and effective multilateralism: Internal and external reform practices*. (Routledge 2014) 136-152; Vincent De Graaf and Annelies Verstichel, 'OSCE crisis management and OSCE– EU relations', in Steven Blockmans (ed.) *The European Union and crisis management* (T.M.C. Asser Press 2008) 255– 76; David J. Galbreath and Malte Brosig, 'OSCE', in Knut E. Jørgensen and Katie V. Laatikainen (eds) *Routledge Handbook on the European Union and International Institutions: Performance, Policy, Power* (Routledge 2013) 271– 81; Emma J. Stewart 'Restoring EU– OSCE cooperation for pan-European conflict prevention', 29 *Contemporary Security Policy* 266– 84; Peter Van Ham 'EU– OSCE relations', in Knut E. Jørgensen (ed.) *The European Union and International Organizations* (Routledge 2008) 131– 48.



focused on mutual engagement in the areas of security and defence as well as implications of the geopolitical situation in Europe for both organisations. This report seizes the opportunity to approach the relationship between the EU and the OSCE from the perspective of human rights. An opportunity to assess achievements and challenges both organisations face while furthering protection and promotion of human rights in Europe and beyond is all the more important given the recent developments both within the EU and the OSCE, such as the migrant crisis and the situation in Poland as well as in countries where they cooperate with the crisis in Ukraine as a challenge for both organisations. This chapter will open with brief presentations of the two organisations, signifying the vital characteristics and recent developments which impact the relationship between the EU and the OSCE.<sup>699</sup> Following that, the framework for cooperation between the organisations will be presented, addressing the normative grounds within both the EU and the OSCE.

## 2. Profile of the EU

The European Union has undergone a long and complicated evolution from a loose association of six Western European countries working together towards common economic goals to a unique supra-national organisation of 28 Member States spanning the area from Lisbon to Bucharest. Three elements of this evolution and expansion have particular relevance for EU's engagement with the OSCE.

First is the EU's increasing interest in the matters of security and defence, which begun with incorporation of the so-called Petersburg Tasks in the 1999 Treaty of Amsterdam. The Petersburg Tasks were a set of principles for mutual European security adopted in 1992 by the now-defunct Western European Union.<sup>700</sup> These principles related to matters of humanitarian tasks, peacekeeping and engagement of armed forces in crisis management. In this same year, during the European Council meeting in Cologne, the European Security and Defence Policy came into being as an element of the overarching Common Foreign and Security Policy of the EU. The ESDP steadily evolved into its current form, the Common Defence and Security Policy which was established by the Treaty of Lisbon in 2009. With the expansion of its defence and security policy areas and aspirations as to becoming a major military actor in Europe, the EU stepped into an arguably crowded field where both the OSCE and the NATO were already active, although with very different profiles and aims. While examining the entirety of the CSDP is well beyond this report (and is a focus of another FP7-FRAME work package<sup>701</sup>), it bears to mention that the EU's increased activity in the field of military security and conflict prevention are factors that do have influence on the entirety of its relations with the OSCE, especially when the EU is confronted with OSCE Participating states that have their own agenda for European security, such as the US and Russia.

The second major factor was the increased focus of the EU on human rights in external relations. Initially, as the FRAME report D4.1 observes, the EU focused on economic integration and cooperation while following assumptions of neo-functional logic that progress and integration in economy should result in a spill-over effect on other sectors and eventually result in a closer cooperation and

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<sup>699</sup> A more detailed mapping of the OSCE and presentation of some of its unique features and characteristics see above chapter III.A.

<sup>700</sup> Western European Union Council of Ministers, Petersburg Declaration, 19 June 1992.

<sup>701</sup> See FP7-FRAME report Work Package 10 – Deliverable 10.3 'CSDP case study' forthcoming 2016.

integration in the political sector as well.<sup>702</sup> Additionally, there existed an assumed division of competences in Western Europe where the CoE dealt with human rights while the EU focused on economic cooperation. The change in the geopolitical paradigm from 1989 on resulted in a shift in EU's orientation, with the recognition of respect for fundamental rights as one of core values of the EU in the 1992 Treaty of Maastricht. Subsequent developments such as the adoption of the Copenhagen Criteria and the Charter of Fundamental Rights of the EU expanded the EU fundamental rights framework. At the same time, the external human rights policy of the EU began to evolve following the adoption of the 2003 European Security Strategy, and currently according to provisions of the Treaty of Lisbon mandates the EU to engage in promotion of human rights in multilateral fora, including the OSCE.

The third factor emerges from the geopolitical expansion of the EU.<sup>703</sup> The aspirations of post-communist countries to join the NATO and the EU became the subject of a political struggle between the 'old' EU Member States, United States and Russia. While arguably it was the expansion of NATO that caused most of the friction between the actors invested in European politics, the subsequent major expansion of the EU in 2004 not only did place Russia, Ukraine, Moldova and Belarus as immediate neighbours of EU Member States, but also led to expansions of the EU's 'periphery area' of candidate, associated and partner countries, towards which the EU implemented various external policies either alone or in cooperation with other organisations, among them the CoE and the OSCE. The enlargement led to a shift in EU's position within several multilateral fora, as its internal and external policy became increasingly focused on areas which were at the same time the focus of Russian and American foreign policies.

### 3. Profile of the OSCE

Contrary to the early phases of the EU, human rights were present from the very onset of the processes that led to the birth of CSCE/OSCE. In fact, one can argue that they were one of the core elements of the arrangements behind the OSCE, for the Western states were actively looking to bring the Warsaw Pact countries to commit themselves to recognising civil and political rights. Yet despite the OSCE proclaiming its engagement in three equally important 'baskets' (politico-military, economic and environmental, human dimension), the politico-military aspect has been the primary focus of the OSCE since its inception, with the human dimension being the second most important and the economic and environmental aspects falling behind. This state of affairs is a consequence of aims and goals of the Participating states. While all participants of the CSCE/OSCE process shared, to a varied degree, common interest in the matters of security and political dialogue in Europe, the human dimension was mostly an insistence of the Western states who provided the momentum for its furthering and development. Between the EU and its partners in the EEA emerging as economic powerhouses of the continent and relatively sparse common ground for co-operation between major

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<sup>702</sup> Monika Mayrhofer, Carmela Chavez, Venkatachala Hegde, Magnus Killander, Joris Larik, Bright Nkrumah, Elizabeth Salmón, Kristine Yigen, 'Report on the mapping study on relevant actors in human rights protection' FP7-FRAME Work Package No. 4 – Deliverable No. 4.1 54.

<sup>703</sup> Peter Van Ham, 'EU-OSCE relations' in Knut E. Jørgensen (ed) *The European Union and International Organizations* (Routledge 2008) 136.

actors in Europe, the economic basket never evolved to the degree where OSCE would be considered as a major regional stakeholder.<sup>704</sup>

The development of the OSCE's human dimension over time is closely linked to the ups and downs of the whole organisation. After the political climate in Europe changed in 1989, the CSCE was able to swiftly transform itself into a more institutionalised and permanent form of the OSCE and moved forward to make several sound achievements, such as the expansion of the human dimension political commitments or establishing the autonomous institutions. However, the political crisis that struck the OSCE in the late 90's and largely persists to this day has also had a negative impact on its human rights work. While the autonomous institutions were shielded from such impact to a degree, thanks to their relatively independent mandate and the ability to procure funds outside of the core OSCE budgets, the same cannot be said of development of political commitments of the OSCE. While the organisation was able to hold five summits during the 90's, it has succeeded to organise just a single summit since 1999, thus severely limiting its ability to carry out the high-level dialogue that is the core of the OSCE process. At the same time, as outlined in the previous section, the EU became increasingly focused on internal and external human rights policies. Interestingly, while the CoE reacted to these developments within the EU with reservation, the OSCE never developed a similar attitude. Interviews with stakeholders from OSCE/ODIHR indicate that from the very onset of EU's increased activity in the field of human rights, the conversation between both organisations was focused on finding synergies and complementary areas.<sup>705</sup> While there is certainly overlap between both geographic and thematic fields of human rights policy of both organisations, it has never resulted in tensions nearly as profound as disagreements between the EU and the CoE regarding the FRA (see chapter II.C).

Currently, the OSCE is undergoing a phase of reinvigoration which could lead to a wider revival of the organisation as a whole. This phase begun with its timely and strong response to the crisis in Ukraine in 2014, where the OSCE was able to swiftly launch its biggest field operation in history, the OSCE Special Monitoring Mission to Ukraine (SMM).<sup>706</sup> Its rapid deployment and role in stabilizing and de-escalating the conflict is seen as one of the most vital achievements of the OSCE in this decade – one that possibly leads to restoration of its relevance and could pave way to a larger reform of OSCE's mandate, policies and modalities.<sup>707</sup>

#### 4. Normative frameworks for co-operation

##### a) The EU

On the legal level, the EU primary law features both general and specific provisions for the EU's engagement with the OSCE. The relevant normative foundations lie in the art. 21 TEU, which provides that 'The Union shall seek to develop relations and build partnerships with (...) international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems (...)'. The principles mentioned earlier in art. 21 TEU are: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect

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<sup>704</sup> David J. Galebreath, *The Organization for Security and Co-operation in Europe* (Routledge 2007) 36.

<sup>705</sup> Interviews with representatives of OSCE/ODIHR, Warsaw, February 2016.

<sup>706</sup> Stefan Lehne, *Reviving the OSCE. European Security and the Ukraine Crisis* (Carneige 2015) 5-8.

<sup>707</sup> Elena Kropatcheva, 'Russia and the role of the OSCE in European security: a 'Forum' for dialog or a 'Battlefield' of interests' (2012) 21 *European Security* 386-387.

for the principles of the UN Charter and international law. This general provision is supplemented by the art. 220 TFEU, which states that ‘The Union shall establish all appropriate forms of cooperation with (...), the Organisation for Security and Cooperation in Europe’. In paragraph 2 of art. 220 the TFEU outlines the responsibility of the High Representative of the Union for Foreign Affairs and Security Policy and the Commission to implement the cooperation. Thus, the OSCE is one of four international and regional organisations which are explicitly indicated in the primary EU law as partners for multilateral cooperation, the others being the UN, the CoE and the OECD.

### *b) The OSCE*

Until 1999, the co-operation between the OSCE and other international and regional organisations active in Europe was largely concluded on ad hoc basis. Although contacts between the OSCE and other organisations were established as early as in 1991, they initially lacked formalisation. Regular frameworks for dialogue were established primarily vis-à-vis the CoE and the UN, with the then-European Communities present in a marginal capacity.<sup>708</sup> During the OSCE Istanbul Summit in 1999, on the initiative of the EU,<sup>709</sup> the OSCE adopted the *Operational Document – the Platform for Co-operative Security (PCS)* as part of the *Charter for European Security*.<sup>710</sup> The aim of the PCS was to constitute the basis for the OSCE’s engagement with other organisations operating in the broadly understood OSCE area of activity. The Platform’s goals are outlined as ‘to strengthen the mutually reinforcing nature of the relationship between those organisations and institutions concerned with the promotion of comprehensive security within the OSCE area.’<sup>711</sup> The PCS outlines a list of features required to be present within organisations with whom the OSCE commits to co-operate, interestingly, the list does not refer directly to respect for human rights or human dimension, but it does recall the need for such organisations to adhere to principles of the UN Charter and the OSCE principles and commitments set out in the HFA, the Charter of Paris and the concluding documents of the 1992 Helsinki Summit and the 1994 Budapest Summit, which all include provisions related to human rights. The PCS defines the modalities for co-operation between the OSCE and other organisations, including the following instruments and mechanisms: ‘Regular contacts, including meetings; a continuous framework for dialogue; increased transparency and practical co-operation, including the identification of liaison officers or points of contact; cross-representation at appropriate meetings; and other contacts intended to increase understanding of each organisation’s conflict prevention tools.’<sup>712</sup> In the following years, the PCS was operationalised in relation to engagement with the EU, with regular meetings of the EU-OSCE ministerial and ambassadorial troikas held under the rotating EU Presidency since 2002 and annual staff-level meeting of representatives of the European Commission with their counterparts in the OSCE/ODIHR.<sup>713</sup> The presence of the EU within the political decision-making bodies of the OSCE was formalised in the 2006 Rules of Procedure of the Organisation

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<sup>708</sup> Oleksandr Pavlyuk, ‘The Platform for Co-operative Security: Ten Years of Co-operation.’ Yearbook on the Organization for Security and Cooperation in Europe 351-352.

<sup>709</sup> Niels van Willigen, ‘Effective multilateralism between unequal partners. The EU and the OSCE.’ in Edith Drieskens and Louise G. Van Schaik (eds) *The EU and effective multilateralism: Internal and external reform practices*. (Routledge 2014) 138.

<sup>710</sup> OSCE, Istanbul Document 1999, 18 November 1999.

<sup>711</sup> Supra, para I.1.

<sup>712</sup> Supra, para II.4.

<sup>713</sup> See supra (fn 708) 352.

for Security and Co-Operation in Europe<sup>714</sup>, which provided the European Commission a seat next to the EU Member State holding the current Presidency in all OSCE decision-making bodies.

### *c) Mutual agreements*

Unlike it is the case with the CoE, which signed the 2007 Memorandum of Understanding with the EU (see chapter II.C of this report), there exists no overarching written agreement formalising the cooperation between the EU and the OSCE. Naturally, concluding a legally binding international treaty between both organisations is impossible due to lack of legal personality on OSCE's part, this however does not preclude the possibility of entering an agreement which could take the form of a soft law instrument. In fact, the OSCE has insofar formalised its relations i.a. with the UN and the CoE in a series of Permanent Council decisions and bilateral soft law agreements.<sup>715</sup> The current political situation within the OSCE coupled with its modalities of requiring a unanimous agreement of all Participating States makes prospects for entering a similar agreement with the EU unlikely due to the current state of relations between the EU and Russia. Such obstacles do not apply to the eventual possibility of the EU entering agreements with the autonomous institutions of the OSCE, due to the ability to formalise cooperation with other organisations being an element of their autonomy which does not require consent from the political decision-making bodies of the OSCE.

## **D. Substantive Human Rights goals and objectives of the EU vis-à-vis the OSCE**

### **1. Introduction**

The overarching priorities of the EU for the co-operation with the OSCE have insofar focused on four major areas:<sup>716</sup>

1. Improving capabilities for preventing, managing and resolving conflicts, and making progress on resolving the protracted conflicts;
2. Strengthening conventional arms control including security- and confidence-building measures;
3. Strengthening implementation of norms, principles and commitments, in particular in the human dimension, including full support for the work of the relevant OSCE institutions;
4. Tackling transnational and emerging threats and challenges.

In practice, while the EU addresses all four areas in its policy goals and objectives, the EU focuses heavily on the implementation of OSCE political commitments in the human dimension.<sup>717</sup> Several factors have contributed to such orientation of the EU policy towards the OSCE. First is the overall strong commitment of the EU to promoting human rights in its external policy, as laid out in art. 21 TEU. Respect for human rights and their universality and indivisibility is enshrined as one of the foundations of EU external action, and the EU has over the last decade increasingly heightened the

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<sup>714</sup> OSCE Ministerial Council, Rules of Procedure of the Organisation for Security and Co-Operation in Europe, MC.DOC/1/06 1 November 2006.

<sup>715</sup> See supra (fn 708), 353.

<sup>716</sup> See supra (fn 709), 142.

<sup>717</sup> Supra.

importance of human rights in its multilateral relations.<sup>718</sup> Historically, the Western European countries which formed the EU were at the onset of the OSCE process oriented heavily towards promoting respect for the human dimension in all OSCE Participating States, and this orientation continues to form a cornerstone of their focus both in national foreign policy towards the OSCE and as part of the EU CFSP. This orientation was also assumed by new Member States which joined the EU from 2004 on. Finally, on a more pragmatic side, the current political situation within the OSCE means that while achieving defense- and security-related policy goals and objectives in the intergovernmental bodies of the OSCE faces major obstacles, the EU is able to make substantial progress in cooperation with the human dimension-oriented autonomous institutions of the OSCE, chief amongst them the ODIHR.

Unlike in the case with the Council of Europe, the relationship between the EU and the OSCE is not entrenched in an agreement akin to the 2007 MoU. Therefore, the primary overarching policy document outlining priorities and goals for the EU's engagement with the OSCE is the **2012 Strategic Framework on Human Rights and Democracy (SF)** which outlines the overall strategic aims of the EU in its external human rights action.<sup>719</sup> The 2012 SF contains a section on 'Working through multilateral institutions', which outlines the EU's commitment to '(...) continue its engagement with the invaluable human rights work of the Council of Europe and the OSCE'.<sup>720</sup> The strategic priorities of the SF are operationalised by the **EU Action Plan on Human Rights and Democracy**, which was introduced in its first four-year cycle concurrently with the SF, and has had its second iteration adopted in 2015.<sup>721</sup> Both Action Plans refer to co-operation with multilateral partners in general and to the OSCE/ODIHR in particular as indicated below in this subchapter.

Another important group of overarching policy documents for human rights in external action are the **EU Guidelines on Human Rights**. To date, 11 thematic guidelines have been adopted. All of the Guidelines are related to either general issues (such as human rights defenders) or civil and political rights (such as freedom of religion and belief). The Guidelines outline the issue in questions, provide relevant definitions and objectives as well as operationalisation of the issue by the EU in its external action, including in multilateral fora and in cooperation with other international and regional organisations.

As it is the case in the EU's engagement towards the UN<sup>722</sup> and the CoE,<sup>723</sup> the EU adopts **specific documents outlining its policy objectives towards the OSCE**. However, unlike the policy documents related to the UN and the CoE, the EU priorities for cooperation with the OSCE are confidential and are not made available to the public. Their existence is confirmed by publicly available documents (e.g. meeting agendas)<sup>724</sup> which refer to OSCE priorities and by interviews carried out by the research team with representatives of EEAS, ODIHR and EU Member States. According to stakeholders interviewed,

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<sup>718</sup> See other reports of the FP7-FRAME Work Package 5 'EU engagement with the UN/regional organisations'.

<sup>719</sup> Council of the EU, 'EU Strategic Framework on Human Rights and Democracy', 25 June 2012, Doc No 11855/12.

<sup>720</sup> See *Supra*, sec. VII.

<sup>721</sup> Council of the EU, 'EU Action Plan on Human Rights and Democracy', 20 July 2015, Doc No 10897/15 [2015 Action Plan].

<sup>722</sup> See *supra* (fn 11) 77-80.

<sup>723</sup> See *Supra*, ch II.

<sup>724</sup> See for example the provisional agenda for the meeting of the PSC on 17 July 2012, which foresees as item 6 of the agenda the discussion of 'European Union's priorities in the OSCE for 2012-2013', Doc No CM 3965/12, 13 July 2012; see also the provisional agenda for the meeting of COSCE on 28 March 2014, which includes as agenda item II.1. 'EU priorities in the OSCE 2014-2015', stating that 'The EEAS will seek an agreement to the draft paper on the European Union's Priorities in the OSCE for 2014-2015. A revised draft, taking into account the comments received by the Delegations to the first version of the paper circulated on 17 March, will be circulated prior to the meeting', Doc No CM 2156/14, 19 March 2014.

these priorities are confidential owing to their security-related content and due to the political situation within the OSCE. Some elements of the EU priorities for cooperation with the OSCE have been made available to the authors of this report and will be referenced throughout this subchapter. These priorities are adopted biannually, with the current document covering the years 2016-2017. The procedure of their drafting and adoption also differs from the procedures used in formulating EU priorities towards the UN and the CoE. Unlike the ‘conveyor belt’ process common for other strategic human rights documents, which are prepared in the Council Working Party on Human Rights (COHOM) and adopted by the Foreign Affairs Council,<sup>725</sup> the OSCE priorities are drafted by the EU Delegation to the OSCE in Vienna and discussed by relevant stakeholders, including the EU Member State HoMs, the Council Working Party on CoE/OSCE (COSCE) and COHOM.

## 2. Thematic priorities

The areas of human rights priorities listed below reflect both core areas of activity of the OSCE and the EU, including areas which do not feature on the OSCE’s agenda but are highlighted by EU’s documents as priorities where the EU aims to work with the OSCE/ODIHR. Together with the Action Plans and the EU human rights guidelines they provide details on possible thematic and geographic focal areas and concrete strategies to operationalize them.

*Table 5 Overview of EU thematic priorities for cooperation with the OSCE*

	<b>EU Priorities for OSCE 2014- 2015</b>	<b>2012 Action Plan</b>	<b>2015 Action Plan</b>	<b>EU Guidelines</b>
<b>Strengthening the OSCE (Helsinki+40 process)</b>	•			
<b>Support for OSCE autonomous institutions and field missions</b>	•			
<b>Full implementation of human rights (human dimension)</b>	•	•	(•)	
<b>Democracy &amp; Elections</b>		•	•	
<b>LGBTI rights</b>		•	(•)	•
<b>Gender equality</b>	•			
<b>Freedom of expression and of the media</b>	•		(•)	•
<b>Freedom of religion and belief</b>	•	•	(•)	•
<b>Freedom of assembly and association</b>	•		(•)	
<b>Torture and ill-treatment</b>		•	(•)	•

<sup>725</sup> For detailed description of the process of adopting the EU priorities at the UN, see FRAME Deliverable D5.1. 113-120. The CoE priorities follow a virtually identical procedure.



<b>Civil society and Human Rights Defenders</b>	•		(•)	•
<b>Children</b>				•

(brackets indicate that a thematic issue is not expressly declared a priority or that the document only generally refers to regional organisations without explicitly mentioning the OSCE)

#### *a) Full implementation of human dimension (human rights)*

According to information gathered in interviews with stakeholders, the overarching aim of ensuring full implementation of the OSCE human dimension is an ongoing and permanent objective of the EU. In the 2014-2015 biannual EU priorities for the OSCE the EU set out to '[s]eek full implementation of human dimension commitments in all areas relevant to the mandate of the OSCE (...)'. The OSCE Priorities outline several specific focus areas of the human dimension as noted later in this subchapter. Beyond the biannual priorities, the 2012 and the 2015 Action Plan also commit the EU to strengthening regional human rights mechanisms, although only the former refers to the OSCE explicitly.<sup>726</sup>

#### *b) Strengthening the OSCE (Helsinki+40) process*

The biannual EU priorities for the OSCE continue to reinforce the EU's commitment to support the Helsinki+40 process, which was launched in 2012 as an attempt to undertake a major reform of the OSCE framework and alleviating the issues faced by the organisation. The 2014-2015 priorities for the OSCE outlined this aim as to 'engage constructively in the Helsinki+40 process with the aim of strengthening the organisation, its procedures, structures and implementing capacities, enhancing the effectiveness and efficiency of the organisation, and developing a more focused substantive agenda.' However, the priorities stop short of elaborating what solutions the EU envisions towards handling the vital areas of the Helsinki+40 process, such as the issues of the legal status of the OSCE, the role of the OSCE PA or the question as to the degree of autonomy of ODIHR, HCNM and RoFM.

#### *c) Support for OSCE autonomous institutions and field missions*

The biannual priorities for the OSCE feature an ongoing commitment of the EU to 'Support the autonomous institutions and field missions' role in supporting participating States to ensure the full implementation of commitments in all three dimensions, including through a more systematic follow-up of recommendations, as well as their role in monitoring and reporting in these areas'. These priorities are consistent across the years and emerge from an established practice of EU support for ODIHR, HCNM and RoFM as well as engagement with field presence of the OSCE.

<sup>726</sup> Council of the EU, 'EU Strategic Framework on Human Rights and Democracy', 25 June 2012, Doc No 11855/12., sec. VII.36.



#### d) *Democracy & Elections*

Interestingly enough, the topic of electoral rights and election observation does not feature in the current biannual EU priorities for the OSCE. However, they feature in the general policy aims and objectives as outlined in the 2012 SF and both Action Plans. The Strategic Framework refers to the EU's commitment to '(....) strengthen its work with partners worldwide to support democracy, notably the development of genuine and credible electoral processes and representative and transparent democratic institutions at the service of the citizen'.<sup>727</sup> However, it must be noted that despite its title, the Strategic Framework on Human Rights and Democracy concerns predominantly human rights and topics related to democracy feature less prominently.<sup>728</sup> The 2015 Action Plan features a significant upgrade of topics related to democracy and elections. As part of the 'I. Boosting Ownership of Local Actors' section under the 'Delivering a comprehensive support to public institutions' general objective the 2015 AP outlines several objectives and actions related to democratisation and electoral processes, with the overarching objective of 'Strengthening cooperation with the UN and regional Human Rights and Democracy mechanisms', however it does not mention the OSCE/ODIHR explicitly.<sup>729</sup> In the section V. 'A more effective eu human rights and democracy support policy' the 2015 AP includes the objective of 'Maximising the impact of Electoral Observation'.<sup>730</sup> This objective refers to the OSCE/ODIHR in two of its actions: 'Support and re-commit to the implementation of the Declaration of Principles (DoP) for International Election Observation and co-operate closely with organisations that are applying the DoP in observation methodology, such as ODIHR.' and 'Consolidate best practices for leveraging EU EOMS and OSCE/ODHIR Election Observation Missions recommendations in EU and EU Member State political dialogues and democracy support activities'.<sup>731</sup> Interestingly, the first publicly available draft of the 2015 AP did not include the first of abovementioned actions, which was added during the final stage of work on the Action Plan.<sup>732</sup> All objectives and actions of section V are reinforced by the overarching objective 'Ensuring the effective use and the best interplay of EU policies, tools and financing instruments' which features the action 'Engage systematically with the UN and with the regional organisations (e.g. AU, OAS, LAS, CoE, OSCE, ASEAN, SAARC, PIF) on best practices for human rights and the strengthening of democracy in all regions'.<sup>733</sup>

#### e) *Human Rights of LGBTI persons*

The case of EU's priorities for action on LGBTI rights within the OSCE is an interesting element of the current array of EU's goals and aims in its engagement towards the OSCE/ODIHR. The OSCE is set apart from the EU, the UN and the CoE by the fact that LGBTI rights are largely absent from its activities. They are not enshrined in any OSCE political commitments nor in any documents adopted at intergovernmental level. This situation is a result of the Holy See's continued opposition to the topic.<sup>734</sup>

<sup>727</sup> Council of the EU, 'EU Strategic Framework on Human Rights and Democracy', 25 June 2012, Doc No 11855/12. p 2.

<sup>728</sup> FP7-FRAME, 'European policy brief: the EU and Human Rights' (2014) 9.

<sup>729</sup> Council of the EU, 'EU Action Plan on Human Rights and Democracy', 20 July 2015, Doc No 10897/15 [2015 Action Plan]. 7-9.

<sup>730</sup> *Supra*, 28.

<sup>731</sup> *Supra*, 21.

<sup>732</sup> See *supra* (fn 14), 21.

<sup>733</sup> Council of the EU, 'EU Action Plan on Human Rights and Democracy', 30.

<sup>734</sup> Cees Van Beek 'The Politics of LGBT Rights: A Comparison Between the United Nations, the OSCE and the Council of Europe' (Leiden University 2013) 92.

The Holy See, employing the fact that it is a full participating state of the OSCE, has so far blocked any attempts to include LGBTI rights in the OSCE agenda. On the other hand, LGBTI rights feature prominently in policy documents of the EU. Both the 2012 and 2015 AP feature objectives related to promoting enjoyment of human rights by LGBT persons. Specifically, the 2012 AP included the outcome 22., ‘Enjoyment of human rights by LGBT persons’ with attached action ‘Develop an EU strategy on how to cooperate with third countries on human rights of LGBT persons, including within the UN and the Council of Europe. Promoting adoption of commitments in the area of human rights of LGBT within the OSCE, including through organisation of a public event in the OSCE framework’.<sup>735</sup> The LGBTI rights were markedly downgraded in the 2015 AP. While they feature in several actions related to Human Rights Defenders and non-discrimination, the overarching objective on enjoyment of human rights by LGBT was not carried over from the 2012 AP. In 2013 the Council of the EU adopted the EU Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons.<sup>736</sup> The Guidelines refer explicitly to the OSCE in several general areas concerning the activities of international and regional organisations, suggesting it to engage with civil society that works to promote and protect human rights of LGBTI persons and to address LGBTI issues in the work of OSCE field missions. Additionally, the Guidelines feature the following suggestions aimed exclusively at the OSCE:

- When appropriate, incorporate LGBTI concerns in national statements and in questions during interactive dialogues within the OSCE.
- Continue to work actively to include ‘sexual orientation and gender identity’ as explicitly recognised discrimination grounds in OSCE Commitments or Ministerial Council Decisions.
- In accordance with the commitment of OSCE participating states to exchange information on the abolition of the death penalty and to make it available to the public (Copenhagen Document), incorporate in the EU Member States’ national statements within the OSCE’s Human Dimension framework information on the abolition of the death penalty with regard to LGBTI persons (measure contained in the EU Guidelines on the Death Penalty).<sup>737</sup>

The rights of LGBTI persons do not feature in the biannual EU priorities for the OSCE. Interviews with stakeholders indicate that the commitment to achieving progress in including these rights in the work of the OSCE is sufficiently entrenched in the AP and the Guidelines as to not repeat them in other policy documents.

### *f) Torture and ill-treatment*

Prevention of torture and inhuman or degrading treatment is firmly entrenched in the OSCE political commitments.<sup>738</sup> However, the activity of the OSCE in this field did ebb and flow, having largely fallen from the OSCE’s political agenda after 2003 and returned on initiative of the Swiss chairpersonship in

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<sup>735</sup> Council of the EU, ‘EU Strategic Framework on Human Rights and Democracy’, 25 June 2012, Doc No 11855/12. p 2. In September 2012, the EU organized a side event on ‘Monitoring of manifestations of intolerance and discrimination against LGBT persons’ at the OSCE annual Human Dimension Implementation Meeting (HDIM) in Warsaw.

<sup>736</sup> Council of the European Union, Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons, 24 June 2013, Doc No 11492/13.

<sup>737</sup> *Supra*, 11.

<sup>738</sup> OSCE/ODIHR, ‘OSCE Human Dimension Commitments. Volume 1: Thematic Compilation’ (OSCE 2012) 108-111.

2014.<sup>739</sup> In 2014, the ODIHR organised a Supplementary Human Dimension Meeting on the Prevention of Torture, which signaled the return of anti-torture-related activity to the OSCE's agenda. On the EU side, the fight against torture and inhuman treatment in its external action is enshrined in several policy documents. The EU has adopted Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment (first published in 2001, updated in 2008 and 2012) which in all versions included the undertaking to cooperate with multilateral partners, including the OSCE/ODIHR, towards raising the issue in their fora.<sup>740</sup> The 2012 AP includes the outcome 'Eradication of torture and mother cruel, inhuman or degrading treatment or punishment' but interestingly does not indicate the OSCE as a partner for anti-torture efforts. Similarly, the 2015 AP commits the EEAS, the European Commission and the EU Member States to 'undertake joint actions' for the eradication of torture in close cooperation with regional organisations, though not explicitly mentioning the Council of Europe.<sup>741</sup> The 2014-2015 EU biannual priorities for the OSCE suggest that '[t]he EU can also support strengthened OSCE commitments on torture', but does not elaborate any details as to what action can or should be undertaken towards that goal.

### *g) Freedom of expression and freedom of the media*

The promotion of freedom of expression and of the media is among the core priorities of both the EU and the OSCE. Freedom of expression features prominently in the *acquis* of the OSCE. Its crucial role in a democratic society has been reaffirmed for example in the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990),<sup>742</sup> the Budapest Document ('Towards a Genuine Partnership in a New Era', 1994)<sup>743</sup>, and Decision No 633 of the OSCE Permanent Council.<sup>744</sup> In 1997 the OSCE appointed its first Representative on Freedom of the Media, whose mandate includes promoting freedom of expression and the media, and keeping track of developments in the OSCE Member States.<sup>745</sup> The EU has recognized freedom of expression and freedom of the media as one of its priorities for cooperation with the OSCE in 2014-2015, with a particular focus on digital media and the safety of journalists. This corresponds to other strategic EU documents. In the 2015 Action Plan, the EU commits to oppose restrictions on the freedom of expression in its bilateral and multilateral relations, including in –unspecified– regional fora. The safety of journalists and the online dimension are particularly emphasized. The EU Guidelines on freedom of expression contain several express references to the OSCE. Not only does the EU seek in its bilateral relations to encourage the adoption and implementation of regional human rights instruments and of recommendations made by OSCE bodies, it also seeks to cooperate closely with the OSCE Representative on Freedom of the Media, and to generally 'step up' its engagement with the OSCE in this respect.<sup>746</sup>

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<sup>739</sup> Association for the Prevention of Torture, 'Prevention of torture in the OSCE region', <<http://www.apt.ch/en/osce/>> last accessed on 22 February 2016.

<sup>740</sup> Council of the EU, 'Guidelines to EU Policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment', 20 March 2012, Doc No 6129/1/12.

<sup>741</sup> Council of the EU, 'EU Action Plan on Human Rights and Democracy', 20 July 2015, Doc No 10897/15 [2015 Action Plan], para 13.c.

<sup>742</sup> OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, available at <[www.osce.org/odihr/elections/14304](http://www.osce.org/odihr/elections/14304)>.

<sup>743</sup> CSCE, Budapest Document 1994, 'Towards a Genuine Partnership in a New Era', 6 December 1994, available at <[www.osce.org/mc/39554](http://www.osce.org/mc/39554)>.

<sup>744</sup> OSCE, Permanent Council Decision No. 633, 11 November 2004, available at <[www.osce.org/pc/16912](http://www.osce.org/pc/16912)>.

<sup>745</sup> See the website of the OSCE Representative on Freedom of the Media, <[www.osce.org/fom](http://www.osce.org/fom)>.

<sup>746</sup> See also paras. 61 and 62.

### ***h) Freedom of religion or belief***

Freedom of religion or belief are another joint priority of the EU and the OSCE. ODIHR, assisted by an Advisory Panel of independent experts on freedom of religion or belief observes the implementation of freedom of religion or belief in OSCE Member States, reviews national legislation and provides expertise and guidance. In doing this it can rely on a solid *acquis* of relevant OSCE standards.<sup>747</sup> The EU places a strong emphasis on freedom of religion or belief in its external relations, as evidenced for example by the annual tabling of thematic resolutions in the UN Human Rights Council. In line with this commitment, the EU has identified freedom of religion and belief as one of the priorities for its cooperation with the OSCE in 2014-2015. The promotion of 'initiatives at the level of OSCE' was also explicitly listed as an action in the 2012 Action Plan. This express reference has disappeared in the revised version, which merely generally refers to 'multilateral fora'. The EU Guidelines on Freedom of Religion and Belief reaffirm and specify the EU's approach, referring in particular to strengthening the regular exchanges with ODIHR. The Guidelines also include OSCE standards in the list of international norms on which the EU will base its external human rights promotion.

### ***i) Children***

Art. 3(5) TEU commits the EU to contribute to the 'protection of human rights, in particular the rights of the child' in its external relations. This focus on children's rights has been put into practice for example through the annual sponsoring of resolutions in the UN Human Rights Council, but also through the adoption of two sets of Guidelines on children's rights generally, and the protection of children in armed conflicts. Both Guidelines specifically identify the OSCE and the ODIHR as 'relevant actors', whose work the EU seeks to support. The EU Guidelines on children's rights in addition commit the EU to develop its partnership and strengthen its coordination with the OSCE, 'particularly around research and systematic data collection, analysis and dissemination and in designing appropriate country response strategies'. Beyond this, however, children's rights are not identified as a priority for EU-OSCE cooperation in any other strategic EU document, including the two Action Plans and the biannual priorities.

### ***j) Civil society and Human Rights Defenders***

The 2014-2015 priorities for cooperation with the OSCE state that the 'EU can also support [...] stronger engagement with civil society, including youth'. Based on the wording, this commitment comes across as slightly weaker than the prioritisation of the abovementioned human rights areas. In the 2015 Action Plan the EU commits to putting encroachment on civil society space and restrictions of the work of Human Rights Defenders on the agenda of –unspecified – regional fora, and to continue its support and cooperation with regional fora for the protection of HRDs. Only the EU Guidelines on Human Rights Defenders expressly refer to the OSCE, committing the EU to strengthen the focal point for human rights defenders and national human rights institutions of ODIHR.

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<sup>747</sup> See OSCE, 'Freedom of religion or belief', <[www.osce.org/odihr/44455](http://www.osce.org/odihr/44455)>.

### *k) Other*

The EU's priorities for cooperation with the OSCE in 2014-2015 additionally list freedom of assembly and association and gender equality as focal areas. However, it is not specified how these priorities are going to be implemented. In addition, the EU's Action Plans do not contain any references to the OSCE in this respect.

### 3. Country-specific priorities

Assessing country-specific priorities of EU external action is made problematic by the fact that the EU country human rights strategies, which are drafted by COHOM in co-operation with EU delegations, are confidential owing to their political nature. Interviews with stakeholders indicate that the topic of cooperation on the ground with the OSCE/ODIHR is included in such strategies and that COHOM takes into the account information provided by OSCE field missions while assessing the situation on the ground. Apart from country strategies, geographical focus is included in the biannual EU priorities for the OSCE. The 2014-2015 priorities included a focus on the following countries and areas:

- Georgia, Moldova and Nagorny-Karabach (all in the context of conflict resolution)
- Central Asia
- Mediterranean and Asian partners for co-operation

Beyond these priorities, interviews with stakeholders indicate that the EU has an overarching principle of focusing on all areas where the OSCE maintains field presence (Albania, Bosnia & Herzegovina, Kosovo, Montenegro, Serbia, Macedonia, Moldova, Ukraine, Armenia, Turkmenistan, Kazakhstan, Kyrgyzstan, Uzbekistan, Tajikistan) as well as EaP countries where the OSCE does not have field presence (Belarus, Georgia) although the scope and priority of engagement in these areas varies. In the last two years, the EU has significantly focused on co-operation with the OSCE/ODIHR in Armenia, Belarus, Macedonia and Ukraine. Ukraine is an interesting case, as the 2014-2015 EU priorities for cooperation with the OSCE did not highlight Ukraine as a priority area, yet when the Ukrainian crisis unfolded in February 2014 the EU was able to shift its priorities rapidly and focus on cooperation with OSCE. The policy background for the EU's cooperation with the OSCE/ODIHR in Ukraine in the context of the 2014 events is explored in a case study presented in Appendix II of this report.

### 4. Conclusions

The goals and objectives of the EU in its engagement with the OSCE fall into several categories. The majority of them are traditional core priority areas of the external action of the EU in the field of human rights. This includes the topics of freedom of religion and belief, children's rights, human rights defenders and human rights of LGBTI persons. Interestingly, while the EU's focus on LGBTI rights in the OSCE is on the one hand consistent with its engagement in this topic in other venues, it also remains a contentious topic for several EU Member States. This shows that the EU is capable of consistently advancing this item despite internal tensions. Similarly, the geographic priorities of the EU follow the pattern of focusing on the candidate and associated states, the Eastern Partnership, the South Med countries and Central Asia. The goals of providing support for the Helsinki+40 process, strengthening the autonomous institutions and field operations, and enhancing the human dimension

of the OSCE all are in line with the EU working towards ensuring effectiveness and sustainability of international and regional human rights systems and institutions.

Some systematic shortcomings of EU's human rights policy towards the OSCE are visible as well. Economic, social and cultural rights, which were only recently upgraded in the 2015 Action Plan, did not feature at all in its priorities towards the OSCE. This should be seen as a lost opportunity given that ESC rights are absent from the OSCE agenda and would benefit greatly from a strong promoter raising their profile. Roma and Sinti rights, which are featured prominently in the OSCE framework, are absent from both general and specific priorities of the EU. It is quite likely that the decision to distance itself from Roma/Sinti rights (and to consider them covered by the general topics of supporting tolerance and non-discrimination) come from the EU's perception of these areas as Russian initiatives within the OSCE which are employed as tools for naming and shaming the EU and its Member States, yet this does not justify distancing from the problem altogether. Tackling human rights from the perspective of geopolitical tactics instead of a value-based approach risks moving towards an instrumentalisation of human rights, which would be contrary to the principles laid out in the Treaties and overarching policy documents such as the Strategic Framework.

Several inconsistencies feature in the array of EU policy documents relevant for the engagement with the OSCE. Perhaps the most striking is the nature and procedure of elaborating the biannual EU priorities for the OSCE. Their confidentiality and the modalities of their drafting and adoption differ greatly from both general strategic documents and specific priorities for venues such as the UN and the CoE. The supposed reasoning behind this situation is perplexing given the fact that the OSCE is not the only forum where the EU faces strong and organised opposition to its principles and goals. For example, both the UNGA and the HRC are markedly politicised, and especially the latter sees the EU in a politically charged situation, where it is at this time the main force actively supporting universality and indivisibility of human rights while facing the opposition of China, Russia and Saudi Arabia. Some interviews with stakeholders indicate that the current situation is also a result of complicated interaction between relevant actors within the Council of the EU, with the division of labour and competence between COSCE and COHOM being not as clear as they are between COHOM and CONUN.

As for inconsistencies across policy documents, observations made elsewhere in this report regarding the array of policy documents concerning engagement with the CoE hold true here as well. Lack of consistent identification of the OSCE/ODIHR as a regional partner combined with 'blind spots' where the goals and aims of the EU do not correspond fully with the current agenda of the given organisation are all factors that impede full realisation of EU's significant potential for bringing about positive developments within the OSCE framework.

## **E. Common EU-OSCE Human Rights Standards**

### **1. Introduction**

This section examines the topic of common human rights standards between the EU and the Organisation for Security and Cooperation in Europe (OSCE). Unlike it is the case with the exploration of the common human rights standard between the EU and the Council of Europe (see chapter II.F), a direct comparison between the two normative systems of human rights of the EU and the OSCE is hardly straightforward. This is not the least due to the fact that the OSCE norms are enshrined in a



system of voluntary political commitments made by OSCE Participating states. The EU relies upon a more traditional array of legal norms enshrined in primary and secondary EU law, international treaties ratified by the EU, general legal principles as established in the CJEU jurisprudence and other sources, as well as policy documents. This section does not focus in detail on specific convergences or divergences in the interpretation of specific rights and freedoms between OSCE political commitments and EU law, beyond using practical examples. Instead, it looks at areas of human rights where both organisations share common standards and provides examples of both highly aligned standards and standards which align in principle, but diverge in scope and precision. Such analysis entails three major elements. First is a brief introduction to the OSCE political commitments and their unique nature as the sole sources of human dimension obligations. Second is an exploration of the role and significance of the common human rights reference points for both organisations, namely the international human rights system. Then third element of analysis focuses on the examples of lacunae between both systems, indicating areas where either organisation has elaborated its standards to a significantly different degree than the other.

## 2. OSCE Political Commitments

The OSCE normative framework is built using the around the concept of relying solely on non-legally binding political commitments. While several other international and regional human rights systems feature non-binding instruments, they are all centred around core documents which have direct legally binding effect for the ratifying states and organisations, such as it is the case with core UN treaties or EU primary law. The OSCE in turn operates solely on grounds of political commitments and did not resort to use of treaties or other hard law instruments throughout its history. As far as organisations which deal with human rights are concerned, this is a rare approach. A similar framework has been adopted by the ASEAN, but is far less extensive both scope and relative importance for the organisation.<sup>748</sup> Without delving too deeply into the theory of international law and international relations, this section presents some of the most relevant characteristics of political commitments as they feature within the OSCE.

Political commitments have over the years garnered significant attention from academia.<sup>749</sup> In fact, it was the adoption of OSCE's Helsinki Final Act which triggered an extensive scholarly discourse as to the role and importance of high-level non-binding agreements in international law. Some authors question their normative power, with Jan Klabbbers providing an argument for ambiguity of the OSCE's Helsinki Final Act character, claiming that if it was truly a non-legally binding instrument, then it would not have the capability to act as a founding instrument of an international organisation.<sup>750</sup> Others, such as Michael Bothe, highlight the advantages of non-legal commitments and their potential relevance in the areas where rigid legal norms would not be feasible for the agreeing states.<sup>751</sup> From today's perspective it is quite clear that the OSCE framework is a remarkable example of non-binding political commitments having tangible impact in form of establishing an international actor and

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<sup>748</sup> Anna-Luise Chané, Jakub Jaraczewski, Zdzisław Kędzia, Susanna Mocker, Pawat Satayanurug, 'Engagement with regional multilateral organisations – Case study: ASEAN Perspective' (forthcoming 2016) FP7-FRAME Work Package No. 5 – Deliverable No. 5.5.

<sup>749</sup> Duncan B. Hollis, Joshua J. Newcomer, '“Political” Commitments and the Constitution', (2009) 49 Virginia Journal of International Law 512.

<sup>750</sup> J. Klabbbers, *An Introduction to International Institutional Law* (Cambridge 2002) 142, 156.

<sup>751</sup> Michael Bothe, 'Legal and Non-Legal Norms – a meaningful distinction in international relations?' (1980) 11 Netherlands Yearbook of International Law 92-93.

providing it with both substance and procedure necessary to meaningfully act on the regional and global scene. The majority of the aforementioned discourse on the nature of political commitments is centred around high-level documents and their relevance vis-à-vis traditional international law instruments. This report takes a closer look at the nature, role and relevance of the bread and butter of the OSCE human dimension, namely political commitments related directly to specific areas of human rights. In doing so, the broadly accepted definition of political commitment elaborated by Hollis and Newcomer as '(...) a nonlegally binding agreement between two or more nation-states in which the parties intend to establish commitments of an exclusively political or moral nature (...)’ will be used.<sup>752</sup> Furthermore, the analysis will operate under three out of four core assumptions provided by Hollis and Newcomer. First assumption is that international ‘hard’ law is not the sole and exhaustive source of rules that define international relations and obligations, including those in the field of human rights.<sup>753</sup> Second assumption is that political commitments do not have legal force and are thus unenforceable before national or international courts<sup>754</sup> and instead their enforcement relies on purely political mechanisms, such as is the case with Vienna and Moscow mechanisms of the OSCE. Third is that political commitments of the OSCE framework do not fall into the category of ‘soft law’, insofar as we assume that the term ‘soft law’ refers to instruments which are unenforceable (be it legally or politically) due to their vagueness or lack of relevant procedures. However, the fourth assumption made by Hollis and Newcomer, namely that of sovereign states being the sole actors capable of elaborating political commitments in the sphere of international relations, will not be considered. This is due to the fact that a vital question of this report concerns to what degree is the EU bound by OSCE political commitments undertaken by EU Member States. As examples such as the 2007 MoU between the EU and the CoE show, political commitments can and do function in relations between international organisations, in particular where legally binding instruments would be not feasible due to obstacles such as in this case the OSCE’s lack of legal personality.

As to precise characteristics of OSCE political commitments, they all share a high level of formality. OSCE instruments contain commitments elaborated on behalf of Participating states and signed by their authorised representatives on head of state/government or ministerial level. The analysed OSCE human dimension framework does not include unsigned written commitments, oral commitments or commitments elaborated on lower levels. This entails a high degree of their formal credibility, as they represent the direct political will of Participating states. Regarding the level of substance, the situation varies greatly between particular commitments. We assume the classification of substance provided by Hollis and Newcomer:

*Table 6 Substance of Political Commitments<sup>755</sup>*

	<b>Low</b>	<b>Medium</b>	<b>High</b>
<b>Normativity</b>	Statements of Intention	of Declarations of Effort	Promises of Result
<b>Precision</b>	Principles	Standards	Rules

<sup>752</sup> Supra (fn 749), 517.

<sup>753</sup> Supra. This view is contested in academia, most notably by Jan Klabbers who rejects the notion of non-legal instruments carrying binding obligations.

<sup>754</sup> Supra, 518.

<sup>755</sup> Supra, 533.



Within the OSCE framework, one can identify commitments characterised of varied level of normativity and precision. On the normativity scale, the majority of human dimension commitments are of low to medium strength. For example, the 1997 HFA states that:

‘The participating States, recognizing the contribution that national minorities or regional cultures can make to co-operation among them in various fields of culture/education, intend, when such minorities or cultures exist within their territory, to facilitate this contribution, taking into account the legitimate interests of their members.’

This low level of normativity can be contrasted with the medium level of normativity found in the 1991 Moscow documents, which contain several indications that the Participating states ‘will’ undertake specific action, e.g.

‘The participating States will treat all persons deprived of their liberty with humanity and with respect for the inherent dignity of the human person and will respect the internationally recognized standards that relate to the administration of justice and the human rights of detainees.’<sup>756</sup>

The high level of normativity, which is usually found in treaties, does not feature in the OSCE framework. As far as precision is concerned, one must reflect that frequently political commitments of the same level of normativity feature varied levels of precision. Newcomer and Hollis provide a stellar example drawn from the OSCE human dimension framework:

‘Contrast, for example, the precision of the 1996 OSCE Agenda on Security Cooperation’s “pledge to refrain from any policy of ethnic cleansing or mass expulsion” with the 2000 Charter for European Security in which participating states “pledge to take measures to promote tolerance and to build pluralistic societies where all, regardless of their ethnic origin, enjoy full equality of opportunity”.’<sup>757</sup>

One should note that the criterion of precision should be examined while keeping the entire OSCE normative framework in mind. For example, no OSCE political commitments refer to the right to food and water (as understood in the context of art. 11 ICESCR), one must therefore assume that these rights can only be seen as included in the overarching general commitments to principle of protection and promotion of economic, social and cultural rights (see below, p. 201). On the other hand, several areas of OSCE political commitments feature a markedly high level of precision, with commitments setting out standards and rules. Examples of high level of precision feature among commitments related to the rights and freedoms of Roma and Sinti, for example the scope of commitments related to health care of Roma and Sinti is markedly more precise and extensive than the general commitments to upholding the right to health within the OSCE framework.<sup>758</sup> Generally, OSCE human dimension commitments feature a medium to high level of precision in the areas where the OSCE has focused its work related to human rights (democratic institutions, rule of law, national minorities, Roma and Sinti, equality and non-discrimination) and low to medium level of precision in other areas.

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<sup>756</sup> OSCE, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 3 October 1991, para 23.

<sup>757</sup> *Supra* (fn 749), 532.

<sup>758</sup> OSCE, Document of the Eleventh Meeting of the Ministerial Council, Maastricht, 1-2 December 2003, para 58-63. These commitments recommend the Participating States to i.a. promote awareness about the specific needs of Roma and Sinti among medical personnel and pay special attention to health care of Roma and Sinti women and girls.

Other frequently identified characteristics of political commitments are their organisational implications and normative autonomy. As far as the first item is concerned, the OSCE framework is a unique occurrence of a non-legally binding framework leading the establishment of several permanent institutions and developing their mandates and procedures. Thus, its organisational implications are unparalleled and serve as an example of what can be achieved by means of political commitments alone without resorting to hard law instruments. Similarly, the level of normative autonomy of the OSCE framework is very high due to the fact it's not dependant on any legal other norm or regime. While the OSCE instruments acknowledge the existence and role of other human rights frameworks, in particular the UN international human rights systems, they are entirely independent.

### 3. Common human rights reference points for EU and OSCE

The question on the scope of human rights standards common to both the EU and OSCE cannot, for obvious reasons, entail an analysis of instruments which were adopted by both organisations, since the OSCE did not enter any human rights treaties due to its lack of legal personality. However, one can attempt to identify elements of the global human rights framework which are referenced by both organisations and employed as foundation for elaborating their own standards. Considering the composition of membership of both organisations, a natural step would be to consider the role of the international human rights system. All OSCE Participating states (and thusly all EU Member States) are members of the UN and signatories of the Universal Declaration of Human Rights. Almost all OSCE Participating states have ratified both core UN human rights conventions (ICCPR and ICESCR), the sole exceptions being the United States, which has ratified the ICCPR and signed but not ratified the ICESCR and the Holy See, which did neither sign or ratify the ICCPR and the ICESCR. As far as other core conventions of the UN system, the level of ratification of the 18 UN human rights treaties<sup>759</sup> across the OSCE area is high, as indicated in the table below. The table assumes the methodology provided by the UN OHCHR:<sup>760</sup>

*Table 7 Ratification of UN human rights treaties among OSCE Participating states*

	<b>Very high level of ratification (15-18 instruments)</b>	<b>High level of ratification (10-14 instruments)</b>	<b>Medium level of ratification (5-9 instruments)</b>	<b>Low level of ratification (0-4 instruments)</b>
<b>Number of OSCE Participating states</b>	20	35	2 <sup>761</sup>	0

<sup>759</sup> This number includes: ICCPR (with 2 optional protocols), ICESCR (with 1 optional protocol), CERD, CEDAW (with 1 optional protocol), CAT (with 1 optional protocol), CRC (with 3 optional protocols), CRMW, CPD, CRPD (with 1 optional protocol).

<sup>760</sup> UN OHCHR, 'Status of Ratification Interactive Dashboard', <<http://indicators.ohchr.org/>> last accessed on 14 April 2016.

<sup>761</sup> Holy See, United States.

Naturally, the level of ratification of UN treaties by Participating/Member States of an organisation does not directly translate to the degree to which the organisation itself recognises them as a human rights standard. Such recognition can be found in references to said standard within the normative framework of the organisation. The earliest general reference to the importance of the international human rights system within the OSCE can be found in the Madrid 1983 document, which states that the Participating states

‘(...) reaffirm the particular significance of the Universal Declaration of Human Rights, the international Covenants on Human Rights and other relevant international instruments of their joint and separate efforts to stimulate and develop universal respect for human rights and fundamental freedoms; they call on all participating States to act in conformity with those international instruments and on those participating States, which have not yet done so, to consider the possibility of acceding to the covenants.’<sup>762</sup>

Beyond references to the general importance of the UN human rights system, the OSCE political commitments also highlight specific areas of reference. For example, the Vienna 1989 document refers to the necessity of restrictions on human rights to be consistent with the UDHR and the ICCPR.<sup>763</sup> The same document highlights UDHR and ICCPR as sources of international commitments regarding freedom of expression and information.<sup>764</sup> The UN human rights conventions are also highlighted in several OSCE documents, for example the Copenhagen 1990 document states that the Participating states ‘(...) will consider acceding to the Convention on the Rights of the Child, if they have not yet done so(...)’.<sup>765</sup> However, as one looks at the development of OSCE political commitments over time, the general references to the international human rights standards feature prominently through early 90s. Later documents refer to the UN human rights system in specific focus areas (such as combating discrimination or Roma and Sinti rights).

As far as the EU is concerned, the FRAME project has insofar identified a significant disparity between the internal and external spheres of EU human rights framework as far as recognition of UN standards is concerned. In its external action law and policy, the EU makes liberal use of the international human rights system as a reference point. The EU is committed to global promotion of universal and indivisible human rights as provided for in art. 21 TEU. Towards this goal it has developed an extensive array of policy tools, with the 2012 Strategic Framework for Human Rights and Democracy, the current 2015 Action Plan, the EU Human Rights Guidelines and specific priorities and strategies for multilateral fora and bilateral relations. One can identify direct or indirect references to international human rights standards across all of the abovementioned instruments.

Internally, the situation is markedly different. De Butler identifies three major issues in EU’s approach to international human rights law in its internal legislation and policy.<sup>766</sup> First is the disparity between the scope of rights and freedoms guaranteed in UN treaties and those enshrined in EU law, such as the lack of explicit recognition in CFREU of rights of minorities as provided in art. 27 of ICCPR and right to adequate housing and food as enshrined in art. 11 of ICESCR. Second is the issue of the EU human rights law explicitly recognising only one aspect of human rights obligations, namely that of respecting

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<sup>762</sup> OSCE, Concluding Document of Madrid — The Second Follow-up Meeting, Madrid, 6 September 1983, para 7.

<sup>763</sup> OSCE, Concluding Document of Vienna — The Third Follow-up Meeting, Vienna, 15 January 1989, para 21.

<sup>764</sup> *Supra*, para. 34.

<sup>765</sup> OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, para. 13.

<sup>766</sup> Israel de Jesus Butler, ‘The European Union and International Human Rights Law’ (OHCHR 2012) 21.

them. This does not imply that the EU does not take steps towards protecting and fulfilling human rights, but as far as the obligation to do so is not explicitly provided in EU law, the standards diverge. Finally, the mechanisms and procedures for including human rights concern in EU's legislative and policy-making processes are at times ineffective and incoherent. Apart from these arguments one cannot ignore the position of the CJEU as regards the autonomy and position of the EU law vis-à-vis other normative systems. As early as in *Kadi* cases the CJEU has assumed the competence to review the UN legal instruments towards their compliance with the general principles of the EU law, thus rejecting the concept of the UN law being hierarchically superior to EU legislation. The trend of reinforcing the unique status and independence of EU legal system culminated with the CJEU Opinion 2/13 on EU's accession to ECHR (discussed further in chapter II.F.6 of this report).

The final question concerns the role of the OSCE political commitments within the normative framework of the EU. The EU is not a full member of the OSCE and as such it is not a party to any OSCE instruments. Any consideration of the EU being formally bound by human rights obligations that do not stem from art. 6 TEU or do not emanate from treaties or agreements which it is party to should be taken in light of CJEU's jurisprudence on autonomy of EU law and its relation to other normative frameworks.<sup>767</sup> Given the insofar stance the CJEU has adopted in decisions such as *Grant v South-West Trains Ltd.*, *Kadi* and the opinion 2/13, one can expect that if OSCE commitments were brought forth as a source of human rights obligations of the EU they wouldn't be treated as sources of any obligations for the EU. These legal constraints do not preclude from the OSCE framework to be considered as a reference point and source of inspiration for the EU's human rights policies. In fact, the OSCE instruments are one of the vital sources of principles of the EU's global action. R. Balfour identifies the Charter of Paris for a New Europe as one of key instruments which the EU has drawn from in formulating its external policy.<sup>768</sup> A more specific example of the EU drawing upon the OSCE framework are the methodologies of EU electoral observation missions, which closely follow the standards and practices adopted by the OSCE IOEMs. With the EU's CFSP remaining outside the CJEU jurisprudence and relying primarily on strategic policy documents with light entrenchment in the EU treaty law, there is much more room for referencing and operationalising standards developed within other regional frameworks. Internally, while the OSCE political commitments cannot be considered as sources of EU's obligations, they increasingly feature as reference points for activities of EU bodies and institutions. One salient example is the cooperation in the field of tolerance and non-discrimination, where the achievements of ODIHR in the fields of data collection and capacity building were referenced by both FRA and DG JUST.

The highest degree of commonality between the EU and OSCE human rights standards features in the area of civil and political rights. The OSCE has developed an extensive array of political commitments related to core rights and freedoms such as: right to life,<sup>769</sup> prohibition of torture,<sup>770</sup> personal freedom,

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<sup>767</sup> E.g. Case C-249/96 *Lisa Jacqueline Grant v South-West Trains Ltd* [1998] ECR I-621.

<sup>768</sup> Rosa Balfour, 'Principles of democracy and human rights. A review of the European Union's strategies towards its neighbours' in S. Lucarelli and I. Manners (eds) *Values and Principles in European Union Foreign Policy* (Routledge 2006) Routledge.

<sup>769</sup> Eg. OSCE, Concluding Document of Vienna — The Third Follow-up Meeting, Vienna, 15 January 1989, para 24; OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, para 17 *in fine*.

<sup>770</sup> i.a. OSCE, Concluding Document of Vienna — The Third Follow-up Meeting, Vienna, 15 January 1989, para 23 *in fine*, OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, para 16 *in fine.*, OSCE, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 3 October 1991, para 23.1.vii-x; OSCE, Concluding Document of Budapest, 6 December 1994, art. 20. OSCE, Document of the Seventeenth Meeting of the Ministerial Council, Athens, 1-2 December 2009.

right to a fair trial, freedom of conscience, religion, association and expression. Similarly, the EU has embraced the ECHR standards regarding civil and political rights, and enshrined all core rights and freedoms in the CFREU. Furthermore, both organisations are some of the strongest and consistent promoters of civil and political rights globally. Taking advantage of its unique position as a special observer, the EU carries several initiatives within the UN fora, such as resolutions on abolishing the death penalty and on respecting freedom of religion and belief. Another general area of significant convergence are human rights defenders. The OSCE has adopted several commitments related to the role and importance of human right defenders,<sup>771</sup> both individual persons and organisations, in implementing the OSCE human dimension and monitoring the compliance of Participating states with OSCE standards. The EU has developed the Guidelines on Human Rights Defenders which serve as a reference points for cooperation with other organisations in the field and encourage the EU bodies and Member States to engage with the OSCE towards ensuring adequate support for HRDs.<sup>772</sup>

#### 4. Substantive lacunae between the OSCE and EU human rights standards

The most profound and immediately visible area of lacunae between the OSCE and EU human rights standards exists in the area of economic, social and cultural (ESC) rights. Initially, the CSCE (OSCE's predecessor) elaborated a general commitment to promote and protect the ESC rights, as envisioned in the Helsinki Final Act:

[The participating States] will promote and encourage the effective exercise of (...) economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development. (...) They will endeavour, in developing their cooperation, to improve the well-being of peoples and contribute to the fulfilment of their aspirations through, *inter alia*, the benefits resulting from increased mutual knowledge and from progress and achievement in the economic, scientific, technological, social, cultural and humanitarian fields. They will take steps to promote conditions favourable to making these benefits available to all; they will take into account the interest of all in the narrowing of differences in the levels of economic development, and in particular the interest of developing countries throughout the world.<sup>773</sup>

These overarching commitments were reinforced in the Concluding Document of the 1989 Vienna Follow-up Meeting, which stated that the Participating States will consider acceding to the ICESCR<sup>774</sup> and 'will pay special attention to problems in the areas of employment, housing, social security, health, education and culture.'<sup>775</sup> However, the 1990 Charter of Paris for a New Europe - the next major milestone in development of OSCE political commitments, contained only a brief reference to

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<sup>771</sup> OSCE, Concluding Document of Vienna — The Third Follow-up Meeting, Vienna, 15 January 1989 para 12, 13.3-13.9, 26; OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990 para 10 in fine; OSCE, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 3 October 1991 para 43 in fine; OSCE, Concluding Document of Helsinki — The Fourth Follow-up Meeting, Helsinki, 10 July 1992 para 1, 12, 14, 15, 16, 17; OSCE, Concluding Document of Budapest, 6 December 1994 para 18; OSCE, Istanbul Document, Istanbul, 19 November 1999 para 27; OSCE, Astana Commemorative Declaration, Astana, 2 December 2010 para 6.

<sup>772</sup> Council of the EU, Ensuring protection - EU Guidelines on Human Rights Defenders (2008).

<sup>773</sup> OSCE, Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1 August 1975 7.

<sup>774</sup> OSCE, Concluding Document of Vienna — The Third Follow-up Meeting, Vienna, 15 January 1989 para 13.2

<sup>775</sup> *Supra*, para 14.

ESC rights phrased in significantly weaker language, stating that the OSCE Participating states '(...) affirm that, without discrimination (...) everyone (...) has the right (...) to enjoy his economic, social and cultural rights.'<sup>776</sup> The Charter of Paris for New Europe contains also references to importance of economic liberty, social justice and environmental responsibility. Further OSCE documents contain references to certain items closely linked to protection and promotion of ESC rights, such as the impact of economic and social factors on stability and security<sup>777</sup>, good governance<sup>778</sup> and sustainable development,<sup>779</sup> however general references to the importance and role of ESC rights weren't featured among the OSCE political commitments since 2003.

Several factors have contributed to the current state of ESC rights within the OSCE framework. The organisation's gradual reorientation towards civil and political rights and select focus areas such as minorities' rights or migrant worker's right contributed to diminishing the focus on the ESC rights in general. Another important factor to consider is the presence of the United States and the Holy See within the OSCE. Both Participating states have not ratified the ICESCR and the United States in particular remain distanced from several core rights and freedoms enshrined therein. The EU at the same time experienced a reverse process, with the recognition of ESC rights, and in particular of economic and social obligations, steadily rising from the periphery of EU legal system to its centre. The first major EU instrument in the field of economic and social rights, the Community Charter of the Fundamental Social Rights of Workers (Community Social Charter) was adopted in 1989.<sup>780</sup> The Charter of Fundamental Rights elevated the role of economic, social and cultural rights within the EU framework, legally binding both the EU institutions and Member States (insofar as they are implementing the EU law) and enshrining several core ESC rights. Though the CFREU does not enshrine some core ESC rights (such as right to work, the right to a fair remuneration and the right to housing) and its scope does not extend to all policies and actions of EU Member States, it is nevertheless a vital reference point for the EU human rights framework and the benchmark for the EU bodies as well as Member States.

An interesting element of the comparison between the ESC rights frameworks of the EU and the OSCE is that both organisations have developed certain specific areas of ESC rights in a greatly differing manner. Several early OSCE commitments referred to various aspects of worker's rights, with the 1983 Madrid Document containing a commitment of the Participating states to ensure the right to establish and join trade unions as well as union's right to conduct their activities.<sup>781</sup> These commitments were reiterated and reinforced with the recognition of freedom to strike in the 1990 Copenhagen Document.<sup>782</sup> While general references to worker's rights have faded away from the OSCE agenda, the organisation has steadily kept its focus on migrant worker's rights. As early as in the 1975 HFA the CSCE has extensively referred to the situation of migrant workers in Europe and the importance of recognising their rights, laying out the obligations of Participating states to comply with international and bilateral agreements pertaining to migrant workers' rights and elaborating several aims such as

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<sup>776</sup> OSCE, Charter of Paris for a New Europe/Supplementary Document to give effect to certain provisions contained in the Charter of Paris for a New Europe, Paris, 21 November 1990 4.

<sup>777</sup> OSCE, Document of the Eleventh Meeting of the Ministerial Council, Maastricht, 1-2 December 2003 para 14.

<sup>778</sup> OSCE, Document of the Eleventh Meeting of the Ministerial Council, Maastricht, 1-2 December 2003 para 2.2.

<sup>779</sup> OSCE, Document of the Eleventh Meeting of the Ministerial Council, Maastricht, 1-2 December 2003 para 2.3.

<sup>780</sup> For detailed account on development of EU's economic and social rights framework, see: Tamara Hervey, Jeffrey Kenner (eds) *Economic and Social Rights under the EU Charter of Fundamental Rights—A Legal Perspective* (Hart 2003).

<sup>781</sup> OSCE, Concluding Document of Madrid — The Second Follow-up Meeting, Madrid, 6 September 1983.

<sup>782</sup> OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990 para 9.3.

ensuring the equality of rights between migrant workers and nationals of host countries or facilitating the rights of their families.<sup>783</sup> These concepts were furthered across a wide array of OSCE documents which contain several additional political commitments related to migrant worker's rights.<sup>784</sup> On the other hand, the EU has assumed a dual approach to migrant worker's rights. As far as EU citizens (or their families) migrating from one EU or EEA Member State to another are concerned, the EU has developed an unparalleled legal and policy framework for ensuring the realisation of freedom of worker's movement., as provided for in art. 45 TFEU and the Free Movement Directive.<sup>785</sup> However, as concerns non-EU/EEA nationals seeking employment within the EU, the EU and its Member States have distanced themselves from the notion of providing such individuals with the same rights as intra-EU migrants. No EU Member State has insofar ratified the UN Convention on Rights of Migrant Workers, and while the EU Member States are free to provide migrant workers from outside the EU/EEA area with the same levels of protection, few have opted to do so.

Another specific group which has insofar received extensive attention in the OSCE human dimension framework with comparatively little focus within the EU human rights law and policy are national minorities and the particular case of Roma and Sinti. The OSCE has devoted a large bulk of its standard-setting work to protection of rights of national minorities as well as Roma and Sinti rights. Within these areas, one can identify general standards related to protection of human rights and freedoms, equality of opportunity and non-discrimination, participation in public and political life, cultural and religious identity and education, freedom of media and education, socio-economic issues and protection against hate crime. The EU standards in these areas are grounded in art. 2 TEU and art. 21 CFREU, however the issue of national minorities lies outside the competence of EU bodies and is an exclusive concern of Member States. This arrangement, which has arguably led to no major issues prior to the 2004 enlargement of the EU, fell short of expectations when faced with problems related to Roma and Sinti rights within the 'new' EU Member States. While the EU has recently made forays into expanding its legal and policy standards concerning Roma and Sinti,<sup>786</sup> its array of standards and policies is far less developed than the one featured within the OSCE framework.

As far as areas where the EU has attained a notable level of human rights protection standards while the OSCE standards haven't been developed to a similar degree, one of the most striking examples are rights of persons with disabilities. The OSCE framework contains a single instrument which refers to rights of persons with disabilities, namely the Moscow 1991 document, where the Participating states have undertaken the obligations to ensure protection of the human rights of persons with

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<sup>783</sup> OSCE, Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1 August 1975, 34.

<sup>784</sup> i.a. OSCE, Concluding Document of Vienna — The Third Follow-up Meeting, Vienna, 15 January 1989 para 40-44; OSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990 para 22, 22.1, 22.2, 22.3; OSCE, Charter of Paris for a New Europe/Supplementary Document to give effect to certain provisions contained in the Charter of Paris for a New Europe, Paris, 21 November 1990 4 33-34; OSCE, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 3 October 1991 para 38-38.3, OSCE, Concluding Document of Helsinki — The Fourth Follow-up Meeting, Helsinki, 10 July 1992 para 36-38; OSCE, Document of the Eleventh Meeting of the Ministerial Council, Maastricht, 1-2 December 2003 para 11; OSCE, Document of the Thirteenth Meeting of the Ministerial Council, Ljubljana, 5-6 December 2005 para 4, 4.5; OSCE, Document of the Seventeenth Meeting of the Ministerial Council, Decision No. 5/09 on migration management, Athens, 1-2 December 2009 24-27.

<sup>785</sup> Directive 2004/38/EC of The European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

<sup>786</sup> For an overview of EU's recent effort in protecting Roma and Sinti rights in the context of their integration in European societies, see: Morag Goodwin and Roosmarijn Buijs, 'Making Good European Citizens of the Roma: A Closer Look at the EU Framework for National Roman Integration Strategies' (2013) 14 German Law Journal 2041-2056.

disabilities.<sup>787</sup> Ever since, these rights were not mentioned in any OSCE political commitments, and the issue of the position of people with disabilities in the context of other rights and freedoms was not addressed beyond general commitments related to non-discrimination and equality. The EU, as part of its early efforts to combat discrimination in employment rights, has elaborated standards for non-discrimination of people with disabilities in the employment context as early as in the prominent Council Directive (EC) 2000/78, establishing a general framework for equal treatment in employment and occupation. Beyond the general non-discrimination clause contained in the art. 21 (1), the CFREU contains the novel art. 26, which recognises the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community. The next major step in furthering the EU legal framework for protecting the rights of people with disabilities was the landmark ratification of the UN Convention on the rights of persons with disabilities (CRPD) by the EU in 2010. The EU was the first and insofar the only regional organisation to ratify the CRPD. This, coupled with the markedly high level of ratification of the CRPD among the EU Member States,<sup>788</sup> results in one of the strongest frameworks for protection and promotion of rights of persons with disabilities.

## 5. Conclusions

The significance of the international human rights system as a reference point for both organisations remains important. The OSCE continues to embrace the UN standards, and while the development of its political commitments has suffered from the internal problems of the organisation as a whole, it continues to refer to UN treaties and conventions throughout its normative and policy-making activities. The fact that the OSCE is not capable of becoming a party to any of those instruments can be seen as an advantage, since the OSCE needs not to consider the question of legal implications of relationship between its political commitment framework and the UN law. For the EU, the UN human rights standards continue to play a vital role in its external action, where a large bulk of cooperation with the OSCE/ODIHR takes place. In this dimension, both organisations refer to the same core elements of the international human rights system and align closely on most matters. Internally, the EU certainly is influenced by the fundamental concepts of the UN human rights system. Yet in the pursuit of autonomy and uniqueness of its own legal framework, it has distanced itself from external reference points other than the ECHR. Since insofar the EU's cooperation with OSCE in the context of human rights was primarily focused on non-EU Member States, this did not lead to any major disconnects between both organisations.

In the areas where both the EU and the OSCE share common human rights standards and policy focuses, both organisations are able to co-operate smoothly. This is in particular true regarding actions which fall under the EU's external action, where the EU bodies operate under the broad mandate of the 2012 Strategic Framework and the flexible framework of the Action Plans. The substantive lacunae between both organisations arises from two different types of factors. As far as the EU is concerned, one factor is the delineation between the competences and tasks of the EU and its Member States. In some areas, such as protection of minority rights in Member States, the EU's lack of competence

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<sup>787</sup> OSCE, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 3 October 1991 para 41.1.

<sup>788</sup> At the time of writing, the only three EU Member States which have not ratified the CRPD are Finland, Ireland and Netherlands.



prevents it from developing standards that could allow for cooperation with other actors. In other areas, the issue arises from the lack of political will to develop some areas of EU's human rights framework. An internal example of such impediment is the question of rights of workers migrating from outside the EU. In the external policy field, one can identify the reluctance to promote economic, social and cultural rights despite the EU having both the competence and the means to do so. As far as the OSCE is concerned, legal and policy barriers are not much of an issue, since the political commitment framework is highly flexible and autonomous. The problem of lack of political will within the OSCE, exacerbated by the requirement of unanimous agreement in policy-making, is the sole reason behind the underdevelopment (or, as it is the case with LGBTI rights, non-development) of some areas of human rights concern. The presence of several actors with strong positions on some items coupled with their determination to keep such items away from the OSCE agenda remains the key impediment in development of the human dimension.

## **F. EU engagement in and support for OSCE human rights activities**

### **1. Introduction**

The lack of a formal strategic partnership framework and the ad hoc nature of co-operation has not prevented the EU and the OSCE from carrying out a wide variety of joint initiatives and actions in the fields of democratisation, human rights and rule of law. Until the 1990s, engagement between the EU and the OSCE was a sporadic occurrence, with both organisations firmly focused on their non-overlapping areas of policy and concern.<sup>789</sup> However, as the EU became increasingly focused on both fundamental rights and security in Europe, the engagement with the OSCE increased in both intensity and scope.<sup>790</sup> This coincided with the OSCE's efforts to expand its relationship with other regional and international organisations, which began with adoption of the strategic document 'Platform for Co-operative Security' during the Istanbul summit in 1999<sup>791</sup>, as outlined in chapter III.C of this report. While the EU engages in political dialogue on the OSCE human dimension in the work of intergovernmental bodies in Vienna, it is the work of OSCE field missions and of the ODIHR where the bulk of actual cooperation in the field of human rights between the EU and the OSCE takes place. The EU also engages to a lesser degree in activities of the two other autonomous OSCE institutions, namely the Representative on Freedom of the Media and the High Commissioner on National Minorities. Just as it is in the case of the cooperation between the EU and the CoE, neither organisation maintains a central directory of all modes of engagement between the EU and the OSCE. Insofar the only attempt to map the inventory of EU's engagement with the OSCE was conducted by the Council of the EU in the 2004 Assessment Report on the EU's Role vis-à-vis the OSCE.<sup>792</sup> Given the variety and frequently informal nature of engagement between the EU and the OSCE, this chapter will not make an attempt to map all modes of cooperation between both organisations, instead focusing on select areas and examining the current developments.

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<sup>789</sup> Emma J. Stewart 'Restoring EU–OSCE Cooperation for Pan-European Conflict Prevention.' (2008) 29 Contemporary Security Policy 273.

<sup>790</sup> Dimitry Paunov 'Assessing the success of EU-OSCE cooperation: a case of mutualism?' (2014) 24 Security and Human Rights 375.

<sup>791</sup> OSCE, Operational Document – the Platform for Co-operative Security, Istanbul 1999.

<sup>792</sup> Council of the EU, Assessment Report on the EU's role vis-à-vis the OSCE, 15387/1/04 REV 1, Brussels 10 December 2004.

## 2. High-level engagement between the EU and the OSCE

The highest political level of engagement between the EU and the CoE is represented by the EU's presence within the political decision-making process of the OSCE in Vienna. In 1999 the OSCE adopted the strategic document 'Platform for Co-operative Security', which outlined the general parameters for cooperation between the OSCE and other international and regional organisations. The 2006 OSCE Rules of Procedure formalised the EU's presence within the OSCE policy-making bodies, giving the Commission (and later, the EEAS) a seat next to the EU Presidency and allowing it to make statements on behalf of the EU. While this arrangement continues to function despite the reform of EU's external presence following the Lisbon Treaty, interviews with diplomats indicate that it does not impede the EU's presence, as the Presidency's role has diminished and the burden sharing between the EUDEL and Member States is adequately resolved. Over the last decade, the EU has seized the opportunity for its increased presence within the OSCE political framework and put it to remarkable effect in particular within the context of the OSCE's human dimension. The EU continues to be one of the strongest supporters of the human dimensions and expresses keen interest in development, sustainability and enhancement of the human rights arms of the OSCE. This policy priority of the EU is expressed both formally, by means of statements on behalf of the EU, as well as informally through diplomatic support for initiatives which, in EU's assessment, lead to furthering the OSCE's human dimension. Additionally, the EU is a vocal defender of select elements of the current status quo regarding the human dimension, not the least by providing continued resistance to calls for limitations on autonomy of ODIHR, HCNM and RoFM. The EU does not refrain from issuing statements which express its criticism of the current situation within the OSCE and its recent inability to further the human dimension. For example, the statement by the EU at the 2012 meeting of the OSCE's Ministerial Council reads:

'The European Union deeply regrets the failure to adopt any decisions in the human dimension for the second year running. We reiterate that security cannot be achieved without respect for human rights and fundamental freedoms, including those of human rights defenders and lesbian, gay, bisexual and transgender persons. Each participating State must implement all of its human dimension commitments. We deplore the clear signs of backwards movement on existing commitments and values. But our human dimension commitments also need updating to reflect the changing security environment. Freedom of the media, including the safety of journalists, and freedom of peaceful assembly and association are key issues in the OSCE area. We will continue to pursue them. We particularly regret that some participating States were not prepared to acknowledge explicitly that rights and commitments offline also apply online.'<sup>793</sup>

An important element of the statements issued by the EU during the meetings of OSCE's Ministerial Council is the wide groups of OSCE Participating States which align themselves with the EU. Several groups of states frequently express their alignment with the position of the EU and its Member States. These groups are:

1. Acceding countries (Croatia prior to 2012, Romania and Bulgaria prior to 2007, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia prior to 2004),
2. Candidate countries (e.g. Macedonia, Iceland, Montenegro, Serbia, Turkey),

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<sup>793</sup> OSCE, Nineteenth Meeting of the Ministerial Council. 6 and 7 December 2012. 35.

3. Associated countries and potential candidates (e.g. Albania, Bosnia and Herzegovina),
4. Members of the EEA and EFTA (Norway, Liechtenstein, Switzerland)
5. Eastern Partnership countries (this group most frequently includes Georgia, Ukraine and Armenia),
6. Other countries (e.g. San Marino and Andorra).

Furthermore, the cooperation is maintained through consultations between the EU and the OSCE at both ministerial and ambassadorial level (the latter carried out i.a. by the PSC) and working contacts between the OSCE Secretary General and the EU HR/VP. Both organisations interface through cross-representation in various working bodies and committees.<sup>794</sup>

### 3. Co-operation in the geographic context

In the context of EU's enlargement, the ODIHR delivers regular input to the so-called 'EU Enlargement Package' on the request of the European Commissions' Directorate-General for Neighbourhood and Enlargement Negotiations. The contribution by ODIHR consists of reports on progress made by candidate and potential candidate states on aligning with EU values and policies. Currently, the Enlargement Package covers 7 countries (Albania, Bosnia and Herzegovina, Macedonia, Kosovo, Montenegro, Serbia and Turkey). In the 2015 round of Enlargement Package reports, the input from ODIHR was focused on the following areas: democracy (including elections), freedom of peaceful assembly, hate crimes, Roma and Sinti, gender equality and women's participation in politics, parliament and independent institutions, political parties and criminal justice reports.<sup>795</sup>

The arrangement regarding activities in the field of election observation and follow-up between the EU and the OSCE is based upon an unwritten agreement between both organisations whereas the EU does not deploy its own electoral observer missions (EOMs) to OSCE participating states.<sup>796</sup> Instead, the observation delegations of the European Parliament are integrated into OSCE International Electoral Observer Missions (IOEM) whenever the EP and OSCE decide to delegate observers to the same election. These arrangements result in the following matrix of electoral observer deployment:

*Table 8 The arrangement regarding activities in the field of election observation and follow-up between the EU and the OSCE*

	<b>EU</b>	<b>OSCE</b>
<b>EU Member State</b>	No deployment of observer mission possible due to lack of mandate.	Deployment of OSCE IOEM Observer mission possible
<b>Non-EU Member State, OSCE Participating state</b>	Delegation integrated into the OSCE IOEM	Deployment of OSCE IOEM Observer mission possible

<sup>794</sup> Alyson J.K. Bailes, Jean-Yves Haine, Zdzislaw Lachowski, 'Reflections on the OSCE-EU Relationship' in Institute for Peace Research and Security Policy (eds) *OSCE Yearbook 2007* (Nomos 2008) 77.

<sup>795</sup> Jean Pierre Froehly, 'OSCE'/ODIHR's added values for the European Union's work in the field of Human Rights and Democratisation' (forthcoming 2016) *European Yearbook of Human Rights* 5.

<sup>796</sup> Michael Meyer-Resende, 'EU Election Observation: achievements, challenges.' (European Parliament 2008) 6.

<b>Non-EU Member State, Non-OSCE Participating State</b>	Deployment of EU IOEM Observer mission possible	No deployment of observer mission possible due to lack of mandate.
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In 2015, the OSCE carried out the following electoral observation missions and follow-up activities where the EU or its Member States were engaged to a degree:

*Table 9 2015 OSCE electoral observation missions and follow-up activities where the EU or its Member States were engaged*

<b>EU Member States</b>	<b>EU Candidate Countries</b>	<b>EaP Countries</b>	<b>Other countries</b>
Estonia (parliamentary elections)	Turkey (two parliamentary elections)	Belarus (presidential election)	Kazakhstan (presidential election)
United Kingdom (parliamentary elections)	Albania (parliamentary elections)	Ukraine (local elections) *	Kyrgyzstan (parliamentary elections) *
Croatia (parliamentary elections)	Bosnia & Hercegovina (follow-up activities to the 2014 parliamentary, presidential council and local elections)	Moldova (local elections)	Tajikistan (parliamentary elections) *
Poland (parliamentary elections, presidential election)	Macedonia (follow-up activities to the 2014 parliamentary and presidential elections)		Uzbekistan (presidential election)
Czech Republic (follow-up activities to the 2013 presidential election)			Turkmenistan (follow-up to the 2013 parliamentary elections)
Bulgaria (follow-up activities to the 2013 presidential election)			

\* indicates IOEMs where observers from the European Parliament were present

Interviews with stakeholders from OSCE/ODIHR indicate that the ODIHR is capable of deploying observer missions to all elections in EU Member States providing the European Commission would be willing to provide technical support.<sup>797</sup> Beyond the cooperation in for of participation of EP observers

<sup>797</sup> Interviews, Warsaw February 2016.

in OSCE IOEMs, both the modalities of OSCE's observer mission and their outcomes resonate with both the external policies and actions of the EU in the field of electoral rights and election observations. O

One of the most extensive yet difficult to assess modes of co-operation between the OSCE and the EU is the interaction between the presence of both organisations on the ground in host countries of OSCE field operations and EU delegations. The following table indicates all active OSCE field ops in the areas where the EU has established its Delegations and other forms of local presence:

*Table 10 Active OSCE field ops in the areas where the EU has established its Delegations and other forms of local presence*

<b>Country/area</b>	<b>OSCE presence</b>	<b>OSCE presence's budget (2015) in EUR<sup>798</sup></b>
Albania	OSCE Presence in Albania	2.918.500
Armenia	The OSCE Office in Yerevan	2.954.400
Azerbaijan	OSCE Project Co-ordinator in Baku	1.800.000
Bosnia & Herzegovina	OSCE Mission to Bosnia & Herzegovina	11.315.600
Georgia	The Personal Representative of the Chairperson-in-Office on the Conflict Dealt with by the OSCE Minsk Conference	1.173.000
Kazakhstan	The OSCE Programme Office in Astana	2.148.700
Kosovo <sup>799</sup>	OSCE Mission in Kosovo	18.886.600
Kyrgyzstan	The OSCE Centre in Bishkek	6.909.600
Macedonia	OSCE Mission to Skopje	6.257.200
Moldova	OSCE Mission to Moldova	2.200.000

<sup>798</sup> OSCE, Survey of OSCE Field Operations, SEC.GAL/28/15.

<sup>799</sup> This designation is without prejudice to position on status, and is in line with UN Security Council Resolution 1244/99 and the International Court of Justice Opinion on the Kosovo declaration of independence.

Montenegro	OSCE Mission to Montenegro	2.146.200
Serbia	OSCE Mission to Serbia	6.429.000
Tajikistan	The OSCE Office in Tajikistan	7.338.200
Turkmenistan	The OSCE Centre in Ashgabat	1.570.800
Ukraine	OSCE Project Co-ordinator in Ukraine	2.993.000
Ukraine	The OSCE Special Monitoring Mission to Ukraine <sup>800</sup>	57.181.100
Ukraine	Observer Mission at the Russian checkpoints Gukovo and Donetsk	Funding is allocated on ad hoc basis from the OSCE Unified Budget
Uzbekistan	The OSCE Project Co-ordinator in Uzbekistan	1.994.900

The intensity, scope and modalities of co-operation between the field presence of the OSCE and the EU Delegations vary to a large extent, owing to several factors such as the relative priority of given area in each organisations' policy and resources available. Currently, the greatest extent of co-operation can be witnessed in the case of Ukraine. The engagement between the EU and OSCE in Ukraine expanded rapidly in the wake of the 2014 crisis and is a major achievement of both organisations. The relationship between the multiple forms of field presence of both organisations in Ukraine is explored in detail in Appendix II of this study. The second most extensive geographical area of cooperation between the EU and the OSCE is Kosovo. Before the establishment of the OSCE SMM in Ukraine, the OSCE Mission in Kosovo (OMIK) was the largest OSCE field presence, and is currently the third iteration of its presence on the ground following the 1999 conflict.<sup>801</sup> The EU presence is also markedly extensive, with the EU Office in Kosovo and the EUSR in Kosovo present alongside the largest EU field operation, the EU Rule of Law Mission to Kosovo (EULEX). OMIK and EULEX are formally elements of the United Nations Mission to Kosovo (UNMIK) and have initially operated under a pillar-based structure of UNMIK whereas the OMIK handled matters of democratisation and institution-building while the EU was responsible for reconstruction and economic developments. This division has however since eroded, and with the downsizing of the UNMIK following the Kosovo's declaration of independence, currently the OMIK deals with human rights, democratisation, good governance and public security, while the EULEX focuses on the rule of law. The third major area of cooperation

<sup>800</sup> For detailed information on the OSCE Special Monitoring Mission to Ukraine, see below Appendix II.

<sup>801</sup> The previous field ops of the OSCE operating in Kosovo were the OSCE Mission of Long Duration in Kosovo, Sandjak and Vojvodina and the OSCE Kosovo Verification Mission.

between the EU and the OSCE is Macedonia. The OSCE is present in Macedonia since 1992, when the Spillover Monitor Mission to Skopje was established, while the EU has concluded two civilian missions (EUPOL PROXIMA 2004-2005 and EUPAT 2006) and one military deployment (EUFOR CONCORDIA in 2003).

Despite these variations, several features of these engagement feature in virtually every case. First is the informality of the on-the-ground cooperation between the OSCE field ops and EUDELs. Just as both organisations haven't entered an overarching agreement on cooperation on central level, the local co-operations between the EU and the OSCE have no formal grounds as well. Apart from observing the overarching commitments to cooperation with multilateral partners as enshrined in strategic documents of both organisations, the OSCE field ops and EUDELs have a large degree of leeway in how they operationalise the mutual engagement. This leads to a markedly high level of flexibility, which has been a major advantage on several occasions, such as was the case with the cooperation between the various OSCE actors and the EUDEL in Ukraine.<sup>802</sup> The second feature is the importance of cooperation in diplomacy, and in particular in quiet diplomacy which is one of primary tools employed by the both organisations. The EU has a specific advantage in such cooperation owing to the fact that the EUDELs are a part of a larger whole of the CFSP. While OSCE diplomats are perceived as representatives of just the OSCE itself,<sup>803</sup> the EUDEL is not only a representation of the EU in a narrow sense, but also an element of the EU's wider diplomatic architecture which engages both the external action of EU's central bodies (such as the EEAS and the Commission) but also of the 28 Member States insofar as they pursue elements of the CFSP, of which human rights and democratisation are an important element. Another major element of co-operation between both organisations on the ground is information sharing. This too is a very informal modality and takes many forms, from sharing of documents and data to regular contributions by one organisation to another's benchmarking and human rights indicators. While the OSCE provides the input into the EU's enlargement package on the strategic level as indicated above, the field presences of both organisations engage in regular information sharing on tactical level, drawing upon each other's expertise and experience. Once again, the exact and scope and intensity of this cooperation varies greatly depending on geographic area.

Not unlike it is the case in engagement with the Council of Europe, the EU has carried out a number of joint actions/programmes with OSCE and ODIHR aimed at increasing the protection and promotion of human rights in third countries. These actions have followed similar modalities to the CoE-EU JPs (see chapter II.G), with the EU providing the funding and the OSCE/ODIHR acting as the implementing partner. However, the extensity and volume of cooperation under these frameworks has never reached the level comparable to the CoE-EU JPs. The funding provided insofar by the EU for joint/actions programmes with the OSCE was drawn exclusively from the EIDHR and did not involve any other instruments or budget lines. The EU-OSCE joint actions and programmes did not fall under any overarching agreement or framework for co-operation between the Commission and OSCE/ODIHR and were all established *ad hoc* under EIDHR in its capacity to provide funding for international and regional organisations through the so-called targeted projects, which are selected without calls for proposals and represent strategic partnerships aimed at 'Supporting and strengthening the international and regional framework for the protection of human rights, justice,

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<sup>802</sup> See case study on EU-OSCE cooperation in Ukraine, see below Appendix II.

<sup>803</sup> Interviews with stakeholders, Poznan October 2015, Warsaw February 2016.

the rule of law and the promotion of democracy.<sup>804</sup> In the EIDHR financial envelope for the years 2007-2013 only a single such project was carried out, namely the project EIDHR/2007/142-720 'Joint Management EC-OSCE/ODIHR: project to promote democratisation and human rights in Eastern Europe' with a total budget of 600.000 Euro.<sup>805</sup>

#### 4. Co-operation in thematic fields

An interesting aspect of the engagement between the EU and the OSCE in the field of human rights is the close co-operation between the Fundamental Rights Agency and the ODIHR. This co-operation stretches back to the work of FRA's predecessor, the European Monitoring Centre on Racism and Xenophobia. Following the OSCE's shift towards engagement with other international organisations in the first decade of the XXI century, the ODIHR and EUMC came into close contact and quickly developed several areas of co-operation, many of which were carried over to the FRA. Early engagement involved i.a. EUMC providing ODIHR with support in data collection methodology and regular meetings held towards ensuring that overlap and duplication between both institutions will be avoided.<sup>806</sup> Unlike the situation with Council of Europe's reaction to the notion of establishing a fully-fledged EU human rights agency, which caused major friction between both organisations (see chapter II.C), the OSCE positively welcomed the establishing of FRA. In his 2007 address on the creation of FRA, the then-director of the ODIHR C. Strohal stated:

'The OSCE and particularly the ODIHR stand to benefit if the coherence and consistency of the EU's human rights policy is improved. The Agency will provide real added value to the EU architecture, not only within, but also if best practices and educational materials serve to strengthen the capacity of international human rights organizations to assist countries outside the EU. A consolidated collection of EU best practices will certainly assist the transfer of such assistance.'<sup>807</sup>

Engagement and co-operation between both organisations continued in the following years. As a recent example, in 2014, following the Council of the EU's call for FRA to take action towards combating hate crime in Europe,<sup>808</sup> the FRA set up the Working Party on Combating Hate Crime jointly with the EU Member States, the European Commission (via DG JUST), ODIHR and ECRI. The Working Party aims to facilitate sharing of information on improving reporting mechanisms for victims of hate crime and preventing hate crime in a multi-agency approach, sharing and promotion of best practices and enabling factors and developing indicators for measuring progress in fighting hate crime.<sup>809</sup> Modalities of its work include regular meetings facilitated by FRA, horizontal and theme-specific activities including trainings and exchange of best practices as well as joint work on improving hate

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<sup>804</sup> Delegation of the European Union to the former Yugoslav Republic of Macedonia, 'European Instrument for Democracy and Human Rights (EIDHR) 2010 Country Based Support Scheme (CBSS): Strengthening the Role of Civil Society in Promoting Human Rights and Democratic Reform' 4.

<sup>805</sup> ADE 'Evaluation of the European Commission's Co-operation with Ukraine, Final Report. Volume 2: Annexes' Annex 6, 35.

<sup>806</sup> European Monitoring Centre on Racism and Xenophobia, 'Activities of the European Monitoring Centre on Racism and Xenophobia. EUMC Annual Report 2004/2005. Part I.' 29.

<sup>807</sup> Address by Ambassador Christian Strohal, Director of the OSCE Office for Democratic Institutions and Human Rights (ODIHR), 'Fundamental Rights Agency: Cooperation between the Council of Europe and the OSCE' (sic! - JJ), Warsaw 12 February 2007. The title of the address in the document is obviously erroneous.

<sup>808</sup> Council of the EU, 'Council conclusions on combating hate crime in the European Union.', 5-6 December 2013.

<sup>809</sup> FRA, Working Party Improving Reporting and Recording of Hate Crime in the EU. Inaugural Meeting Report Rome, 4 November 2014.



crime reporting and delivering training on effective counter-measures. ODIHR was able to provide substantial added value thanks to its own experience in prevention of hate crime. In October 2015, the European Commission hosted the first invitation-only Annual Colloquium on Fundamental Rights ‘Tolerance and respect: preventing and combating anti-Semitic and anti-Muslim hatred in Europe’ with participation of the representatives of ODIHR.

The OSCE High Commissioner on National Minorities became a partner for co-operation with the European Commission long before the other modalities of EU-OSCE engagement were developed. During the process of pre-accession engagement with the prospective new EU members during the 1990s, the Commission drew upon the experience of the HCNM and his reports on situation of minorities and their legal situation within candidate states, with a particular focus on laws pertaining to elections and languages of minorities. This engagement influenced the Commissions’ actions towards candidate states, such as was the case with the evaluation of Slovakian governments’ policy towards minorities at the time contributing to a stall in negotiations on Slovakia’s accession to the EU.<sup>810</sup> Over the years, the EU continued to engage with the HCNM. The relationship was maintained as mutually beneficial, the EU drew upon the work of the HCNM for the purposes of assessing the situation of minorities in enlargement and neighbourhood areas, while the HCNM could rely on political and diplomatic support of the EU and its Member States both within the OSCE and in his activities towards other stakeholders.<sup>811</sup> Given the fact that the work of the HCNM relies upon careful application of quiet diplomacy, the EU’s collective capabilities in this regard were of high relevance to HCNM’s activities. The EU has repeatedly reinforced its high regard and support for the actions of the HCNM in the intergovernmental OSCE fora.<sup>812</sup> Beyond information exchange and diplomacy, the European Commission has also recently assisted the HCNM in his efforts to further education of minorities in Serbia, with the DG EMPL providing jointly with the Swiss government a sum of 800k EUR via the PROGRESS programme towards the construction of new premises of Subotica Faculty of Economics’ Department in Bujanovac, the first bilingual high education facility in southern Serbia.<sup>813</sup>

## G. Chances and opportunities

A reflection upon the chances and opportunities which the engagement between the EU and the OSCE presents at the time invites a look back on how this very report evolved over the time. Back in 2012, when the FP7-FRAME project was conceptualised, the situation of the OSCE was quite different than it is now. At that time, academic assessments of the state of the OSCE were virtually unanimously negative, with some referring to the organisations as ‘backwater of international diplomacy’.<sup>814</sup> Such statements, while not unfounded, were perhaps overlooking the achievements the achievements of the OSCE in the sphere of human rights, most notably in the continued work of ODIHR and other autonomous institutions. Despite the political deadlock in Vienna and the deteriorating general budget of the OSCE, the autonomous intuitions were able to continue their work, engaging the EU and

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<sup>810</sup> Walter A. Kemp *Quiet diplomacy in action: the OSCE High Commissioner on National Minorities* (Martinus Nijhoff 2001) 97.

<sup>811</sup> *Supra*.

<sup>812</sup> European Union, OSCE Permanent Council N°1078 Vienna, 19 November 2015 EU Statement in Response to the Report by the OSCE High Commissioner on National Minorities, Ms. Astrid Thors.

<sup>813</sup> European Progress, ‘New Building for Bujanovac Students in 2015’ <<http://www.europeanprogres.org/vest/en/174/New-Building-for-Bujanovac-Students-in-2015>>, last accessed on 20 April 2016.

<sup>814</sup> *Supra* (fn 706), 3.

drawing upon the vital support in form of the extra-budgetary contributions from EU Member States and recently the European Commission as well.

The situation changed drastically in February 2014, when the escalation of the crisis in Ukraine posed perhaps the biggest challenge in the history of the OSCE. The organisation was able, despite the constraints, to marshal enough political momentum and resources to launch a successful field operation and return to relevance in regional security. This was possible not the least due to the fact that with the NATO and the EU firmly situated on one side of the conflict, the OSCE remained the only inclusive regional security framework which provided an opportunity for dialogue between all relevant actors. Despite the clash between Russia and the West both within and outside the OSCE, no side of the conflict did walk away from the table and the mandate of the OSCE SMM to Ukraine was successfully extended.

This situation invites hopes as to possible reform and strengthening of the OSCE. The arguably stalled Helsinki+40 process could provide a foundation for restructuring the mandate and framework of the OSCE. Apart from revitalisation of the politico-security aspects of the organisations, such reform could also foster changes to the human dimension. Adjusting the OSCE budget to more adequately reflect the growing needs of the organisation would entail providing ODIHR, HCNM and RoFM with resources necessary for them to meet all aspirations and goals of their mandates. A reform of the decision-making process within the central OSCE bodies could help ensure progress in the area of political commitments related to the human dimension. A broader realignment of the human dimension itself would help increase the focus on topics which have fallen behind in the OSCE framework, such as economic, social and cultural rights.

The EU appears as an actor with some unique capabilities and quantities for enhancing the OSCE during this window of opportunity. First of all, the EU has powerful resources at its command, both in forms of a capable diplomacy led by the EEAS, but also in terms of financial capabilities. The former, perhaps strengthened in order to meet the challenge, could help provide the OSCE with diplomatic momentum necessary to further an inclusive and broad action oriented towards reforms. The latter could help ensure implementation of these reforms if both organisations were able to establish a framework which would enable for the European Commission to support the OSCE budget the way it is able to contribute to the budgets of the UN (in particular the OHCHR) and the CoE.

Above that, the EU is an organisation with extensive experience in reforming and even reinventing itself in order to meet the challenges ahead. The EU was famously able to circumvent several major political roadblocks it has faced in its history. The move from the failure of the Treaty establishing a Constitution for Europe to the adoption of the Lisbon Treaty and the subsequent reforms is an excellent example of how a major multilateral organisation can work to overcome seemingly immovable obstacles. This experience could provide vital in ensuring that the process of reforming the OSCE is able to move around issues the organisation faces currently without resorting to solutions which could exacerbate the situation.

The eventual progress in reforming and strengthening the OSCE cannot be achieved without some consideration to the internal workings of the EU. Specifically, from the perspective of supporting the human dimension of the OSCE, the EU could reflect upon the way its bodies and institutions work and interact in formulating and carrying out its policies towards the OSCE. Two areas come immediately to mind. One is the question of fully implementing the Lisbon reform changes to the external representation of the EU in OSCE's Vienna-based bodies. The other is the matter of ensuring internal

coherence in formulating the EU's biannual policies for cooperation with the OSCE and having them fully reflected in the Strategic Framework and Action Plan on Human Rights and Democracy. This entails also close cooperation between the relevant working groups of the Council (COHOM and COSCE).

## Appendix II – case study

### 1. Introduction

The present study focuses on the interplay between the European Union (EU) and the Organisation for Security and Cooperation in Europe (OSCE) in Ukraine through the prism of the EU's external human rights policy agenda and its actual implementation.

In order to critically assess the ongoing cooperation between the two regional actors, the sources of the EU's external human rights policy and its engagement with Ukraine in this particular field first need to be briefly outlined as the general source framework. The crisis 'in and around Ukraine', as referred to it in the OSCE context, which erupted at the end of 2013, brought significant changes into the EU's approach towards the country, but also to its relationship with the OSCE. While the latter has been experiencing a revival as legitimate European security actor, the former found itself almost unable to act, even becoming a party to the conflict, if seen from the wider (geo)political perspective. Accordingly, Decision No. 1117 of the OSCE Permanent Council on 'Deployment of an OSCE Special Monitoring Mission to Ukraine' stipulates that 'the aim of the said mission will be to contribute, throughout the country and in co-operation with the concerned OSCE executive structures and *relevant* actors of the international community (such as the United Nations and the Council of Europe), to reducing tensions and fostering peace, stability and security [...]'<sup>815</sup>, leaving the European Union *irrelevant*, at least on paper.

Needless to say, the Russian Federation being one of the OSCE's participating States is at the same time one of the key (f)actors that the study takes into account when analysing the EU's ability to work with the OSCE presence on the ground, but also in Vienna, in the pursuit of its external human rights objectives.

Building on this framework, close attention will be given to different EU and OSCE mechanisms and actors involved in the promotion of (implementation of) human rights, on different levels, supported by existing literature, official documents and interviews conducted with EU officials in Brussels, Vienna and Kyiv and members of the OSCE Secretariat.<sup>816</sup> In conclusion, the study provides a critical evaluation of how the EU is able to project its external human rights policy in Ukraine, in cooperation with the OSCE. This complex dynamic is particularly understood through the prism of an inevitable labour division and synergies, both on the political and practical level, and a certain degree of *instrumentalisation* of the OSCE field presence, given the structural constraints that the EU faces in pushing for its human rights agenda.

### 2. Motives of the EU's external human rights policy

As it exists today, the EU's human rights agenda and action abroad<sup>817</sup> shall be *a priori* guided by 'the principles, which have inspired its own creation, development and enlargement and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human

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<sup>815</sup> OSCE, 'Decision No. 1117 Deployment of an OSCE Special Monitoring Mission to Ukraine', PC.DEC/1117, 21 March 2014, [emphasis added].

<sup>816</sup> The detailed interviews were conducted with EU/OSCE officials during the period January 2016 – March 2016.

<sup>817</sup> The development of human rights driven EU foreign policy has been explained in a heterogeneous manner, stemming from diverse sources, dynamics and motivations, e.g. the convergence of the EU Member States' objectives, quest for a shared external identity or EU identity as *sui generis* global actor (normative perspective) or comprehensive nature of security (*realpolitik* perspective).

rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect for the principles of the United Nations Charter and international law<sup>818</sup>. The EU institutions, particularly the European Commission, gradually adopted the OSCE's understanding of security as *comprehensive*, including a strong human rights component, and have incorporated it since across its initiatives, instruments and actions in a relatively coherent manner.

The current 'Action Plan on Human Rights and Democracy (2015-2019)', issued together by the European Commission and the High Representative of the EU for Foreign Affairs and Security Policy (HR/VP), stresses that human rights are kept at the heart of the EU agenda.<sup>819</sup> As regards the OSCE, the document stipulates principles that should 'guide both bilateral work and EU engagement in multilateral and regional for a'.<sup>820</sup> Interestingly, the document does not make any specific reference to the OSCE (in contrast to the case of the United Nations and the Council of Europe), even though one of its five strategic areas of action is 'ensuring a comprehensive HR approach to conflict and crises'<sup>821</sup>, i.e. an area of action where the OSCE has proven to be an irreplaceable and inevitable partner (or 'an important tool'<sup>822</sup>) of the Union in its immediate neighbourhood.

On top of the considerable *institutionalisation* of the human rights agenda externally, a codification of human rights as a key cross-cutting objective of the EU's external policy<sup>823</sup> has also seen the light of day, having, potentially, a great significance for the EU involvement in and with its biggest direct Eastern neighbour. How has this rather decisive institutional and legal potential of the EU in the field of human rights materialised in Ukraine and where do the OSCE and its comprehensive security approach in which human rights constitute the key part fit?

### 3. Uneven EU engagement with Ukraine

Before the outburst of the asymmetrical conflict in Eastern Ukraine, discontinuity and ambiguity characterised bilateral EU-Ukraine relations, stemming both from the 'Russian factor' and the Union's unwillingness to offer EU membership to Ukraine. Even though the Commission designed the European Neighbourhood Policy (ENP), it was the EU Member States<sup>824</sup> and the diversity of their perspectives on the EU-Ukraine future that became the detrimental driver of EU responses and policies towards Ukraine before the 2013 crisis. These responses were rather declaratory<sup>825</sup> and often did not transcend the least common denominator stance. In short, there was no clear and shared vision on behalf of the EU institutions as well as significant heterogeneity of interests among EU Member States of the future relationship between the EU and Ukraine, which consequently reflected itself in an *ad hoc* and one-way engagement with Ukraine, including in the field of human rights.

Moreover, the Union's inability to meet the demands coming from Ukraine, magnified by the Orange Revolution (2004) and in the wake of the conflict with Russia, affected also the Union's credibility. This

<sup>818</sup> EEAS, 'Human Rights and Democracy' <[http://eeas.europa.eu/human\\_rights/about/index\\_en.htm](http://eeas.europa.eu/human_rights/about/index_en.htm)>, last accessed on 20 March 2016.

<sup>819</sup> Council of the EU, 'EU Action Plan on Human Rights and Democracy', 20 July 2015, Doc No 10897/15.

<sup>820</sup> Supra.

<sup>821</sup> Supra.

<sup>822</sup> Interview with an EU official (1), Brussels, 27 January 2016.

<sup>823</sup> The legal basis is found in the Treaty on European Union (TEU) in the form of various provisions scattered across the Treaty, most importantly Art. 21.

<sup>824</sup> Rosa Balfour, *Human Rights and Democracy in EU Foreign Policy: The Cases of Ukraine and Egypt* (Routledge 2012).

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<sup>825</sup> Supra, 76.

is especially the case in Eastern Ukraine<sup>826</sup> where clearly the EU's post-conflict future task will be to rebuild trust as well as the region.<sup>827</sup> Still, even though the explanations of the sources of the growing tensions between Russia and Ukraine are heterogeneous, the recurrent parameter and independent variable has been 'EU caution towards Russia [...] determining a weak engagement with Ukraine'.<sup>828</sup> However, with the conflict in Ukraine being a game-changer, certain big EU Member States have assumed an even stronger leading role in different formats, including the Normandy format and the German 2016 OSCE Chairmanship-in-Office (CiO), generating a space for a coherent approach to the conflict in cooperation with the EU behind the scenes. Furthermore, given the well-developed and relevant EU toolbox and stronger normative position since the annexation of Crimea and (city of) Sebastopol, the EU institutions have turned out to be more consistently involved in Ukraine – hence the need of an *efficient* communication and cooperation with the OSCE both on a political and operational level.

Ukraine, despite seeking EU membership, does not seem to be fully aware of what EU membership entails<sup>829</sup>, and oscillates/d (at least until recently) between the EU and Russia. Seen from this angle, EU *normativism* and a certain *instrumentalism* as well as the lack of progress on human rights in Ukraine was also used as one of the arguments supporting non-commitment on the side of the Union<sup>830</sup>, condemning Ukraine's shortcomings in this field. Those tendencies also impacted the EU's ability to exercise its influence and conditionality impact (e.g. related to visa liberalisation<sup>831</sup>), including when it comes to upholding and improving human rights standards in Ukraine, e.g. in case of political freedoms, rights of minorities, freedom of media and protection of journalists.

By and large, Ukraine started to gradually reach the EU's radar screens with unfolding crises since 2004 and particularly, as the stability of the country became seen as threatened, the EU became *de facto* engaged and 'human rights and democracy became merged in the conflict resolution package to which the EU contributed'.<sup>832</sup> This pattern is partially valid today, bearing in mind that the Union *per se* is not directly part of the crisis management efforts due to the structural and geopolitical constraints. The *modus operandi* leans towards a multi-layered and multi-faceted division of labour between the international and regional actors that are presently engaged in and with Ukraine as well as the parties to the conflict. The EU's ability to promote human rights and democracy in Ukraine has been constrained by security and geopolitical realities in Ukraine and beyond.<sup>833</sup>

#### 4. EU and OSCE in Ukraine today: Story of an (almost) perfect couple?

When analysing the present EU engagement with Ukraine in the field of human rights, both political/diplomatic and operational/practical dimensions shall be considered on different levels and in different contexts in order to understand where and how the OSCE fits into the equation.

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<sup>826</sup> In Eastern Ukraine even the internally displaced persons (IDPs) find it hard to reintegrate among those who have stayed in their places since the outburst of the violence in the area. See below, n 827.

<sup>827</sup> Interview with an OSCE official, via telephone, 15 February 2016.

<sup>828</sup> Supra (fn 824), 76.

<sup>829</sup> Supra (fn 827)

<sup>830</sup> Supra (fn 824), 76.

<sup>831</sup> Interview with an EU official (3), via Skype, 22 February 2016.

<sup>832</sup> Supra (fn 824), 97.

<sup>833</sup> E.g. detention of Ukrainian citizens in Russia and adoption of law against NGOs seen as undesirable 'foreign agents' in Russia, etc.

Firstly, given that the country is in a deep crisis stemming from the asymmetrical armed conflict in its territory, hostilities being reported by the OSCE Special Monitoring Mission (OSCE SMM) daily, there are two sorts of human rights at stake. The present conflict is not a frozen one and impacts the very basic human rights to life, peace and security. In this sense, the EU cannot do much more than stay aside<sup>834</sup> provide humanitarian aid, material (including numerous armoured and non-armoured vehicles, medical equipment) in order to support the OSCE's crisis management and tension diffusion efforts.

Hence, the key factor determining the form and quality of cooperation is the current conflict in Eastern Ukraine, in which the EU *per se* is perceived as *de facto* a party to the conflict from the perspective of the wider regional geopolitical setting. That said, the role of EU Member States, internally, heterogeneity of their interests and externally, their ability to mediate within high-level diplomatic initiatives, such as the Normandy format,<sup>835</sup> shall be taken into account when considering the overall impact on the human rights situation in Ukraine today. The same observation of relevance could also be made when it comes to the process of policy formation, internal and external institutional dynamics, i.e. within the EU and between EU and the OSCE. On the meso-level, the *outcome* is determined by available resources and the legitimacy of the EU to act in this field.<sup>836</sup> Moreover, in this specific context, the *impact* in terms of EU effectiveness is determined not only by its bargaining power, but also by the role of other international actors,<sup>837</sup> including Russia on the one side and the OSCE, Council of Europe or the United Nations on the other side.

Secondly, beyond the conflict and on a more general level, there are human rights standards that both the EU and the OSCE have aimed to promote and improve in Ukraine for a long time, such as the freedom of media, the rights of national minorities, including Roma issues, and political and civic rights and freedoms. In this context the EU's presence is more relevant and with hands-on implications for EU-OSCE cooperation, since it is not directly linked to the rights affected in the conflict.

Another important question to be asked in the current crisis context is where the promotion and implementation of the EU's external human rights policy ranks in bilateral relations. Despite the fact that human rights have been high on the EU's agenda when it comes to Ukraine, they are not the number one priority at the moment<sup>838</sup>, *inter alia* given the limits of the EU's engagement. This reality clearly reflects the specific and fragile situation on the ground, which has its implication on the timing of the EU's present and future involvement with Ukraine in the field of human rights. The value added remains particularly in the Union's indirect contribution to upholding and protecting human rights in Ukraine, which is channelled through the OSCE and its field presence by means of the resources the EU devotes to the mission.

When it comes to other than the most basic human rights affected by the conflict, the EU cooperates with the OSCE actors in Ukraine, while applying a certain degree of conditionality to implement its external human rights goals. The role of informality in EU-OSCE cooperation on the ground is of utmost importance, given that in the current context informality makes the cooperation more possible and

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<sup>834</sup> Supra (fn 824), 76.

<sup>835</sup> Normandy format regroups the leaders of Ukraine, Russia, Germany and France with the aim to put an end to 'the conflict in and around Ukraine'.

<sup>836</sup> Spyros Blavoukos and Dimitris Bourantonis 'Struggling with Performance: An Analytical Framework for the EU International Interactions' (Paper prepared for the EUSA Thirteenth Biennial Conference 2013) 21.

<sup>837</sup> Supra.

<sup>838</sup> Supra (fn 822).

effective, criticism of unsystematic relations being put aside. The following section sheds light on the practical implications of this particularly complex setting at different levels of engagement. The EU and the OSCE interact on different levels and in different settings, which shall be considered when evaluating their present cooperation in the field of human rights in Ukraine.

***a) Axis Brussels – Kyiv – Vienna: diplomatic and political dimension***

When it comes to the improvement of human rights standards in Ukraine, the EU and the OSCE are two complementary actors, conditioned by working in synergies, including with OSCE specialised agencies and autonomous institutions. Overall, the EU's power stems from its capacity of providing funds and in combination with conditionality when it comes to legislative reforms, which shall stimulate the protection of human rights in Ukraine. The total amount of EU money has reached EUR 12 billion in different forms since the beginning of the crisis.<sup>839</sup> This feature of bilateral relations should be understood also in as closely linked to the EU-Ukraine Association Agreement that encompasses a human rights element<sup>840</sup>, regular high-level human rights dialogues between the EU and Ukraine, with some positive developments such as Ukraine's adoption of a Human Rights Action Plan, recently applauded by the European Union Advisory Mission Ukraine (EUAM).<sup>841</sup> To sum up, the EU puts more general pressure on Ukraine to meet its human rights commitments and international standards. As for the OSCE, it has also contributed with technical advice on the draft of this plan, for instance concerning protection of national minorities, keeping the EU presence well informed. From the perspective of high-level political and diplomatic contacts between the EU and the OSCE regarding the conflict in and around Eastern Ukraine, regular staff meetings, including the Chief Monitor Apakan's or his Deputy's visits to Brussels,<sup>842</sup> became the rule on the top of established exchanges between EU and OSCE staff. Those exchanges are based on information sharing and include visits in Ukraine and in Brussels, briefings and reporting from the inaccessible conflict zones.<sup>843</sup>

***b) 'EUDEL' in Vienna: raising its voice and EU 'activism'***

In line with the EU's commitment to 'effective multilateralism', the Vienna context is characterised by the massive diplomatic activism and support that the EU Delegation (EUDEL) to the International Organisations in Vienna has constantly lent not only to the OSCE SMM, to the Observer Mission at the Russian Checkpoints Gukovo and Donetsk and OSCE autonomous institutions, but also the initiatives of respective OSCE CiO, the Swiss and currently German CiO being particularly important. The growing frequency of EU statements related to the crisis in and around Ukraine at the weekly OSCE Permanent Councils formally illustrates the EU's engagement (see Table 1).

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<sup>839</sup> Supra.

<sup>840</sup> Supra (fn 831).

<sup>841</sup> European Union Advisory Mission Ukraine (EUAM) 'EUAM experts welcome human rights boost for Ukraine', <[http://www.euam-ukraine.eu/en/public\\_information/news/887/](http://www.euam-ukraine.eu/en/public_information/news/887/)> last accessed on 1 March 2016.

<sup>842</sup> Supra (fn 822).

<sup>843</sup> Supra.



Table 11 EU statements in the OSCE Permanent Council (2014 – March 2016)

Year	No. of Plenary sessions	No. of Statements	No. of EU statements on Ukraine	Average per session (Statements on UA/ sessions)	Ratio (EU statements/ EU statements on UA)
2014	47	198	64	1,36	32,32%
2015	51	216	80	1,57	37,03%
2016*	7	28	12 <sup>844</sup>	1,74	42,86%

Source: Delegation of the EU to the International Organisations in Vienna<sup>845846</sup>

\*Data collected up till 3 March 2016

Considering the substance, the Union coordinated and delivered rather strong statements in the OSCE's major human rights gatherings in Warsaw, the Human Dimension Implementation Meetings (HDIM), which takes place on a yearly basis and are accompanied by a considerable mobilisation of the EU Delegation and its coordination efforts. In its opening statement in 2015, the Union apparently prioritised the issue of human rights violations in Ukraine, particularly that of persons belonging to national minorities (e.g. Crimean Tatars), in separatist areas of Eastern Ukraine and Crimea.<sup>847</sup> Furthermore, the EU called for unhindered access of the OSCE to the destabilised areas, most importantly Donbas and Crimea.<sup>848</sup> In its closing statement, the EU representative made a clear link between violations of human rights that occur when a State tackles threats to its security, which constitutes another significant source of instability.<sup>849</sup> This idea is in line with current EU engagement with the Ukrainian elites: while human rights are not the ultimate priority at the moment, the conflict cannot infinitely justify inaction or even deterioration of the situation of human rights in the country.<sup>850</sup> The EU prepares Ukraine 'for good times', which if a final deal is struck and fully implemented and the conflict is terminated and the situation normalises, shall come and the EU will assume the leading role in rebuilding of Eastern Ukraine, since nobody else would be willing to pay for it<sup>851</sup>.

<sup>844</sup> The number includes 'EU Statement in Response to Frank-Walter Steinmeier, Foreign Minister of Germany' given the priority position it attributed to Ukraine in the statement and the extent of Ukraine related content as well as 'Interpretative Statement under Paragraph IV.1 (A) 6 of the Rules of Procedure of the OSCE' on the extension of the deployment of OSCE observers to two Russian checkpoints on the Ukrainian- Russian State border.

<sup>845</sup> Delegation of the European Union to the International Organisations in Vienna, OSCE and EU, EU statements in the OSCE, <[http://www.eeas.europa.eu/delegations/vienna/eu\\_osce/eu\\_statements\\_osce\\_meetings/index\\_en.htm](http://www.eeas.europa.eu/delegations/vienna/eu_osce/eu_statements_osce_meetings/index_en.htm)> last accessed on 29 February 2016.

<sup>846</sup> See: Michaela Anna Šimáková 'The European Union in the OSCE in the light of the Ukrainian crisis: trading actorness for effectiveness?' Thesis presented for the Degree of MA in EU International Relations and Diplomacy Studies (forthcoming EU Diplomacy Papers Series Spring 2016).

<sup>847</sup> European Union, 'EU Statement – Opening Session', OSCE Human Dimension Implementation Meeting, Warsaw, 21 September – 2 October 2015.

<sup>848</sup> Supra.

<sup>849</sup> European Union, 'EU Statement – Closing Session', OSCE Human Dimension Implementation Meeting, Warsaw, 21 September – 2 October 2015.

<sup>850</sup> Supra (fn 822).

<sup>851</sup> Supra (fn 827).

Moreover, a maintained level of political representation of the EU is also noteworthy. Unlike in 2013, the HR/VP attended the Ministerial Council both in Basel in 2014 and in Belgrade in 2015. In her statement at the OSCE Ministerial Council in Belgrade at the end of 2015, the HR/VP Mogherini devoted a significant time to Ukraine,<sup>852</sup> making a strong reference to OSCE/ODIHR and the OSCE High Commissioner on National Minorities (HCNM) as a source of information when it comes to human rights violations in Crimea.<sup>853</sup> Indeed, even though the latter do not have a genuine access to the Crimean Peninsula, they have established strong networks of local contacts, enabling them to meet with the representatives of the national minorities and gather scarce information from the cut-off parts of Ukraine.<sup>854</sup> The HR/VP portrayed the EU as a sponsor of 'all efforts for a solution that respects Ukraine's sovereignty, unity, independence and territorial integrity'.<sup>855</sup> Unlike the OSCE, for which discussing the situation of Crimea remains a taboo, the EU for its part pressures and speaks freely about the illegal annexation of Crimea by Russia, since it is not involved in the crisis management. By contrast, the present OSCE structures must retain a balanced and neutral stance, especially in the view of potential local elections in certain areas of Luhansk and Donetsk regions.

The key issue concerning the human rights situation in Ukraine in the Viennese context is first and foremost linked to the crisis management and conflict resolution effort, i.e. to the OSCE SMM and its continuation or for instance, the use of the OSCE's substantial expertise and tools related to the UNSCR 1325 on Women, Peace and Security<sup>856</sup>, which has been blocked by Russia<sup>857</sup>. Even though the OSCE SMM mandate as adopted and prolonged by respective Decisions of the OSCE Permanent Council<sup>858</sup> is today rather associated uniquely with its monitoring function, it also encompasses a tiny part on the protection of human rights and humanitarian aid delivery facilitation. What is often overlooked is that the Mission's task is also to '[m]onitor and support respect for human rights and fundamental freedoms, including the rights of persons belonging to national minorities'<sup>859</sup>, which is where the interests of the EU presence and that of the OSCE converge also regarding the protection of human rights in the conflict torn areas of Ukraine. A simplified formula 'the EU pays and the OSCE does' seems to be at work; given the circumstances, for instance in case of the OSCE's support of implementation of decisions on mine action and on the prohibition of live-fire exercises in Donetsk and Luhansk regions, as endorsed by the Trilateral Contact Group (TCG)<sup>860</sup>. The high-level political/bureaucratic track appears to be more noteworthy than a straightforward engagement in the field. In Vienna, since the outburst of the Ukraine crisis, there has not been almost single OSCE

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<sup>852</sup> Almost a one third of the entire statement.

<sup>853</sup> European Union, 'Statement by Federica Mogherini, High Representative of the Union for Foreign Affairs and Security Policy', MC/DEL/64/15, 22 Meeting of the OSCE Ministerial Council, Belgrade, 3 December 2015.

<sup>854</sup> Supra (fn 831).

<sup>855</sup> Supra (fn 831).

<sup>856</sup> As the recent NATO-sponsored report 'The Role of Women and Gender Policies in Addressing the Military Conflict in Ukraine' shows, the conflict in Ukraine has had an immense impact on the situation and exercise of the basic human rights of women and girls in Ukraine. See: Irene Fellin 'The Role of Women and Gender Policies in Addressing the Military Conflict in Ukraine' (Istituto Affari Internazionali 2015).

<sup>857</sup> Discussion with D. Baer, 'OSCE's Role in the Russia-Ukraine Crisis: A discussion with U.S. Ambassador to the OSCE, Daniel Baer', The German Marshall Fund of the United States, 16 April, 2016, Brussels.

<sup>858</sup> Namely OSCE Decisions No. 1117 (PC.DEC/1117) and attached interpretative statements, Decision No. 1129 (PC.DEC/1129) and attached interpretative statements and Decision No. 1162 (PC.DEC/1162) and attached interpretative statements.

<sup>859</sup> OSCE Permanent Council Decision No. 1117, supra.

<sup>860</sup> OSCE, 'Latest from OSCE Special Monitoring Mission (SMM) to Ukraine, based on information received as of 19:30hrs, 2 March 2016', <<http://us6.campaign-archive1.com/?u=b11aceda364f8f9afa6cadbbb&id=6d5acb082a&e=5c1ea2182e>> last accessed on 2 March 2016.

Permanent Council where the EU did not deliver at least one statement dealing with the situation in Ukraine and its impact on the human rights status quo, in and around Ukraine.

Furthermore, the EU Delegation in Vienna has been a vocal and consistent defender of the OSCE's autonomous institutions (ODIHR, RFOM, HCNM), the presence of which in Ukraine is of utmost importance as well. The diplomatic and political support of the Union (including through the sanctions on Russia) has been markedly voiced on every occasion, including high-level reciprocal visits and key OSCE events. That said, the importance of the OSCE CiO's initiatives in crisis management and conflict resolution in Ukraine, in particular that of the Swiss, Serbian and currently German CiO shall not be omitted when considering the EU's aggregate impact. The EU Delegation in Vienna traditionally holds weekly meetings with the CiO, which in 2016 is performed by Germany. What is more, Germany is at the same time part of the Normandy format (together with France), OSCE CiO, and an EU Member State that engages in numerous coordination meetings in Vienna with other EU Member States. Besides, it is one of the few European countries with decent bilateral relations and communication channels with the Russian Federation. This apparent coincidence ensures solid communication links in terms of the politico-diplomatic track of the conflict resolution efforts in Ukraine. All things considered, on the high-level political engagement in the protection of human rights affected by the conflict in Ukraine, the Union has been rather '*facilitating* [emphasis added] engagement in various formats'<sup>861</sup>, while allowing other EU Member States to take the political lead in negotiations and the OSCE being the consensual forum to mediate the way forward.

### *c) Ukraine: EU-OSCE informal and ad hoc cooperation*

The OSCE presence in Ukraine is rather dense and qualitatively diversified, comprising almost 10 different institutions or actors acting under the OSCE umbrella, including the independent institutions, OSCE SMM, OSCE Project Coordinator and OSCE Observer Mission at the Russian Checkpoints Gukovo and Donetsk, which is capacity the EU institutions cannot reach. Moreover, the OSCE has over the period of time of its presence in the field established important networks of grass-roots contacts with different sectors of Ukrainian society and authorities. Seen from this perspective, the OSCE has great potential as an important *tool* for strengthening the EU's external human rights action and implementation of its policy objectives.

One of the vital dimensions of the EU's local support is both political and financial, via the use of its Instrument contributing to Stability and Peace (IcSP), to the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and its Election Observation Missions (EOMs) in Ukraine, which also indirectly contribute to the normalisation of the situation in the country, rule of law and respect of human rights. The EU's contribution to OSCE/ODIHR's activities in Ukraine has been of an 'exceptional nature [...] in addition to the secondments provided by EU Member States, in the framework of a wider EU engagement'.<sup>862</sup>

As for the EU Member States' engagement, they have seconded altogether 410 OSCE SMM monitors out of the total number of 662, provided their training (also conducted by the OSCE/ODIHR<sup>863</sup>), which

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<sup>861</sup> European External Action Service (EEAS), 'EU increases support for the OSCE Special Monitoring Mission to Ukraine', press release, Brussels 19 June 2015 [emphasis added].

<sup>862</sup> EEAS, 'Note to the EU Member States Delegations to the OSCE, Council Working Party on the OSCE and the Council of Europe (COSCE), Council Working Party on Eastern Europe and Central Asia (COEST)', 4 April 2014.

<sup>863</sup> OSCE, 'ODIHR in Ukraine', <[www.osce.org/odihr/ukraine](http://www.osce.org/odihr/ukraine)> last accessed on 30 April 2016.

counts for almost two thirds, or 62% of the total number of the Mission's monitors<sup>864</sup>. The Union complements the OSCE with funding and sharing of its assets. As of mid-2015, the overall volume of European Commission funding to the SMM reached EUR 25 million,<sup>865</sup> which together with satellite imagery and other monitoring tools made available to the SMM makes the EU the biggest contributor to the OSCE Mission.

From the long-term perspective and protection of the basic human rights not directly affected by the conflict in Ukraine, the EU has stepped up its support through the European Instrument for Democracy and Human Rights (EIDHR), giving Ukraine 'a strengthened priority for 2013-2017'<sup>866</sup> with a minimum of EUR 4.5 million allocated for this period. This scheme includes also small grants for Human Rights Defenders from Crimea<sup>867</sup>, which yet remains an inaccessible black box for the International Community. Furthermore, whilst deploying an inter-service mission to Ukraine, the European Commission acknowledged the importance of 'full synergies/ division of labour with other instruments and other actors'<sup>868</sup> including the OSCE executive structures in Ukraine. That said, the question of the EU's monitoring of implementation as well as Ukraine's absorption capacities<sup>869</sup> emerge with the significant volume of financial resources devoted. Even though it is out of the scope of this case study to answer the question of the EU's effectiveness in Ukraine in the field of human rights, clearly, options of effective implementation monitoring mechanisms in cooperation with other international actors should be further explored and improved.

Again, the *practical* EU-OSCE cooperation has mostly been noticeable in the areas of human rights that are not directly related to the conflict, e.g. national minorities, Roma, freedom of religion, elections, etc. The EU Delegation has also been active at the highest political level and in dialogues with the Ukrainian authorities (e.g. EU's Human Rights dialogue), while the OSCE and its structures were more relevant on the technical level and building of a democratic Ukrainian statehood. For instance, OSCE/ODIHR has proven to be irreplaceable in enhancing participation of and bringing together Ukrainian civil society with the Ukrainian state and its administrative structures. In this context, this is another example of division of labour between a more political and bureaucratic EU and an OSCE equipped with a technical expertise and local contacts, whilst making the best use of available resources and existing comparative advantages. Practical synergies between the work of the two can for instance be detected in the case of issuing reports, such as the one of the OSCE/ODIHR Human Rights Assessment Mission (HRAM) in March 2014<sup>870</sup>, sharing comments on those reports by relevant staff members and helping legislative reform in Ukraine. One of the EU's triumphs in this sense was the introduction of anti-discrimination language in the Ukrainian labour code based on sexual orientation,<sup>871</sup> which has not been covered by the OSCE that extensively as for instance national minorities. The EU undoubtedly leads where it has a stronger leverage over Ukraine, particularly on

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<sup>864</sup> OSCE, 'OSCE Special Monitoring Mission to Ukraine - Status Report as of 13 January 2016'.

<sup>865</sup> EEAS, 'EU increases support for the OSCE Special Monitoring Mission to Ukraine', press release, Brussels 19 June 2015.

<sup>866</sup> European Commission, 'EIDHR and Ukraine', Information Note, March 2014.

<sup>867</sup> Supra.

<sup>868</sup> Supra.

<sup>869</sup> The absorption capacity refers to the overall ability of a country, its formal and informal structures, including its cultural specificities, to utilise foreign assistance in all different forms, e.g. in terms of financial and material assistance (available financial resources), humanitarian assistance, sharing of good practices, transfer of values and assistance in reforming existing (legislative) shortcomings.

<sup>870</sup> See supra (fn 863).

<sup>871</sup> Supra (fn 831).

the ministerial level,<sup>872</sup> and in terms of higher standards that are not always agreed upon at the OSCE level.

What must also be kept in mind is that the EU has its Delegation in Ukraine that shall ‘play a crucial role in ensuring that the recent institutional and policy developments on global human rights are effectively implemented’.<sup>873</sup> The level and quality of cooperation among structures engaged in EU external human rights policy could be further improved with ‘a view to improving integration or “mainstreaming” – of human rights in all aspects’<sup>874</sup> of EU policies in Ukraine and plausible synergies with the OSCE. The lack of human resources, particularly regarding staff working on human rights and in the political section, make this facet even more urgent, both in terms of human rights affected by the conflict and of human rights standards in Ukraine. The cooperation between the EU Delegation in Ukraine and OSCE presence is *ad hoc* but very frequent. The EU regularly asks for advice, since the OSCE has important local contacts, notes, evaluations and information are shared.

To sum up, the role of informality is in the current politically sensitive context of paramount importance. The fact that EU-OSCE cooperation is for instance not that formalised and systematic as in the case of the OSCE and the Council of Europe seems to allow the two actors to be more flexible, efficient and go beyond existing political and geopolitical sensitivities in their practical cooperation in the field. The key variables of this comprehensive cooperation are the resources available, in particular human resources, and the ability to establish and maintain dynamic informal contacts and exchanges in a quickly changing, challenging and sensitive environment. The balance between informal contacts and cooperation *per se* has to be struck in the politically subtle atmosphere, while identifying possibilities of further cooperation. One of such areas could be the ability to better evaluate Ukraine’s implementation of commitments in the human dimension and follow-up, for which the EU is lacking a clear methodology for the moment, once it exercises its influence. A more elaborate, cost-efficient and integrated monitoring mechanism on the ground would prevent history to repeat in terms of lip service paid by the Ukrainian authorities to the EU related to their long-term human rights commitments.

## 5. Conclusions

When asked how often reference to the EU or the OSCE comes up in their daily work, the interviewed EU officials confirmed a very frequent, daily reference made to the OSCE in their daily work. Yet, this was quite scarce in the case of reference made to the EU in the OSCE context, when dealing with the conflict in and around Ukraine. This example could be rather illustrative of the current *status quo* as the security considerations dominate other areas, whilst human rights are always in the background.

The OSCE re-emerged as the ‘most appropriate framework to manage the crisis and prevent further escalation [...], easing tensions between Russia and the West’.<sup>875</sup> By facilitating negotiations on the implementation of the Minsk agreement as well as its massive presence on the ground, the OSCE *de facto* contributed to the protection of human rights directly impacted by the conflict, while the Union provided the inevitable funding and material, but kept its distance and silent pressure. This role is of

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<sup>872</sup> Supra.

<sup>873</sup> Rosa Balfour, ‘The Role of EU Delegations in the EU Human Rights Policy’, (European Parliament 2013) 5.

<sup>874</sup> Supra.

<sup>875</sup> See supra (fn 706).

supreme importance since not many other entities would be in a position to support the OSCE SMM or ODIHR in their vital observing, facilitation and monitoring tasks.

The EU engages through existing high-level channels and formats with the Ukrainian elites, applying conditionality, focusing on its long-term human rights agenda, i.e. upgrading human rights standards in Ukraine in general. In this sense, there is also an important frequent, informal and *ad hoc* cooperation between OSCE actors and EU ongoing in the field of human rights.

The present situation in Ukraine, underlined by structural and geopolitical constraints, favours a *division of labour* between the EU and the OSCE, both from the perspective of human rights at stake and timing (conflict and post-conflict rebuilding). EU-OSCE interplay inclines towards convergences and even synergies, rather than overlaps, which are noticeable when studying current *status quo* on different levels. While the OSCE keeps a non-biased and neutral image, the EU sends strong political messages from Brussels and Vienna in support of Ukraine and stimulates the latter's reform process and implementation of human rights commitments. While the EU remains more political and bureaucratic, applies conditionality and pushes for its human rights agenda in Ukraine on the ministerial level, where it is more efficient, the OSCE acts in a more technical way and does the physical work on the ground, backed by its well-developed network of local contacts.

Looking cautiously into the future, the Union by its action 'prepares for better times', focusing on long-term reforms of the Ukrainian legislature and human rights mainstreaming, while sustaining the OSCE's presence 'by its purse'. Assuming that the conflict comes to an end and the situation in Eastern Ukraine normalises, the EU will be an important (f)actor in rebuilding of the country, while pushing for human rights mainstreaming in every policy area, endorsed through its normative nature that is welcomed by both the OSCE and Ukraine.

## IV. Conclusions

1. The European Union is committed to seek the advancement of the principles of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms not only within its own framework but also in the wider world. While avowing itself to the concept of multilateralism, the EU recognizes regional organisations as partners with whom it strives to develop cooperation. The relevant policies and actions should *inter alia* focus on consolidating and supporting the implementation of the aforementioned principles; fostering the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; and promoting an international system based on stronger multilateral cooperation and good global governance.<sup>876</sup> These objectives have been reaffirmed in the 2012 Strategic Framework on Human Rights and Democracy and 2015 Action Plan on Human Rights and Democracy in which the Council of Europe and the Organisation of Security and Cooperation in Europe take a prominent place.
2. The Strategic Framework states that the EU will continue its engagement with ‘the invaluable human rights work of the Council of Europe and the OSCE.’<sup>877</sup> Accordingly, the Action Plan refers to cooperation with these organisations under several headings. This Report provides an analysis and critical assessment of various aspects of the relevant EU policies and their implementation, including problems already encountered and anticipated challenges. However, the Report also substantiates the view that the European actors mutually complement and enrich each other in their work for democracy, human rights and the rule of law. Moreover, the Report highlights that there is a considerable potential in this regard that has still to be further explored and exploited.
3. While focusing on the EU perspective, the Report is based on the recognition of the multi-centred organisational setting in Europe. As a consequence, it is organized around two central threads, namely: a) the adequacy of the EU policies and activities from the perspective of its strategic goal to advance democracy, human rights and the rule of law, b) the need for a coherent and effective human rights protection framework for all people in Europe which would build on the different organisational settings and not suffer under differences, discrepancies and tensions.
4. Specific conclusions concerning the analysis of the EU engagement with the CoE and the OSCE have been placed under the respective chapters of this Report. Therefore, remarks in this part focus on more general issues.
5. The EU recognizes the partnership with the Council of Europe in the area of human rights and democracy as particularly important. From the EU policy documents the conclusion can be drawn that like the United Nations is the EU key partner at the multilateral level, the Council of Europe takes a similar position at the regional level.
6. The EU’s thematic goals and objectives correspond largely to the core areas of work of the CoE. They have been expanded over time as the CoE’s human rights agenda broadened. At the same time, not all EU policy documents are consistent in their identification of thematic priorities of the CoE as a partner for the promotion of certain human rights issues. These gaps and inconsistencies risk that certain avenues of cooperation will be overlooked by the EU and EU Member States officials who are tasked with the implementation of EU human rights policy. Avoiding these blind

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<sup>876</sup> Art. 21 TEU.

<sup>877</sup> Council of the EU, ‘EU Strategic Framework on Human Rights and Democracy’, 25 June 2012, Doc No 11855/12 4.

spots could enable the EU to realize untapped potential for cooperation and ultimately strengthen EU external human rights policy. The geographic priorities of the EU on the contrary are very broad. Here, it should be examined, whether a stronger country-specific focus, linking thematic issues to countries where violations are particularly prevalent, may be a useful strategy.

7. The Council of Europe has a number of direct channels through which it can shape EU policy-making. They include in particular the adoption of legal standards and the provision of information and expertise. The impact of the CoE is strongest when the EU ratifies its legal instruments, but even without ratification the EU has drawn on the conventions of the Council of Europe as a source of inspiration for its own legal framework, and as an indication for the guiding principles of EU law. So far, the EU has only acceded to a very few CoE conventions, although more than 50 are open to EU participation. The exclusive focus on the Union's accession to the European Convention on Human Rights has been partially redirected after the European Court of Justice issued its Opinion 2/13 on the matter. Now, accession to other conventions, in particular in the areas of trafficking of human beings, children's rights, data protection and women's rights is being considered. Unfortunately, this progress can above all be witnessed in the area of civil and political rights, while economic, social and cultural rights continue to take second place in the EU. Particularly the different treatment of the jurisprudence of the European Court of Human Rights, on the one hand, and of the European Social Committee, on the other hand, is striking. In this context, the EU may wish to see the 'Turin process' launched by the CoE in 2014<sup>878</sup> as an opportunity to enter in closer cooperation with the CoE also in the area of social and economic rights.
8. Furthermore, the CoE impacts on EU human rights law and policy by providing information and expertise. The European Commission relies heavily on knowledge provided by external sources. Next to the information made available by Fundamental Rights Agency, building on information provided by the CoE is often not only more convenient in terms of cost and time for the European Commission, it may also add legitimacy to its action. Close exchanges between officials of both institutions at all levels, training provided to EEAS staff by the Council of Europe, and the use of the recommendations made by the CoE's monitoring bodies all contribute to strengthening the latter's impact on the EU.
9. One of the major challenges to the EU policy regarding the CoE is the compliance with its commitment agreed in the Treaty of Lisbon to accede to the European Convention on Human Rights.<sup>879</sup> Therefore, legally speaking, there is no return for the EU from this commitment without an appropriate amendment of its primary law. It is also to be recalled that this EU step was accompanied by reform of the adoption of the Protocol 14 to ECHR allowing the Union by way of exception to become party to the Convention even though it is not a state. However, in accordance with same TUE provision such accession shall not affect the Union's competences as defined in the Treaties. Taking this into account, the Court of Justice in its Opinion 2/13 questioned the conditions of accession as negotiated between the EU and the CoE. The Court's criticism is of

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<sup>878</sup> 'The 'Turin process' aims at reinforcing the normative system of the Charter within the Council of Europe and in its relationship with the law of the European Union. Its key objective is to improve the implementation of social and economic rights at the continental level, in parallel to the civil and political rights guaranteed by the European Convention on Human Rights. See: Council of Europe, 'Turin Process' <<http://www.coe.int/en/web/turin-process/home>> last accessed on 28 April 2016.

<sup>879</sup> Art. 6(2) TEU.



fundamental character and covers a wide range of issues. It is to be noted that the present deadlock may negatively affect not only the further rapprochement of the EU and the CoE but also the functioning of the EU' own system of the protection of fundamental rights. Therefore, the report elaborates in details on various aspects of the accession and related options. It underlines the need for the EU and its institutions to carefully examine the Opinion as well as to develop means of addressing the Court's arguments in order to return the process of accession to the right tracks (including possible adjustments of the EU architecture, convincing the CoE partners, especially non-EU-member-states parties to the Convention, to get back to the negotiating table with a view to possible modifying the current draft agreement.

10. Taking these recent developments into account, the prospects of having a unified, common standard of human rights across Europe appear today more complicated and less bright than some years ago. The CJEU is vociferously asserting its autonomy in the interpretation of human rights law. The scope for divergences between Strasbourg and Luxembourg on human rights issues also seems to be increasing as the influence of EU law spreads. In addition, the ECHR presumption of EU compliance with human rights law without properly checking its actual implementation may have a detrimental impact on human rights protection. In fact, once can claim that despite the good intention to facilitate the EU accession process to the ECHR, the Bosphorus approach in fact discourages detailed analysis of whether the EU is protecting human rights law in its actions.
11. Despite these challenges or perhaps because of them, other than treaty accession forms of EU-CoE cooperation such as Joint Programmes seem to gain additional importance. The achievements of this framework are undoubtedly a success story for both organisations. While the Joint Programmes should be continued as tools of EU's external policy towards its close neighbourhood, it would be desirable to enhance their sustainability, predictability and thus effectiveness.
12. The EU's engagement with the OSCE and in particular with its autonomous institutions is an example of efficient partnership despite disparity in resources available to both partners. The EU continues to support OSCE Office for Democratic Institutions and Human Rights, the High Commissioner on National Minorities and the Representative on Freedom of the Media in their activities and engages in successful cooperation in furthering human rights on the ground. Despite these achievements, this partnership suffers from lack of an overarching agreement akin to the EU-CoE Memorandum of Understanding. While much can be attained through ad hoc cooperative projects and activities based on the converging interests, even a purely technical agreement between the EU and ODIHR would enhance cooperation towards greater efficiency and coherence.
13. The EU's engagement with the human dimension of the OSCE is primarily positioned within the external policies of the EU and focused on third countries. This arrangement results in lost opportunities regarding the possible synergy which the two organisations could attain while working in the context of internal policies of the EU and addressing human rights in EU Member States. While some progress has been made in form of OSCE's cooperation with FRA or its involvement in the discussion on fundamental rights in the EU, much ground remains to be covered. One possible avenue to explore is the OSCE's capability to deploy electoral observer missions to all EU Member States, if the necessary technical assistance could be provided by the EU towards facilitating an undertaking on such scale. A success in this field could pave the way towards a more extensive cooperation in the internal sphere of EU human rights policies. It could

also enhance the credibility of the EU by displaying readiness to embrace internally the same standards which the EU is frequently promoting externally.

14. One can conclude that with its timely reaction to the crisis in Ukraine, the OSCE has returned to relevance and is once again an important actor in European security. Many scholars and policymakers have expressed hopes that this could lead to a revival of the OSCE as a whole, including 'human dimension.' Yet much work remains to be done in this regard, as political deadlocks continue to dodge the OSCE and impair its ability to reform. The EU has found itself in an exposed position, as it is seen by many as having taken a side in the Ukrainian conflict. An attempt to help the OSCE move forward and overcome some of its weaknesses would entail careful consideration of relations within the US-Russia-EU triangle. The 'human dimension,' which could greatly benefit from a reform of OSCE, should be at the core of any discussion on the future of this organisation. The EU, with human rights, democracy and rule of law at the heart of its external policy, is perhaps best suited to assume responsibility in this regard.
15. The report in a case study related to Ukraine underlines that structural and geopolitical constraints in this country has favoured a division of labour between the EU and the OSCE. While the EU 'prepares Ukraine for better times' when it comes to upgrading its human rights standards, the OSCE is directly involved in immediate upholding of human rights, including by means of its reinforced presence on the ground in the context of the conflict in Eastern Ukraine. The OSCE conducts the crisis management and facilitates the implementation of the Minsk agreement and the EU provides most of the funding, material and human resources and thus, indirectly contributes to the protection of human rights. It is to be stressed that no other actor than the EU would be able to sustain the OSCE Monitoring Mission Special Monitoring Mission or could be considered as relevant for the future post-conflict rebuilding of Eastern Ukraine.
16. Despite this premises, the EU-OSCE cooperation in Ukraine in the field of human rights has been rather ad hoc and informal. On the one hand, this state of play provides a certain degree of flexibility and favours efficiency (i.e. synergies and avoidance of overlaps) in the current politically sensitive context but, on the other hand, involves a great deal of uncertainty. Perhaps, a more comprehensive monitoring mechanism of the progress achieved in the areas of democracy, human rights and the rule of law could be considered as a desirable cooperative endeavour of the country authorities, the OSCE and the EU?
17. There are numerous examples of bilateral cooperation between EU, CoE and OSCE in various configurations. The interplay between the three organisations was so far subject to few academic studies.<sup>880</sup> Nevertheless, closer multi-layered cooperation involving all three organisations might offer additional opportunities for the advancement of democracy, human rights and the rule of law, in particular in countries or sub-regions where deficits in this regard create structural obstacles to human development. The EU is well equipped to facilitate such cooperation and may wish to assume this responsibility.

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<sup>880</sup> See: Ugo Caruso, 'Interplay between the Council of Europe, OSCE, EU and NATO' FP6-MIRICO Report (European Academy Bozen-Bolzano 2007); Malte Brosig, 'Governance between International Institutions: Analysing Interaction Modes between the EU, the Council of Europe and the OSCE' in David Galbreath and Carmen Gebhardt (eds) *Cooperation or Conflict? Problematizing Organizational Overlap in Europe*. (Ashgate 2010).

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