



THE BENEFIT OF THE EU FUNDAMENTAL RIGHTS AGENCY WITHIN EUROPE'S HUMAN RIGHTS REGIME

Are the EU and the Council of Europe clashing on their human
rights protection structures?

by Rory Nuyens



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1st supervisor (University of Twente): Prof. Dr. R.A. Wessel

2nd supervisor (WWU Münster): Prof. Dr. Reinhard Meyers

Supervisor for the Netherlands Ministry of Foreign Affairs: Drs. A.S. van Mens

*Rory Nuyens
Jacob Schorerlaan 30
2525 ZA Den Haag
E: rory@rorynuyens.nl
M: +31652431126*

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FOREWORD

Around one year ago, I was about to start my internship at the Netherlands Ministry of Foreign Affairs, where I was going to work at the Council of Europe desk of the Central and Western Europe division. At that time, I knew as much about the European Union as an average European Studies student knows when he or she is about to start the journey that ultimately leads to graduation. However, little I knew about the Council of Europe, probably due to the same feeling of arrogance of which EU officials are often accused of by their Council of Europe counterparts.

However, after about one day at the Ministry, I realized that my knowledge about both organizations needed a much appreciated update! Fortunately, my colleagues at the Ministry, most notably Andri van Mens, Astra Groenendijk, Arjen Uijterlinde, Cees Meeuwis, Gerard de Boer and Maarten van den Bosch, gave me the opportunity to taste from what it is like to work with real world issues within the context of the EU and Council of Europe that previously were not so real and tangible to me at all.

It is in this context that I became interested in the state of play of the relation between the Council of Europe and the European Union that has got such a clear expression in the debate surrounding the establishment of a European Union Fundamental Rights Agency.

Lastly, I would like to sincerely thank Andri van Mens, Ramses Wessel and Reinhard Meyers for their guidance during the last months.

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Rory Nuyens

EXECUTIVE SUMMARY

Last December, the Justice and Home Affairs Council of the European Union reached an agreement on the establishment of the EU Fundamental Rights Agency. The establishment of this Agency is telling for the increased attention for human rights in the EU. However, the Council of Europe traditionally plays a central role regarding human rights in Europe and has developed an unmatched expertise on fundamental rights during its existence, mostly through the European Convention on Human Rights (ECHR). That is why the question arises in what way the establishment of an EU Fundamental Rights Agency provides added value in relation to already existing human rights protection offered by the Council of Europe. Therefore, it is needed to look at the competences of both the EU and the Council of Europe to generate a clear picture of how exactly the Agency fits in.

The debate on the Fundamental Rights Agency takes place within the context of the European human rights regime, developed by the Council of Europe and more recently by the EU. The EU competences in human rights issues have been initially developed by the European Court of Justice (ECJ). However, the ECJ is not able to solve differences concerning the interpretation of fundamental rights across the EU member states. It has been suggested that the EU therefore should accede to the ECHR to prevent divergent interpretation of human rights in Europe and to confirm the EU's commitment to human rights. However, the ECJ ruled that the EU cannot accede without an explicit Treaty change. The EU's own Charter of Fundamental Rights never received any legal status. Currently, the EU's internal competences are mostly derived from Art. 6 and 7 TEU, but are lacking compared to its external competences in human rights issues and are not well institutionalized. The human rights monitoring of EU institutions and the EU member states when implementing Community law is therefore up for improvement, which led to the establishment of the Agency.

The Council of Europe competences in human rights are confirmed during the Third Summit, held in 2005. The protection and promotion of human rights in Europe is one of the organization's core tasks. However, the organization's main convention and accompanying Court (European Court of Human Rights) is confronted with an ever increasing workload. Although the Council of Europe consists over high quality human rights monitoring tools, these mechanisms are not sufficiently able to connect human rights to specific EU concerns, most notably where that concerns the development and implementation of EU policies.

It did not prevent the Council of Europe, most notably its Parliamentary Assembly, to take a skeptical approach towards the establishment of the Fundamental Rights Agency, stating that the Agency would lead to a duplication of efforts already undertaken by the Council of Europe. Consequently, the negotiations on the establishment of the Agency have focused on preventing such an overlap. As a result,

the Agency genuinely fills a gap within human rights protection offered in Europe, namely monitoring the EU institutions and member states when implementing Community law. It can make its advice available in an early stage of policy development, providing an *ex-ante* check on fundamental rights issues. Moreover, the Agency can assist in harmonizing the interpretation of fundamental rights across the EU member states.

However, the focus on preventing overlap has also caused adverse effects. The Agency, for example, has not received a remit in third pillar issues, in which many human rights sensitive policies are developed. Existing EU human rights structures, such as the EU Independent Network of Experts, have ceased to exist. The work and tasks of EU Monitoring Centre on Racism and Xenophobia (EUMC) will be continued, but will be considerably narrowed as the Agency's mandate is confined to first pillar matters. It can thus be questioned if the focus on preventing overlap, which is the result of two organizations defining their organizational limits towards human rights competences, is a useful approach. From an EU perspective, it is important to accede to the ECHR as a confirmation of its commitment to fundamental rights. Hopefully, the acknowledgment of each others complementarity and an extended mandate to cover third pillar matters will lead to a better suited Fundamental Rights Agency that contributes to the promotion of and respect for fundamental rights within the EU, thereby genuinely adding to the overall European human rights architecture.

1. INTRODUCTION

“Double work, that leads to double standards and a waste of public money”¹. Those were the harsh words spoken by the Chairman of the Parliamentary Assembly of the Council of Europe, Mr. René van der Linden, when asked about the establishment of an EU Fundamental Rights Agency. The European Council in 2003 decided to transform the European Monitoring Centre on Racism and Xenophobia (EUMC), based in Vienna, into a European Union Fundamental Rights Agency (hereafter: the Agency)². After several years of negotiating, the establishment of the European Union Fundamental Rights Agency has been decided by the Justice and Home Affairs Council of the EU in December 2006³. Consequently, the Agency will become operational in the beginning of 2007⁴.

Since the establishment of the European Union (EU) in the Treaty of Maastricht and the birth of the three-pillar structure, the EU has increasingly put forward the protection of human rights as an important aspect of its newly acquired policy fields⁵. Especially the policy areas in the second and third pillar are considered as ‘human rights sensitive’. But also within the first pillar tensions between the internal market and fundamental rights arise due to different interpretations of fundamental rights across the EU member states⁶. Furthermore, European integration progressed, internal borders gradually disappeared, twelve new member states acceded (while other states received candidate status) and human rights sensitive problems and policies were more and more placed inside the EU sphere of influence. Consequently, the EU’s interest in human rights protection increased, as the need for more guarantees and safeguards for human rights protection within the Union’s member states and possibly (future) candidate member states became apparent⁷.

However, one of the core tasks of the Strasbourg Council of Europe, not to be confused with the European Council or the Council of the European Union, is the protection of human rights in Europe⁸. All the EU member states and candidate member states are members of the Council of Europe as well and are thus bound to the Convention on Human Rights and the Fundamental Freedoms, the organization’s main instrument for the protection of human rights in Europe. An increased EU focus on

¹ See Annex 1 (in Dutch). The entire press conference of Mr. Van der Linden can be viewed at http://coenews.coe.int/vod/061002_w01_wmv.

² Philip Alston, 2004, p. 172-173.

³ Press Release, Justice and Home Affairs Council Meeting 4 December 2006, p. 10.

⁴ Art. 32 regulation for establishment of the Agency.

⁵ Christopher McCrudden, 2001; report by Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, p. 34.

⁶ Steve Peers, 2004, p. 119-122.

⁷ Report by Antonio Cassese, Catherine Lalumière, Peter Leuprecht and Mary Robinson, *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000*.

⁸ Action Plan (CM(2005)80 final); The Council of Europe is an international organization consisting of 46 member states and based in Strasbourg.

human rights could overlap with activities currently already undertaken by the Council of Europe, which causes concern within the Council of Europe⁹.

In this respect, the question arises whether the establishment of the Agency will add anything beneficial to the already existing human rights protection structures in Europe that have been put in place by first and foremost the Council of Europe and -more recently- by the European Union. Therefore, after having looked at the current degree of human rights protection that the EU and the Council of Europe offer, it is interesting to look at the actual benefit of the EU Fundamental Rights Agency. This leads to the following research question:

What is the added value of the establishment of a European Union Fundamental Rights Agency in relation to existing human rights protection offered by the Council of Europe?

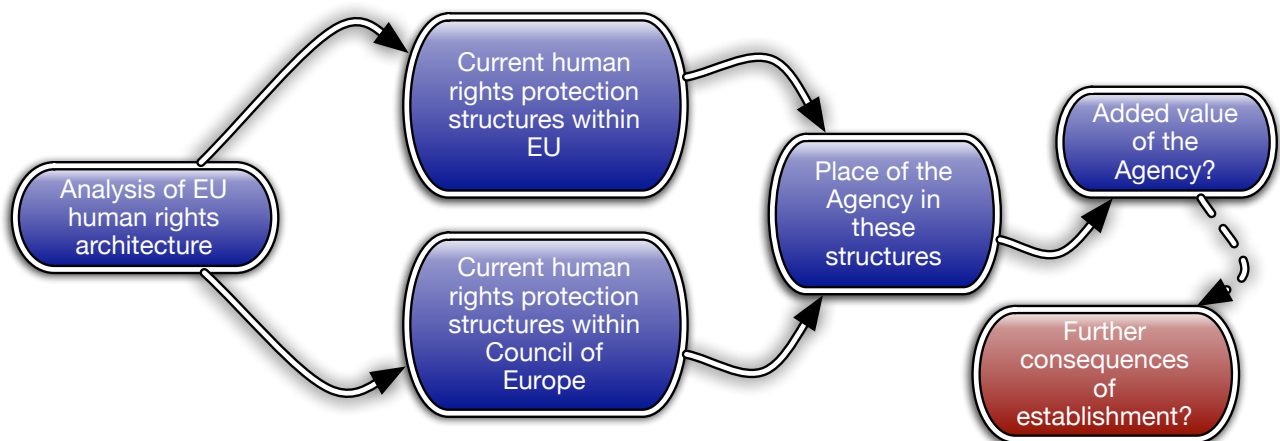


Figure 1: Building blocks that will lead to an answer to the main research question.

The establishment of a Fundamental Rights Agency has value when it contributes to the implementation of human rights protection and promotion within the European Union. To effect such a contribution, the establishment of the Agency first and foremost must have a sound legal basis within the EU Treaty and its tasks must fall within the competences of the European Union. The establishment of a Fundamental Rights Agency has added value when that contribution is complementary to already existing human rights structures put in place by the Council of Europe. Complementarity in this sense means that the tasks, as listed in the regulation defining the Agency, must not overlap the development of law, policy and activities already undertaken by the Council of Europe in the field of protecting and promoting human rights in the member states of the European Union. Added value is, in this respect, thus defined as “providing a complementary contribution”.

⁹ PACE recommendation 1696; PACE Recommendation 1744; PACE Resolution 1427; PACE Report Doc. 10894; PACE Report Doc. 10449; Jean-Claude Juncker, 2006, p. 4-9.

While not part of the main research question, determining the added value of the Agency also gives insight into the impact of the Agency on the overall European human rights architecture. This impact will also be assessed.

To further answer the main research question, it needs to be broken down into several sub questions that will be dealt with in the subsequent chapters of this thesis. The first question that needs to be answered is '*What are the underlying concepts of Europe's human rights architecture?*'. Human rights protection occurs in a human rights regime. The debate surrounding the establishment of the Fundamental Rights Agency actually takes place in the context of a wider discussion on the interaction between two human rights regimes in Europe; that of respectively the EU and the Council of Europe¹⁰. Furthermore, Europe's current overall human rights regime is defined by the discourse it uses on human rights as well as the political underpinnings of its existence. Therefore, chapter two will characterize Europe's overall human rights regime in terms of its historical development, the dominant discourse used on human rights in Europe, its political underpinnings as well as the way in which Europe's human rights regime operates. This will shape the context in which the debate on the role of the Agency within Europe's current human rights structure takes place. It clears the way to dive deeper into the respective human rights regimes of both the EU and the Council of Europe as well as understanding the impact a Fundamental Rights Agency is likely to have on these regimes.

When a clear understanding of the concepts has been established, it is time to answer the second question: '*What are human rights competences of both the EU and Council of Europe?*' The debate in the EU on human rights has taken centre stage for a long time, related to the increased competences in the second and third pillar of the EU Treaty, the development of the Copenhagen criteria as well as the ongoing development of European integration¹¹. The establishment of the Agency can be seen as a result of a growing EU focus on human rights. At the same time, the Council of Europe feels its core tasks are being threatened with so much EU attention for human rights¹². In order to determine the added value of an Agency, it is necessary to look at why it was deemed necessary to establish an Agency and how that relates to the development of EU policies on human rights. Furthermore, it is important to look at how the Agency fits in already existing structures, including those of the Council of Europe, in order to prevent possible overlap of activities between the EU and the Council of Europe. Therefore, the third and fourth chapter will respectively deal with the characterization of both the EU and the Council of Europe in terms of their human rights protection structures. In the case of the EU, the focus will be on how the Agency can contribute to the human rights structures of the EU. In the case of the

¹⁰ The terms 'human rights' and 'fundamental rights' will be used interchangeably.

¹¹ Christopher McCrudden, 2001; report by Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, p. 34.

¹² PACE recommendation 1696; PACE Recommendation 1744; PACE Resolution 1427; PACE Report Doc. 10894; PACE Report Doc. 10449; Jean-Claude Juncker, 2006, p. 4-9.

Council of Europe, the focus will be on the concerns the Council of Europe has towards the Agency. Furthermore, the human rights competences of both organizations will be characterized using the concepts of international legal enforcement tools set out in chapter one. This will lead to a blueprint of the current state of both organizations, in which the present day competences of both respective organizations regarding human rights will be presented in order to gain an insight in how the Agency could fit in these structures..

When a thorough overview of present day human rights protection structures in Europe has been established, it is necessary to look at the competences of the Agency according to its regulation. Therefore, the question *‘What is the legal basis of the EU’s Fundamental Rights Agency and what competences are derived from this?’* needs to be answered. The fifth chapter therefore will deal with the competences and the impact of the Agency on Europe’s human rights regime. For that, not only its legal basis needs to be studied, but also its role in the general framework of EU human rights policies. After doing that, it is possible to compare the practical implications of the Agency to that of the activities already undertaken by the Council of Europe and answer the final sub question: *‘How will the Agency fit in the existing human rights protection structures?’* that will lead to answering the main research question. The fifth chapter will thus deal with connecting the results and conclusions of the third and fourth chapter, which will enable an assessment in what way the Agency provides a complementary contribution to the current European human rights structures as developed by the Council of Europe and -more recently- by the EU.

Finally, after having answered the aforementioned sub questions and having gathered and assessed all the relevant information and arguments, a conclusion can be drawn as an answer to the main research question. Added to that, an assessment will be made regarding the impact of the Agency on Europe’s human rights architecture, since the definition of added value earlier mentioned is a rather strict definition in the sense that it focuses on complementarity to already existing structures. This focus on complementarity has been a *leitmotiv* in the negotiations surrounding the establishment of the Agency within the EU¹³. Therefore, in the form of recommendations and suggestions for further research, the impact on and consequences for Europe’s human rights architecture of such an Agency will be assessed. For this, not only the scope of the tasks as described in the Agency’s mandate will be assessed, but also the role of the Council of Europe and the European Union concerning the implementation of tasks by the Agency. This will make up the final chapter of the thesis.

The general purpose of the main research question is to explore the benefits a EU Fundamental Rights Agency has within the existing human rights protection structures in Europe. To sufficiently answer the research question, different kinds of sources of information have been used. To answer sub question

¹³ According to the interviewees.

one (chapter two), books and articles on human rights, its history and its philosophical foundations have been used, together with books and articles on international law and the place of human rights within international law.

For the second subquestion (chapter three and four) books and articles dealing with human rights within the EU and the Council of Europe have been used. Also reports on the development and evaluation of human rights policies and law made by the institutions of both the European Union and the Council of Europe have been used. The reports of the European Union that deal with human rights have been collected at the Justice and Home Affairs website of the European Commission¹⁴. The reports of the Council of Europe have been collected at the Netherlands Ministry of Foreign Affairs as well as at the website of the Committee of Ministers of the Council of Europe and the website of the Parliamentary Assembly of the Council of Europe¹⁵. Also the reports prepared by the European Commission on the Fundamental Rights Agency, as well as reports, resolutions, recommendations and replies made by the Committee of Ministers of the Council of Europe and the Parliamentary Assembly of the Council of Europe on the desirability of the Agency have been used to form a clear picture of the benefit of the Agency. The sources of data have been collected at the EUR-LEX and PRE-LEX website of the EU, as well as at the Council of Europe desk of the Netherlands Ministry of Foreign Affairs, the website of the Committee of Ministers of the Council of Europe and the website of the Parliamentary Assembly of the Council of Europe¹⁶. Furthermore, transcriptions of debates held at the Dutch Senate between the Senate and the Dutch government about the establishment of the Fundamental Rights Agency have been used, as well as opinions expressed by the Senate and replies provided by the Dutch government have been used¹⁷. To support arguments with examples, cases have been presented that have been collected at the CURIA website of the European Court of Justice as well as the HUDOC search engine of the European Court of Human Rights¹⁸.

To answer sub question three (chapter five) and to draw conclusions, firstly the official documents prepared by the Commission on the Agency have been studied that have been collected at the PRE-LEX website as well as the website of the European Commission dealing with the Fundamental Rights Agency¹⁹. After that, the document that proposes the establishment of the Fundamental Rights Agency and the final document that regulates the Agency have been thoroughly reviewed and held against the conclusions of earlier chapters.

¹⁴ http://ec.europa.eu/justice_home/index_en.htm.

¹⁵ http://www.coe.int/t/cm/home_en.asp; <http://assembly.coe.int/default.asp>.

¹⁶ <http://eur-lex.europa.eu>; <http://prelex.europa.eu>.

¹⁷ Motie Dees (VVD) c.s., 7 maart 2006 ; Kamerstuk 22.112.

¹⁸ <http://curia.eu.int>; <http://echr.coe.int>.

¹⁹ http://ec.europa.eu/justice_home/fsj/rights/fsj_rights_agency_en.htm

To test the reliability of the answers to the sub-questions, experts on international human rights law and the negotiations surrounding the establishment of the Agency (both connected to the EU as well as the Council of Europe) have been interviewed²⁰. The results of these interviews will be held against the arguments already included in order to check their reliability and validity. Finally, a peer review of this thesis by some of the experts will further add to reliability and validity.

²⁰ Babbie, Earl, 1998, p. 129-131.

2. THE CONCEPTS OF THE EUROPEAN HUMAN RIGHTS REGIME

To understand the reasons behind the establishment of the Fundamental Rights Agency and the debate on the relation between the EU and the Council of Europe regarding the Agency, it is necessary to gain a clear picture of the underlying concepts of the European human rights regime. This will provide a sound starting point for the debate on the human rights structures present in contemporary Europe and the debate on place of the Agency within those structures. Therefore, firstly an overview of the concept of human rights, including a short historical overview of the development of human rights thinking, will be given, which will give an insight in how human rights are defined in Europe. This will lead to an overview of the current (dominant) discourse on human rights and human rights protection in Europe. Secondly, it is important to look at the political underpinnings of Europe's human rights regimes to understand why the regime exists in the first place and how the development of that regime can be explained. Lastly, insight will be given in how Europe's human rights regime provides human rights protection in order to generally understand the functioning of the human rights regimes of respectively the EU and the Council of Europe.

The aforementioned exercises will shape the context of the contemporary European human rights architecture in which the debate on the establishment of the EU Fundamental Rights Agency takes place.

2.1 What are human rights?

Human rights are rights one is entitled to simply because one is a human being²¹. They are international norms that specify in which way governments should treat their citizens, but differ from ordinary norms, which govern interpersonal contacts. Next to the fact that human rights serve as moral rights, human rights are also legal rights. A human right may exist as a shared norm between different groups of people, cultures and even civilizations, as a justified norm based on strong reasons, as a legal right at the national level or as a legal right at the international level. Human rights have over the course of time evolved to secure a firm place within the international (legal) order. The European Convention on Human Rights (ECHR) and the role the ECHR plays within the Council of Europe's and the EU's legal structure serves as an example in this respect.

The appearance of a form of organizing the state in which governmental authority over citizens is obliged to protect basic rights believed to be possessed by these citizens has its roots in Greek-Roman philosophy as well as Christian-Jewish religious tradition. It gained considerable momentum during the period of the enlightenment that saw the birth of several declarations such as the United States of America Bill of Rights of 1791 and the French Revolutionary Declaration of the Rights of Man and the Citizen of 1789²². The origins of human rights can thus be traced back far into history and rests on

²¹ Christian Tomuschat, 2003, p. 3; Jerome J. Shestack, 1998, p. 203.

²² Chris Brown, 2001, p. 600, 604; Charles Leben, 1999, p. 73.

the idea of natural law²³. Natural law thinking argues that there is an ethical-political system of norms that is independent of time and place to which all other systems of norms existent in a state are subordinate. This description holds two elements. First of all, according to natural law theory, every legal order has to meet certain ethical and political criteria of justice and human dignity to be able to claim legitimacy. Translating this notion, for example, to the contemporary situation, it can be noted that the EU puts a lot of emphasis on human rights in agreements with third countries. To increase its legitimacy towards these countries in applying human rights standards, it must make sure these human rights standards have a firm place within the EU itself too. Secondly, these political and ethical criteria are independent of time and place²⁴. From a historical point of view, natural law is connected with theology. Many early writers have connected the eternal moral commands and bans laid down by God with the secular power of the state. The idea was that when laws are incompatible with the word of God, they are invalid and the state would be exceeding its natural borders. However, since the 17th century, natural law theories have become more and more secularized and the basis for the normative ground for natural law was sought in a general characteristic of the human spirit or human nature that was independent of time and place. In practice it meant that natural law could be applied to any legal system, community, state, race creed and civilization and that every individual was subject to natural law while it was possible for everyone to understand the content and standards of natural law. More specific norms, such as human rights, were derived from this generally recognized ground²⁵.

The idea of natural law continued to be the ground on which political philosophers, such as Hugo Grotius, Thomas Hobbes and John Locke, based their notions of rights. This eventually led to an idea about rights that can be described as the *natural rights theory*²⁶. In this theory, human rights are positioned as a part of an individualist vision of society that defends the sovereignty of individuals expressed in the creation of a liberal and democratic state in which the government serves the citizens²⁷. The natural rights theory can thus be seen as a combination of both *universalism* and *particularism*, because basically the liberal position comes down to a contract between the government and its citizens in which the citizens demand human rights protection (as part of the rule of law) from their government against power of the state, of the church, of economic power and even of science and technology²⁸. Later developments on the international stage have somewhat addressed this tension between universalism and particularism by introducing international humanitarian reforms, but the concepts of sovereignty and non-intervention have always been part of the system²⁹.

²³ Chris Brown, 2001, p. 602.

²⁴ H.M. de Jong and B.R. Dorbeck-Jung, 1997, p. 43.

²⁵ H.M. de Jong and B.R. Dorbeck-Jung, 1997, p. 43; Chris Brown, 2001, p. 602; Jerome J. Shestack, 1998, p. 206.

²⁶ Chris Brown, 2001, p. 603-604; Jerome J. Shestack, 1998, p. 206-207..

²⁷ Charles Leben, 1999, p. 73; Jerome J. Shestack, 1998, p. 207..

²⁸ Chris Brown, 2001, p. 604; Charles Leben, 1999, p. 74.

²⁹ Chris Brown, 2001, p. 605-606.

After the First and Second World War a rapid development of law and standard setting related to human rights took place. In 1948 *Universal Declaration of Human Rights* was proclaimed by the United Nations General Assembly. It was the first time that the international community tried to define an internationally accepted norm for human rights that would be included into the domestic governments of its member states. 1950 saw the birth of the European Convention of Human Rights and the Fundamental Freedoms (ECHR), accompanied by the establishment of the European Commission on Human Rights and the European Court of Human Rights, an important protector of human rights in Europe establishing one of the first (regional) international human rights regimes. Next section will deal how this European human rights regime is further shaped by the contemporary discourse on human rights in Europe.

2.2 The contemporary discourse on human rights

The role human rights play in international organizations, such as the Council of Europe and the EU, is dependent on the human rights discourse used within these organizations. The present day discourse on human rights can be separated into three different strands: the philosophical, the political and the legal discourse on human rights³⁰. The philosophical discourse concerns itself with the (philosophical) foundations of human rights thinking. In the previous section it was explained that these foundations evolved from the ideas of natural law that led to the national rights theory, which in its turn evolved to the contemporary ideas on human rights. Nowadays, the debate on human rights within the philosophical discourse is virtually over. It is so, because the philosophical discourse concerns itself more with trying to determine what constitutes human nature in order to determine what human rights ought to be instead of focusing on human rights as such. During the course of history many different concepts of human nature have been developed, some of which are quite controversial. This is because the concept of human nature is based on a combination of natural, social, historical and moral elements within a given society³¹. A specific interpretation of human nature thus also determines what is considered as a human right in that given society. Therefore, to gain as much support for the human rights movement as possible, present day international human rights regimes are not based on specific philosophical grounds³². Critics argue that this is not really the case, as the philosophical foundations rest on Western thinking and the human rights movement is largely based in the ideas of political democracy, that for its turn has its roots in liberalism³³. However, this criticism mostly addresses the international human rights movement, institutionalized in the United Nations. This thesis addresses a regional human rights regime, namely the European one, where most countries have committed them-

³⁰ Tony Evans, 2005, p. 1051-1052.

³¹ Jack Donnelly, 2003, p. 15-16.

³² James D. Nickel, 1987, p. 9.

³³ Makau Mutua, 2006, p. 3-7.

selves to respect for fundamental rights by ratifying the ECHR. The very fact that almost all of Europe is subject to the same values on human rights that underly the ECHR, shows that in Europe there is widespread agreement on the philosophical foundations of human rights.

The second discourse that can be distinguished is the political discourse, connecting the overall human rights discourse with questions of power and interest. This discourse is also marginalized, because of much of the same reasons that explain why the philosophical discourse is marginalized: the debate on human rights within the political discourse does not concern itself with human rights as such, but more with matters of geo-political interest that, in their turn, are connected to human rights when that may be convenient. In this sense, human rights can serve as a source of conflict to secure interests in which cultural relativism, doubts about the legitimacy of international law and questions about the foundations on which the emergence of human rights rests add to the potential of the emergence of political disputes between countries³⁴. An expression of this practice is that judgments made by the European Court of Human Rights are rarely called into question by the members of the Council of Europe and that it is considered as 'not done' to use these judgments in political disputes between countries. An example of this expression is the case *Cyprus vs Turkey*. Although the dispute between the two countries is clearly a political dispute, the way to solve this dispute within the Council of Europe is sought in legal terms³⁵. Also, the human rights monitoring mechanisms of the Council of Europe operate independently from the organization's political forum, namely the Committee of Ministers. The Fundamental Rights Agency too is designed to work completely independent from the European Council, the European Parliament and the European Commission to prevent political misuse of the Agency's competences.

Therefore, the third discourse, the legal discourse, is considered to be the dominant discourse in Europe on human rights. It focuses on existing human rights law and human rights protection structures in Europe that have emerged after the Second World War to form Europe's human rights regime. The internal logic, coherence, elegance, meaning and development of (the application of) European human rights law are examined. The legal discourse tries to identify a certain set of values that supersedes those describing different cultures in order to create a set of "neutral" standards to which all reasonable people should subscribe. In this case, human rights law tries to transform the principles of international law that traditionally deals with questions regarding sovereignty, non-intervention and domestic jurisdiction towards so-called "transnational law"³⁶. Its purpose is to resolve the conflict between the universality of human rights and the traditional principles of international law. The main arguments that will describe the supposed benefit of the Fundamental Rights Agency are placed inside

³⁴ Tony Evans, 2005, p. 1052-1053.

³⁵ Case of *Cyprus vs. Turkey*, Application No. 25781/94, Judgement by the ECtHR, 10-05-2001.

³⁶ Tony Evans, 2005, p. 1052.

this legal discourse, since the debate very much centers around the institutional structures and competences of both the EU and the Council of Europe regarding their human rights structures and the way the competences of the Agency fit in these structures.

The neutral standards on human rights that underly Europe's human rights structures nowadays address numerous problems in order to protect people from familiar and arbitrary abuses of one's dignity and fundamental interests. In doing this, human rights provide minimal standards; they try to avoid the terrible, rather than try to reach the best³⁷. Another important characteristic of Europe's human rights standards is that they cover all countries and people living in Europe, although some human rights are limited to certain (groups of) people (for example the right to vote) and some human rights are focused on vulnerable groups (children, women or national minorities). To be universal and thus able to withstand cultural diversity and national sovereignty, human rights need strong justifications that apply everywhere in Europe in support of their high priority. Such strong justifications should rest on a fundamental interest in human rights protection and strong normative considerations³⁸. This fundamental interest in human rights protection that gradually found its way in the EU is the basis for the establishment of the Agency in the first place. It is an exponent of the idea that human rights are not only negative rights in the sense that a government or an international organization should only prevent human rights abuses from happening. Human rights should be actively enforced, creating an atmosphere of active enjoyment throughout the EU and Europe in general.

2.3 Why do human rights regimes exist?

The previous section gave an insight in how human rights are perceived in Europe. This shared European perception on human rights eventually led to the establishment of human rights regimes by European states. This section will provide an insight in why any government would want to be a part of an effective independent international system that limits the states sovereignty instead of the states safeguarding human rights themselves. It is important to understand this, because it can help to explain why the European human rights regimes are still being developed through, for example, the establishment of a Fundamental Rights Agency. Several theories can help explain why governments would like to be subject to such European human rights scrutiny.

Realism

Realism is one of the dominant theories of international relations. Central concepts of balance of power, national interest and self-help form the core of the realist theory. For a realist, the international system is in a constant state of anarchy, since there is no 'global government' to centralize power. Therefore, in order to protect their interests, states are responsible for their own well-being and survival

³⁷ Jerome J. Shestack, 1998, p. 216.

³⁸ James D. Nickel, 2006, <http://plato.stanford.edu/entries/rights-human/>

and should not depend on others to do it for them (including international organizations). If a smaller state is threatened by a bigger state or a group of states, it can join forces with other, similar states. In this case, states or groups of states seek to establish a balance of power, which is a state of affairs in which no state or group of states is able to dominate other states or groups of states³⁹.

Regarding international human rights regimes, realists argue that there must be a group of great and powerful states being able to force other states into accepting a certain human rights regime. Grounds for this behavior can be the use of human rights regimes to pursue geopolitical interests or the automatism in which powerful states seek to impose their dominant views onto less dominant states⁴⁰. As has been clarified in the previous section, the use of human rights in the (geo)political discourse is marginalized and as such the realist argument cannot fully explain the rationale behind human rights regimes.

Idealism

Neo-idealism, on the other hand, puts an emphasis on the fact that peace and justice are not self-evident, but require deliberate design. Interdependence through international organizations is the receipt for international peace and therefore international organizations should also be subject to processes of democratization. Civil society plays an important role in this too; democratization should take place at 'grass root level'⁴¹. Regarding international human rights regimes, the most dominant idealist explanations for the very existence of such regimes are based on altruism and the persuasive power of principled ideas. Governments bind themselves to human rights regimes, because they are convinced by the ideological and normative appeal of such regimes. The difference with realism is that idealists do not believe in the realist idea of states being coerced by dominant states in accepting the norms and values underpinning a human rights regime, eventually adopting the regime itself. They believe that altruistic beliefs and the moral motives underlying a human rights regime have persuasive powers of themselves. The adoption of international human rights regimes by states is thus a process of 'transnational socialization' or, as Moravcsik puts it, following the 'logic of appropriateness'. This process takes place because support for international human rights regimes is linked to domestic democracy and support for the rule of law. Democracies promote these democratic values to other countries and recognize other countries that do the same⁴².

In short: idealism explains the position of the great powers (or why they support international human rights regimes) and realism explains how these human rights norms have spread. The position of the great powers is mostly shaped by civil society after which these powers begin to export their ideas. The

³⁹ Tim Dunne and Brian C. Schmidt, 2001, p. 144.

⁴⁰ Andrew Moravcsik, 2000, p. 221-222.

⁴¹ Tim Dunne, 2001, p. 175.

⁴² Andrew Moravcsik, 2000, p. 223.

bottom line of both theories is that government, public opinion and civil society in established democracies are at the forefront of forming and enforcing international human rights regimes across borders, by enforcement, inducement or persuasion⁴³. Idealism may explain why well established and stable democracies stress the importance of participating in human rights regimes. However, in the Council of Europe many not so stable and less democratic states are member and thus bound by the same human rights treaties as the well established and stable countries. The representation of such countries cannot be explained very well by idealism. Therefore, Moravcsik offers another explanation of why human rights regimes are formed and expanded, which he calls republican liberalism.

Republican Liberalism

Republican liberalism offers an explanation for how institutions and society interact to support well functioning governments. Republican liberalism underlines that individuals form the basis of society, but institutions can help to coordinate and solve societal problems to promote the common good⁴⁴. These institutions form a system of checks and balances that reinforce each other in order to prevent the tyranny of one or many⁴⁵. Moravcsik connects this notion to the existence and development of human rights regimes. Republican liberalism argues that states act rationally and in doing so, they put their self-interest at first. International (institutional) commitments, like acceding to an international human rights regime, serves self-interest as a means to lock in particular preferred domestic policies. This is done to secure these interests in the light of future political uncertainty. Moravcsik mentions two important considerations that underlie a decision to delegate parts of policies to independent bodies. First of all, such a delegation means a restriction in a government's discretion. But, secondly, it reduces domestic political uncertainty. The first consideration is termed the 'sovereignty cost' of delegation to an international body. One could easily question the reasons why governments would like to give up a certain amount of their sovereignty, especially from a realist point of view. The second consideration gives an answer to that question. By delegating government's human rights policies to an international human rights body, governments restrain the behavior of future governments, thus taking away future uncertainty. By locking in their policy preferences, they curb the policy preferences of future elected governments. Moravcsik argues that, if this theory is correct, the strongest support for binding human rights regimes should be in recently established and potentially unstable democracies, since the chance of backsliding into less democratic forms of government is greater in these countries. A logical question then is: how do well established and stable democracies react to internationally binding human rights obligations? According to republican liberalism, they are bound to reject reciprocal human rights obligations, because the weighing of the sovereignty cost against the decrease in political uncertainty does not favor the latter, since their domestic policies already are of a high quality. This

⁴³ Andrew Moravcsik, 2000, p. 223.

⁴⁴ John Ferejohn and Frances Rosenbluth, 2006, p. 25.

⁴⁵ Ibid.

does not mean that already established democracies do not support international human rights regimes, quite the contrary. Their support focuses on persuading other countries to join internationally binding human rights regimes, especially recently established and potentially unstable democracies that neighbor their own country. In this case it is more likely that democracy in the region will be preserved and that is also in the interest of already established democracies, analog to the democratic peace theory^{46 47}.

To conclude, Moravcsik has tested the republican liberal theory on the emergence of human rights regimes by looking at the establishment of the European Court of Human Rights (ECHR) in the early

	Realism	Idealism	Republican liberalism
Motivation and tactics	Great powers employ coercion or inducement to unilaterally extend national ideals derived from national pride or geopolitical self-interest. Smaller states defend their sovereignty.	Altruistic governments and groups in established democracies seek to extend perceived universal norms. Less democratic states are socialized or persuaded through existing transnational networks (the 'logic of appropriateness').	Governments seek to prevent domestic oppression and international conflict through international symbols, standards and procedures that secure domestic democracy. They are constrained by fear that domestic laws might be struck down. International agreement reflects convergent interests.
Predicted national preferences on compulsory commitments	Supporters are led by democratic great powers. The weaker the state, the less support we observe.	Supporters are led by societal groups and governments in the most democratic states. The less established the democracy, the less support we observe.	Supporters are led by newly established democracies. Established democracies accept only optional or rhetorical commitments. Non-democracies oppose.
Predicted variation in cooperation	Greater concentration of power in the hands of great power democracies. More cost-effective coercion or inducement. More cooperation	More attractive norms, more salient, more legitimate exemplars, and the more established the transnational networks. More powerful socialization effects. More cooperation.	More immediate threats to democracy. Greater desire to enhance democratic stability. More cooperation.

Table 1: Establishing human rights regimes: theories, causal mechanisms and predictions⁴⁸.

⁴⁶ Andrew Moravcsik, 2000, p. 228-229.

⁴⁷ Democratic peace theory: liberal (or democratic) states do not go to war with other liberal (or democratic) states (Tim Dunne, 2001, p. 171).

⁴⁸ Andrew Moravcsik, 2000, p. 222.

1950s. His conclusion is that state behavior is very much conform the ideas of republican liberalism⁴⁹. He mentions the reluctance of the United States to accept multilateral constraints from the UN as well as the alignment of the former Soviet states towards the Council of Europe right after the fall of the Iron Curtain as examples of accordance with the republican liberalist argument⁵⁰. The process of deepening and expanding the European human rights protection system that has occurred for the last fifty years as well as future developments may not be solely explained by republican liberalism, but what is important is that it gives a better understanding of explanations, reasons and ideas to explain why human rights regimes exist in the first place and why these regimes are still in development⁵¹. For example, the possibility of participation in the Fundamental Rights Agency of EU candidate countries as well as countries having a Stability and Association Agreement with the EU can be explained from the republican liberalist argument. Bringing these countries under the scrutiny of the Agency ensures human rights compliance connected to the EU accession procedure for these countries, making it unlikely that future domestic governments will be able to evade this compliance. Also the wish to bring EU institutions under human rights scrutiny of the Agency can be explained from this theory, since legislation made by these institution will come under human rights review of the Agency, which also is an example of curbing behavior and fixing current human rights standards for future compliance within the EU.

2.4 How do human rights regimes provide human rights protection?

The previous section dealt with the *raison d'être* of human rights regimes that helped to explain why human rights regimes in Europe, such as that of the Council of Europe or the EU, are still in development. This section focuses on painting a general picture of how the European human rights regime operates to ensure member states' compliance with fundamental rights standards. In section 2.2, it was argued that the legal discourse on human rights proved to be the dominant discourse. Therefore, it is no surprise that human rights regimes are shaped through international legal structures. Human rights regimes thus share many characteristics of the working and mechanisms of international law. Within the European human rights regime, human rights function in such a way that they empower the ones who hold those rights⁵². When one holds a right, one is entitled to that what the right specifies. Thus essentially, claiming a right is activating an obligation someone else holds. Exercise, respect, enjoyment and enforcement are four principal dimensions of the practice of rights. These principles only come into play when rights are at issue or, more specific, when their enjoyment is threatened. Three major forms of social interaction that involves the four dimensions of rights can be distinguished⁵³:

⁴⁹ Andrew Moravcsik, 2000, p. 243-244.

⁵⁰ Ibid, 2000, p. 244-245.

⁵¹ Ibid., 2000, p. 244-246.

⁵² In this case, the European citizen, whose government is a party to the ECHR.

⁵³ Jack Donnelly, 2003, p. 9.

1. Assertive exercise: the right is actively enjoyed, claimed or pressed, thereby activating the one that holds an obligation specified by the right in question, who either respects the right or violates it.
2. Active respect: the one that holds the obligation the right in question specifies, takes that right into account and uses it to determine how to behave. In this case, rights are not exercised, but the right is respected and maybe even enjoyed. Therefore, enforcement procedures are never activated, although they may exist in case they are needed.
3. Objective enjoyment: rights are not at stake. In this situation rights are not given any thought, because enjoyment of the right is self-evident. Therefore exercise and enforcement are not involved.

<i>At stake?</i> ↓	Assertive exercise	Active respect	Objective enjoyment
Exercise	Yes	Yes	No
Respect	Yes	Yes	No
Enjoyment	Yes	Yes	No
Enforcement	Yes	No	No

Table 2: Principles of the practice of human rights at stake with different forms of social interaction.

It may be clear that the third interaction is the desired one, since ideally rights would remain out of sight and out of mind as well. One of the purpose of the Agency will be to provide the EU institutions information on human rights compliance when Community law is implemented by EU institutions or member states. This would mean a shift from active respect (in which human rights breaches are corrected after the breach already has occurred by the European Court of Justice in Luxembourg) to a form of objective enjoyment in which legislation is tested for human rights compliance before it takes effect. The desired outcome of the human rights movement in this respect is that a human right will eventually possess all the four dimensions (exercise, respect, enjoyment and enforcement) that would create a situation in which human rights are indeed out of mind and out of sight⁵⁴. However, the ability to claim a right should be available though, since having a right is important when one does not enjoy the object of what the right specifies⁵⁵.

Usually, international law of international organizations is characterized as ‘soft law’ in the sense that international law that is made by international organizations is often described as a non-binding normative instrument⁵⁶. When one talks about ‘hard law’ in international law, usually customary and treaty law

⁵⁴ James D. Nickel, 2006, <http://plato.stanford.edu/entries/rights-human/>

⁵⁵ Donnelly calls this the ‘possession paradox’: having (as in possessing) and not having (as in not enjoying) a right at the same time.

⁵⁶ Nigel D. White, 2005, p. 158.

based on consent is meant. However, true hard law is binding compulsory legislation, which international law normally is not. There is binding and compulsory international law that is the result of legislation made by a law making organ that has legitimate and legal powers to do so (for example the EC), but human rights law is ultimately based on consent⁵⁷. Below, tools are listed that are used by international organization to produce legal output in order to reach such a consent⁵⁸:

Recommendations

Recommendations are resolutions adopted by international organizations that do not bind their member states. It may seem that due to the absence of binding force, recommendations have little effect. But in properly constituted organizations (like the Council of Europe) recommendations can serve as an important legal tool. States subscribing to a specific recommendation will enjoy the benefit of the doubt when their conduct becomes questionable, while states rejecting certain recommendations can become a target for further scrutiny of compliance with their international obligations. Recommendations thus can give important political signals and are often used by the Parliamentary Assembly of the Council of Europe (PACE) to notify the Committee of Ministers of the Council of Europe (CM) of possible human rights issues that are at stake in one or more of the Council's member states.

Declarations

Declarations are a special kind of recommendations in the sense that a recommendation can serve as a legal basis for a declaration. A declaration does not have binding power, but it is presumed that member states comply with the declaration and that conformity with the declaration is lawful. If a declaration is meant to reflect customary law, states are generally bound to that declaration, since they are obliged to compliance with the general principles of international law. Declarations can thus be seen as general principles of international law written down in non-binding resolutions. The Council of Europe makes extensive use of this tool to publicly notify of certain human rights issues might these exist in certain member states. Also the EU makes use of declarations on human rights, but these are mostly targeted at third countries.

Determinations

A determination is the application of the general principles, to which member states have committed themselves by becoming a member of that particular international organization that are mostly laid down in the constituent document of the organization, to a particular set of facts or a dispute. Usually, determinations have no binding effect, but when they reflect customary law or when a thorough process of elaboration has led to a determination, determinations can have binding effect to member states. An example of a determination is the Art. 52 procedure of the ECHR that has been used by the Secretary General of the Council of Europe to ask the Council of Europe member states in which way they

⁵⁷ Nigel D. White, 2005, p. 158.

⁵⁸ Ibid., 2005, p. 168-187.

applied the Council of Europe standards on the rule of law and human rights with regard to the supposed existence of CIA flights for the transportation of detainees to alleged secret prisons in Council of Europe member states.

Conventions

Many international organizations have developed a system in which conventions are formulated and presented to their member states for signing and ratification. Sometimes even non-member states can become a party to the organization's convention. Conventions adopted by international organizations are also supervised by these organizations. A state which is party to a convention, but which fails to meet these provisions, may be criticized by the organization and the other member states. Secondly, when a member state does not sign and ratify a certain convention, it might be compelled to publicly defend this decision and to report on the discrepancies between domestic practice and the internationally accepted practice reflected in that convention.

However, in last instance states still decide whether to sign and/or ratify a convention. Pressure from the international organization and other member states may vary and may not be that strong. Therefore, it can take a long time before a convention can enter into force and an international organization may thus be better off formulating recommendations and declarations. Secondly, when universal ratification is absent, a situation in which different member states have different obligations may well occur. In this case too, an organization may be better off formulating recommendations and declarations, since these are universal. The Council of Europe's human rights machinery for a great deal exist through the conclusion of conventions that can be signed and ratified by its member states. Naturally, the effectiveness as well inclusiveness of the Council's human rights machinery greatly depends on the member states that actually ratify these conventions. Some conventions, such as the ECHR, have to be ratified by member states before they can become a member of the Council of Europe.

Legal order

The statutes or the constitution document of each international organization contains its legal skeleton. Originally it was not envisaged that international organizations would create their own law making competences, but the increased occurrence of externalities between states and also between organizations made it necessary that these organizations did so. An organization with an independent will based on a constitutional framework has often created a well developed (some more than others) legal order as legal output. This legal output is not formally seen as a separate source of international law, but it does contribute greatly to the development of legal orders or so called regimes. A regime can be defined as '*...a set of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations*'⁵⁹.

⁵⁹ cf. Nigel D. White, 2005, p. 185.

A consequence of the existence of many legal orders or regimes is that in many cases competences of international organization overlap each other. Since there is no centralized international law-maker, overlapping legal orders can lead to conflicts between international organizations⁶⁰. It appears that there are few rules that govern the hierarchy between regimes, although customary law⁶¹ and other basic principles of international law remain valid. It may be clear that the establishment of the Agency and the subsequent concerns expressed by the Council of Europe constitute an example of two international organizations that see their competences on human rights clash with each other.

Binding decisions

The last tool described is also the strongest tool that international organizations may have at their disposal. However, because of its strength, there are few international organizations that actually can take decisions that are legally binding to their member states. The organization needs to possess supranational powers in order to make this a possible enforcement measure. Organizations that can take binding decisions in certain policy areas affecting their member states are for example the EU and the UN. The Council of Europe's European Court of Human Rights can make binding judgments on human rights issues with which the Council's member states have to comply.

The general enforcement measures presented above can be divided into three general types of measures to enforce human rights compliance: sanctioning, shaming and co-optation. These three types of measures are an example that, although international human rights law is an important part of international law, human rights regimes play their own, specific role in international law. The distinction lies in the fact that international human rights regimes have a different aim than other international arrangements. Most international organizations are set up to solve externalities between sovereign states, regarding economic, environmental or security issues that happen when sovereign states interact with each other. International human rights regimes, however, are set up to solve internal, domestic problems of states. To solve these problems, interstate action is not required: most international human rights regimes have independent courts and commissions that deal with individual claims of citizens. These claims are judged against the international commitments the state has subscribed to, even when domestic rules responsible of breaking these commitments have been enacted and enforced using perfectly working democratic machinery, consistent with the domestic rule of law. Therefore, international human rights regimes not only challenge traditional international law, as well as traditional international relations realist thinking, but also liberal ideas of direct democratic legitimacy and self-determination⁶². Some even described the emergence of international human rights regimes as "...the most radical development in the whole history of international law..."⁶³. Although, the three types of measure listed below are not

⁶⁰ cf. Nigel D. White, 2005, p. 186.

⁶¹ Jus cogens

⁶² Andrew Moravcsik, 2000, p. 217-218.

⁶³ cf. Andrew Moravcsik, 2000, p. 218.

exclusive to international human rights regimes, they form an important part of the enforcement machinery that is at the disposal of these human rights regimes. Below, the three types of measures are explained:

Sanctioning

To ensure that countries do stick to their human rights obligations, sanctions can be imposed on countries when they do not stick to their obligations. Sanctions usually take on the form of economic sanctions. In this case, the economic relations between (a group of) countries or between an international organization and (a group of) countries are linked to a satisfactory compliance with international human rights norms. When a country does not fulfill its human rights obligations, measures that negatively impact the countries external economic relations are used to curb the country's behavior into the right way⁶⁴. The EU uses sanctions against third countries when these countries do not comply with the human rights clauses the EU has incorporated into economic agreements with these countries. Surprisingly, however, the EU has never imposed sanctions against its own member states when they are in breach of their human rights obligations⁶⁵. That role is performed by the European Court of Human Rights that is part of the Council of Europe.

Shaming

The idea of 'naming and shaming' is to steer bad behavior of member states. When member states do not comply with their human rights obligations, the use of naming and shaming aims at creating an international and domestic climate of opinion that is critical of the domestic practices of the respective member state. Civil society and the media are used to give insight into domestic practices of specific countries that do not comply with international human rights standards. Pressure from civil society, international organizations and other countries should change a country's behavior into the right direction⁶⁶. A great deal of the Council of Europe human rights monitoring machinery makes use of this practice by producing and publicizing reports on certain aspects of human rights compliance by a certain member state.

Co-optation

Co-optation is the process in which governments absorb international legislation into their own domestic judicial structure in order to co-opt with international human rights standards through their national legislation. National courts can use treaties from international organizations and jurisprudence from international courts in their judgments. Lawmakers can judge new laws to existing international norms and values. The Council of Europe not only uses shaming to curb a member state's behavior. Usually,

⁶⁴ Andrew Moravcsik, 1995, p. 161.

⁶⁵ Art. 7 TEU provides the means to do so, but, as will be explained in Chapter three, the measurements under Art. 7 TEU are regarded as too strong.

⁶⁶ Ibid., 1995, p. 168.

when one of the Council's monitoring tools has found an irregularity in the respective member state's human rights compliance, the member state is urged to change its domestic legislation to prevent future occurrences of the same kind when applicable.

Figure 2 identifies the different tools mentioned earlier into the concepts of sanctioning, naming and shaming or co-optation. As can be seen, there are little sanctioning tools available, since most international organizations do not have the power to impose such measures. Of most use are the shaming tools that give organizations a political means to steer the behavior of their member states when they do not follow their obligations. When declarations and determinations reflect customary law, one could argue that both tools are also tools of co-optation, since states are anyhow bound to customary law. Lastly, conventions and the legal output that forms the legal order of an international organization should be reflected into the national judiciary system of member states. If that is the case, it means that member states co-opt with the objects specified and provided by the conventions and the legal order. This should give a sufficient overview of how human rights protection is enforced and how that can be characterized. In later chapters, the overview presented here will be used to generally characterize the EU as well as the Council of Europe.

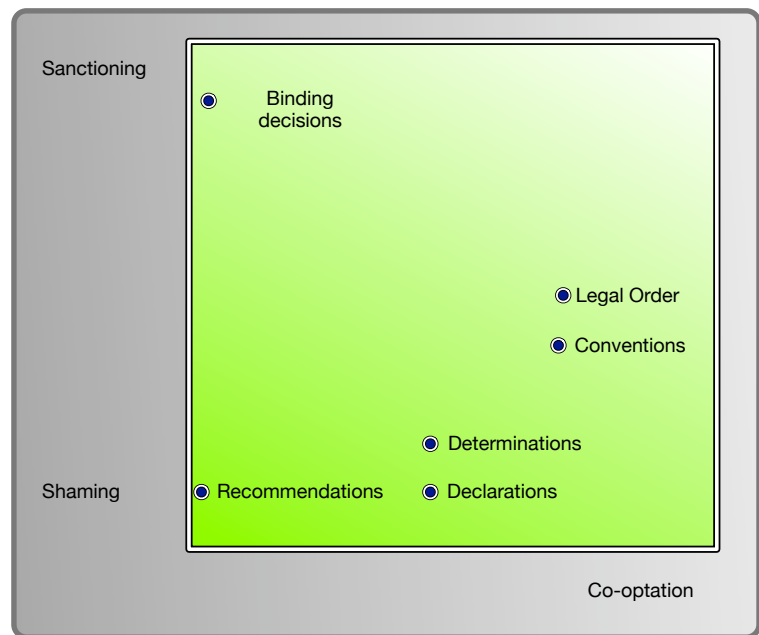


Figure 2: A general overview of human rights law enforcement tools.

2.5 Concluding remarks

Human rights protection occurs in a human rights regime. The *raison d'être* of Europe's human rights regime can best be explained by the republican liberal theory. The main point of this theory is that individual countries are willing to give away a part of their sovereignty on human rights issues to, in this case, the European human rights regime in order to create long term certainty on ensuring respect for human rights within those individual countries. The debate on the Fundamental Rights Agency takes place within the context of this European human rights regime and is an expression of the further-going development of the human rights structures in Europe as developed by the Council of Europe and the EU. Therefore, the debate on the establishment of the Agency also concerns the relation between the Council of Europe and the EU. This chapter thus aimed at clarifying the underlying general concepts of the European human rights regime. The development of this regime gained a considerable

momentum after the Second World War. It has evolved from philosophical foundations inspired by natural law and the natural rights theory developed by the likes of Hugo Grotius, Thomas Hobbes and John Locke. This evolution of the human rights regime currently present in Europe contains three distinguishable elements compared to earlier ideas on human rights⁶⁷:

1. Europe's human rights regime puts an emphasis on protections against discrimination and equality before the law. Especially the fight against discrimination and racism and the promotion of equal treatment of women are contemporary phenomena⁶⁸. The promotion of equality also shows itself through the inclusion of welfare rights. Gradually, poverty, exploitation and discrimination were seen as a threat to human dignity. The notion grew that poverty and other inequalities are subject to influence by the government through changes in economic and social policies, together with the belief that political, social and economic systems are intertwined with each other and that for example certain political happenings are the result of spill over effects from a country's economic situation and vice versa. The development of welfare systems that granted welfare rights to citizens were seen as guarantees to prevent such spill overs to take effect. Spill over effects can help to explain why the EU tries to increase its competences on human rights issues. Not only have the EU's competences in economic policies increased over the course of years, also in the field of security, justice and police cooperation its competences are expanded. Fundamental rights are connected to these policy fields and especially where it concerns exclusive EU competences, the notion grew that fundamental rights must be taken into policy considerations.
2. The liberal view on human rights contains two basic elements, namely an individualistic view on society and the idea of some kind of social contract between individual citizens and their government. Current human rights declarations depart from individualism in the sense that they include the right to family life and see people as part of a larger family or (a particular cultural) community (see for example rights of national minorities)⁶⁹. The linkage with a social contract theory is also mostly gone and most human rights declarations do not point to a specific philosophical groundwork on which present day human rights protection structures are based. This shows the idea of universalism and the need for acceptance of human rights protection as widely as possible. It is this idea that underlines the Council of Europe's concerns regarding the Agency; the creation of an EU Agency that deals with human rights might threaten the universality of the Council's human rights standards, as the EU might develop its own standards. The Council of Europe refers to this as *'the development of double standards that might create a Europe of dividing lines'*⁷⁰.

⁶⁷ James D. Nickel, 1987, p. 7-11.

⁶⁸ See for example Art. 141, 12, 13, 39, 34(3) EC Treaty.

⁶⁹ Art. 8 ECHR

⁷⁰ Jean-Claude Juncker, 2006, p. 4-9.

3. The last characteristic that separates present day human rights from the liberal position is the internationalization of human rights in general. Possible human rights violations by nation states towards their citizens are mostly investigated by (regional) international organizations, such as the United Nations (UN), the Council of Europe or the European Union. Possible breaches by individual countries of their human rights obligations are mostly followed by economic and/or diplomatic sanctions implemented by those organizations. Human rights are thus protected by a substantive (and possibly overlapping) international legal order. Most notably the Council of Europe has developed an extensive human rights monitoring machinery that serves to protect and promote human rights in Europe. The establishment of the Agency, however, shows that the development of regional legal structures and institutions to protect human rights is still an ongoing development.

Europe's human rights regime is shaped through legal structures developed by the Council of Europe and the EU. It shares many characteristics of the working and mechanisms of international law, including the tools used by international law to enforce compliance with its provisions that mostly rely on naming and shaming. The debate on human rights within Europe therefore predominantly takes place within the legal discourse. The discussion on the establishment of the Fundamental Rights Agency is also placed inside this legal discourse. It means that this discussion very much centers around the institutional structures and competences of both the EU and the Council of Europe regarding their human rights structures and the way the competences of the Agency fit in these structures. Therefore, the following chapters will firstly deal with the human rights structures developed by the EU. An assessment of the need within the EU for the Agency will also be made. After that, the focus will shift towards the human rights structures developed by the Council of Europe and the main concerns of the Council of Europe towards the Agency. It will provide the possibility to determine place of the Agency within these structures as well as characterizing the relation between the Council of Europe and the EU regarding the establishment of the Agency.

3. THE HUMAN RIGHTS DIMENSION OF THE EU EXPLAINED

The previous chapter saw a general characterization of the concept of human rights protection offered by human rights regimes. Now that a clear understanding of these concepts has been given, it is time to look at how human rights protection is organized in the EU. It will be argued that especially in the last decade the EU increasingly puts more emphasis on its own,

Since the Treaty of Maastricht the EU is structured according to the so-called pillar structure. The first pillar contains the European Communities (currently the EEC and Euratom). The second pillar contains the provisions for the Common Foreign and Security Policies (CFSP), including European Security and Defense Policies (ESDP). The third pillar contains the provisions for Police and Judicial Co-operation in Criminal Matters (PJCC). There is a difference between the first and the other two pillars. The first pillar is supranational in nature, which means that the EC has exclusive competences to which the member states are bound. The second and third pillars are intergovernmental pillars. It means that in order to decide on matters that arise in these pillars, consensus between the

member states has to be reached, whether by unanimity or by (qualified) majority voting.

The difference between the supranational and the intergovernmental nature is important when looking at the competences of the ECJ and the accompanying Court of First Instance (CFI). They both have judicial competences regarding Treaty provisions only towards those that are in the first pillar. The second pillar falls outside the jurisdiction of the ECJ and the CFI. As far as the third pillar is concerned, the ECJ does have jurisdiction over certain aspects of

policy fields within the third pillar that have been moved to the first pillar via the *passerelle* measure introduced in Maastricht, but the principle of direct effect does not apply to these provisions.

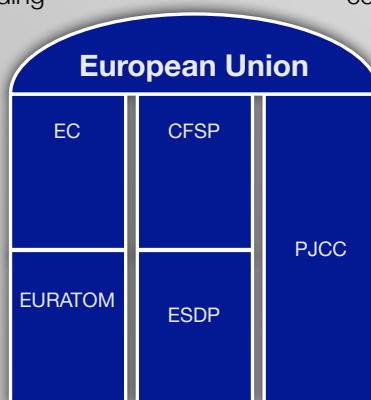


Figure 3: The three pillar structure.

internal development of human rights policies. The gradual inclusion of fundamental rights protection in the EC/EU structures is

both a negative as well as a positive process. In chapter one it was argued that human rights enforcement should foremost be a positive process in which human rights are actively enforced. The human rights policy development process within the EU can be described as negative in the sense that the first steps towards including any kind of fundamental rights protection into the judicial structure of the European Community (EC) can be seen as prohibitions of violations provided by the European Court of Justice (ECJ). The development can be further characterized as *constitutionalizing* fundamental rights protection in the EU/EC structures, where fundamental rights act as checks on the execution of EU and member state (when implementing Union law) acts⁷¹. Essentially, in this approach fundamental rights serve as external limits on the exercise of powers under EU law⁷². Later developments saw political initiatives to include fundamental rights protection in the EU aimed at putting in place a system of governance alongside the EU's formal structures⁷³. This can be described as a more positive ap-

⁷¹ Olivier de Schutter, 2004, p. 2-3.

⁷² Ibid., 2004, p. 4.

⁷³ Ibid., 2004, p. 2.

proach that is necessary to create the desired atmosphere of active enjoyment of human rights⁷⁴. A positive approach regards fundamental rights not as limits to power, but sees fundamental rights protection as an explicit policy *objective* that should be promoted by the EU⁷⁵.

This chapter will firstly deal with the process of negative inclusion of fundamental rights protection after which the focus will shift to the political initiatives taken by the EU. These initiatives aim at gradually including fundamental rights protection in the EU structures, which is the positive approach. It is deemed necessary since the EU over the course of years saw an increased competence in human rights sensitive areas, such as the second and third pillar policy areas, but also because of the so-called *passerelle* measure that transferred several provisions that touch upon human rights from the third to the first pillar. This overview of both processes will provide a characterization of the EU in terms of its competence in the area of human rights. Lastly, the possible benefit of the Agency in terms of the EU's human rights competences and compliance will be assessed.

3.1 EU and human rights: a negative approach

Originally, when the European Community (EC) was founded in 1957, no provisions were made in the Treaty of Rome regarding human rights, since the purpose of the EC was restricted to promoting and ensuring economic integration between its member states⁷⁶. The absence of any reference to a more political union including references to respect for fundamental rights can be explained by the failure of the European Defense Community (EDC) and subsequently the European Political Community (EPC). Jean Monnet designed a plan that had some similarities to the European Coal and Steel Community (ECSC): he proposed to combine French and German forces and thus form a European army. It eventually led to the proposed establishment of the EDC. The plan was officially announced by French Prime Minister René Pleven in October 1950, hence the name Pleven plan. While contemplating on the EDC, a need was felt that together with the common defense initiatives, it was also necessary to deploy common European foreign policies. The reason behind this was that the member states deemed it necessary that a common defense should be accompanied by the capability to form foreign policies. The proposed treaty of the EPC incorporated the rights specified in the European Convention Human Rights (ECHR). The initiatives to establish the EDC and subsequently the EPC were linked to each other. Both initiatives, however, were eventually not ratified. The EDC Treaty was signed, but never ratified, due to French reluctance to do so. The demise of the EPC was accompanied by the EDC failure⁷⁷. When setting up the EC, lessons learned from the EDC and more importantly the EPC failure seemed to have laid down the functional foundations of the EC Treaty, together with the member

⁷⁴ Philip Alston and J.H.H. Weiler, 1999, p. 10-11.

⁷⁵ Olivier de Schutter, 2004, p. 4.

⁷⁶ Bruno de Witte, 1999, p. 863.

⁷⁷ Stephen George and Ian Bache, 2001, p69-72; Paul Craig and Gráinne De Búrca, 2003, p. 318.

states' wish to prevent interference by the EC in traditionally protected constitutional rights⁷⁸. Added to that, it was generally felt that fundamental rights protection should remain in the realm of the nation state and the wish to prevent a failure of the negotiations on the EC Treaty because of disagreement on fundamental rights⁷⁹. Nevertheless, over the years human rights grew to be a part of the constitutional practice of the EU, starting with the involvement of the European Court of Justice (ECJ) in establishing human rights protections within the European Community (EC).

According to Alston and Weiler 'it has been the Court that has put in place the fundamental principles of respect for human rights which underlie all subsequent developments'⁸⁰. The first steps towards including fundamental rights protection into the legal structure of the EC were thus taken by the ECJ. These first steps go hand in hand with the establishment of direct effect and supremacy by the ECJ in the 1960s. Direct effect was established following from case 26/62 *Van Gend & Loos* in which the ECJ ruled that individuals could gain legal rights following from EC law and that those rights could be invoked before national courts⁸¹. A problem that soon appeared as a consequence of direct effect was that the status of EC law compared to national and international law became unclear. As a response, the ECJ described the legal order of the EC as created by its member states as an entirely new legal order that was different from international law. According to the ECJ, by creating the EC, the member states had agreed to give up a part of their sovereignty and transfer that sovereignty to the institutions of the EC. This idea was strengthened by case 6/64 *Flaminio Costa v. ENEL* in which the ECJ expressed the supremacy of EC law above (incompatible) national law⁸². Supremacy means that law made by the EC takes precedence above national law, especially when national law of member states proves to be incompatible with Community law..

The establishment of direct effect and supremacy of EC law caused tension with national constitutional courts, mainly those of Germany and Italy, which declared that they would not recognize EC law where that would lead to a clash with the provisions of constitutional law that also included and still includes provisions for the protection of fundamental rights, especially since the 1957 EC Treaty contained no reference to fundamental rights at all. In the *Internationale Handelsgesellschaft* ruling, the ECJ then decided to "*also recognize constitutional principles common to member states and international treaties of which they are signatories*"⁸³. This decision was further emphasized by the *Nold* ruling that added that interna-

⁷⁸ Bruno de Witte, 1999, p. 863.

⁷⁹ Darcy S. Binder, 1995; Arjan Kleinhou, 2004, p. 831.

⁸⁰ Philip Alston and J.H.H. Weiler, 1999, p. 52.

⁸¹ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963], ECR 00001; Paul Craig and Gráinne De Búrca, 2003, p. 179-180.

⁸² Case 6/64, *Flaminio Costa v E.N.E.L.* [1964], ECR 00585; Paul Craig and Gráinne De Búrca, 2003, p. 277-278.

⁸³ Bruno de Witte, 1999, p. 863-864; Case 11/70, *Internationale Handelsgesellschaft* [1970], ECR 01125.

tional human rights could also provide inspiration^{84 85}. With this recognition of fundamental rights the ECJ made clear that the Community's institutions ought to respect fundamental rights⁸⁶. This step was accompanied by the recognition by the ECJ of the European Convention on Human Rights (ECHR) as expressed in the *Rutili* case⁸⁷, although no formal link between the ECJ and the ECHR was made; the ECJ did not and still does not use the ECHR or other international treaties providing provisions for the protection for fundamental rights as a direct source, but rather points at the general principles underlying these treaties and the fact that EC member states have subscribed to these principles by having ratified the respective treaties. Important to note here however is that the indirect role the ECJ gave the ECHR in its judicial structure in turn led to recognition of the EC's competences in the area of fundamental rights by most national and/or constitutional courts⁸⁸.

3.2 Internal EU human rights competences: towards a positive approach?

The initiatives of the ECJ were gradually supported by political initiatives made by the other EU institutions. In 1977 the European Parliament (EP), the European Council and the European Commission affirmed the stance of the ECJ by presenting a joint declaration that underlined the development of referral to general principles of fundamental rights by the ECJ. This declaration also provided a commitment by these three institutions to respect fundamental rights in the exercise of their powers. This declaration was not legally binding; it merely had a political impact⁸⁹. However, it can be seen as a first, but small, step towards a more positive approach to human rights within the EC⁹⁰. This positive step was needed, since the ECJ encountered two issues when applying fundamental rights protection⁹¹. The first issue concerns the way the ECJ should determine its sources of general principles of fundamental rights. As explained in chapter one, human rights serve as a minimum standard. However, the ECJ faced a tension between providing a lowest common denominator used within a wider Europe and providing a universal maximum standard within the EC itself that would serve as the minimum standard of human rights protection within the EC. As already noted, the ECJ sought inspiration in the general principles already endorsed by the member states through the international agreements to which they are parties, most notably the ECHR. However, initially the ECJ did not see the ECHR as providing enough protection of fundamental rights, since its standards in doing so were deemed too low by the ECJ to serve as a charter for the EC. On the other hand, the ECJ did not strive to provide a universal maximum standard either. To make it a bit more complex, in case C-49/88 it became clear that the ECHR was seen as the standard by the ECJ against which the EC should measure its protec-

⁸⁴ Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Ruhrkohle Aktiengesellschaft* [1977], ECR I-06017.

⁸⁵ Bruno de Witte, 1999, p. 865.

⁸⁶ Darcy S. Binder, 1995.

⁸⁷ Case 36/75, *Roland Rutili v Ministre de l'intérieur* [1975], ECR 01219.

⁸⁸ Cf. Andrew Moravcsik, 1995, p. 177.

⁸⁹ Paul Craig and Gráinne De Búrca, 2003, p. 323-325.

⁹⁰ Philip Alston and J.H.H. Weiler, 1999, p. 10.

⁹¹ Paul Craig and Gráinne De Búrca, 2003, p. 327.

tion of fundamental rights, although still no formal link was made⁹². Nowadays, however, the ECJ and the Court of First Instance (CFI) regularly refer to the ECHR as an important source for the general principles of fundamental rights. Also Article 6 of the Treaty on the European Union (TEU) refers to the ECHR as a fundamental source of the general principles of fundamental rights⁹³. Currently, the ECJ relies not only on the material provisions, but also on the jurisprudence of the European Court of Human Rights (ECtHR)⁹⁴.

The second aspect concerned the determination of what fundamental rights actually constitute, since interpretation of fundamental rights differs per member state. The ECJ only incorporated those provisions, which were already part of constitutional traditions and international agreements and is only able to apply those provisions to first pillar provisions⁹⁵. But, especially concerning constitutional agreements, differences between the constitutional arrangements of the member states exist to a large degree. For example, EU member states may have different ideas on how certain rights should be protected. This is a direct consequence of the different views that each member state has on the status of certain rights. Look for example at how abortion is dealt with in the Netherlands and how it is dealt with in Portugal or Ireland. The same applies to gay marriages and many other issues.

In this respect, a more infamous example, that showed the assessment between different principles the ECJ had to make, is the case *Omega laserdrome*⁹⁶. *Omega laserdrome* was a German operator that organized games which Germany felt to be in breach with fundamental rights. However, the games were imported from the UK and the prohibition to play the games would violate the internal market. This case showed that the ECJ was going to be presented with the issue on how it is going to determine the status of certain rights in EC law. More examples exist⁹⁷. In the Netherlands gay marriages are lawful. A Dutch man married a man from the Philippines and both moved to Germany, because the man was offered a job there. But the spouse of the Philippines was denied a German permit of residence, because Germany does not recognize gay marriages. Dutch law prohibits abortion after the 21st week of pregnancy. However, in Belgium and the UK abortion is allowed until the 26th week of pregnancy. That is why many doctors in the Netherlands direct their patients to either Belgium or the UK when they are beyond their 21st week of pregnancy. This practice is allowed, because of freedom of movement of persons, goods and services, however, it undermines Dutch laws on abortion. In another example, British press enjoys considerable freedom of expression, which allows it to be very critical on issues in or

⁹² Case 49/88, *Al-Jubail Fertilizer Company (Samad) et Saudi Arabian Fertilizer Company (Safco) v Council of the European Communities* [1990], ECR I-03187.

⁹³ Paul Craig and Gráinne De Búrca, 2003, p. 329.

⁹⁴ Philip Alston and J.H.H. Weiler, 1999, p. 53.

⁹⁵ Bruno de Witte, 1999, p. 869.

⁹⁶ Case C-36/02, *Omega Spielballen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-09609.

⁹⁷ cf. one of the interviewees.

outside British society. British tabloids and newspapers are also sold outside the UK in other EU member states in which stronger traditions on freedom of expression exist. Should British newspapers hire 27 lawyers to check if either article might get them in trouble somewhere else in the EU?

What these examples show is that the EU has created its very own legal order, which calls for EU specific solutions concerning harmonizing standards on fundamental rights issues across the member states that can only be provided by the EU itself. The outcome of this process may well disappoint some member states, as these fundamental rights standards may considerably differ from their own constitutional or legal provisions regarding fundamental rights. And even if member states agreed on the same set of standards, they might not want the ECJ be the body that holds them to those standards, since other institutional frameworks exist to that point, such as the Council of Europe. It is thus no surprise that the inclusion of human rights review was a process that started and proceeded gradually⁹⁸. According to Binder, developments in this process ‘have been characterized by a “push and pull” between the various relevant actors in the Community’. The ECJ seemed to be careful not to overstep its powers in applying fundamental rights protection⁹⁹, however, this did not prevent the ECJ to point out in its *ERT* ruling the liability and responsibility of EU member states to prevent restricting fundamental rights when they implement or rely on derogations from Treaty obligations, thus within the sphere of Community law¹⁰⁰. Another landmark case in this respect is the *Wachauf* case, which pointed out the responsibility for member states to respect fundamental rights when implementing Community rules¹⁰¹.

The difficulties described above urged the EU to give fundamental rights a firmer place within the EU. Therefore, starting with the Treaty of Maastricht, the EU gradually commenced with codifying fundamental rights protection into the legal order of the EU. Next to these codification initiatives, efforts to more firmly encapsulate fundamental rights protection within EC/EU structures have focused on two methods: EC/EU accession to the ECHR and the formulation of an EU bill of rights (EU Charter of Fundamental Rights), giving rise to positive and mainly political developments to ensure the respect for fundamental rights within the European Union¹⁰².

3.2.1 Codifying fundamental rights into the Treaties

The jurisprudence that created the legal structure for human rights protection in the EC and exclusively developed by the ECJ was initially not matched by political initiatives that would add to the develop-

⁹⁸ Paul Craig and Gráinne De Búrca, 2003, p. 348.

⁹⁹ Darcy S. Binder, 1995.

¹⁰⁰ Case 260/89, *Elliniki Radiophonia Tiléorassi* [1991] ECR I-2925; Bruno de Witte, 1999, p. 865.

¹⁰¹ Case 5/88, *Wachauf v. Germany* [1989] ECR 2609; Bruno de Witte, 1999, p. 870.

¹⁰² Vaughne Miller, 2000, p.9.

ment of a pro-active human rights policy¹⁰³. As already noted, the European Council, the European Parliament and the European Commission in 1977 jointly declared their approval for the steps the ECJ had undertaken in the field of human rights protection until then¹⁰⁴. Several other political declarations followed, all characterized by their non-binding nature. In 1986 another Joint Declaration was made by the three institutions in the framework of the Single European Act. The European Council made various declarations and resolutions on racism and xenophobia. In 1989, the European Parliament presented a Community Charter on Fundamental Rights and Freedoms which eleven of the then twelve member states subsequently signed¹⁰⁵. Commitment to human rights protection received an increasingly important place within the EC, but these political declarations just remained rhetorical phrases¹⁰⁶. Although these various declarations and resolution provided a soft form of Community law, legal provisions that can be described as hard law only appeared with the Treaty of Maastricht, which saw the birth of the European Union, and subsequently the Treaty of Amsterdam and Nice.

The 1992 Treaty on the European Union (TEU), also referred to as the Treaty of Maastricht, saw the introduction of Art. F(2) TEU (renumbered to Art. 6(2) TEU by the Treaty of Amsterdam in 1997). Art. 6(2) TEU binds the EU to respect for the fundamental rights as safeguarded by the ECHR¹⁰⁷. The Treaty of Amsterdam saw the transfer of the third pillar provisions that have human rights implications (visa, immigration, border controls etc.) to Title IV of the EC Treaty¹⁰⁸. Title IV of the EC Treaty concerns itself with provisions on visas, asylum, immigration and other policies related to free movement of persons. The Treaty of Amsterdam amended Art. 6 to express that the 'Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'¹⁰⁹. Amsterdam also added a new Art. 7 TEU, which provided means to act against a member state that was in a serious and persistent breach of the rights mentioned in Art. 6 TEU¹¹⁰. The Treaty of Nice amended Art. 7 TEU. This was deemed necessary after a diplomatic controversy in which fourteen out of fifteen member states expressed their concerns about the entry of the right-wing party FPÖ into the government coalition of Austria. The measures effectuated created a *cordon sanitaire* around political and diplomatic life in Austria, but were not based on Art. 7 TEU. The measures consisted of fourteen bilateral initiatives, since it was felt that Art. 7 TEU was too strict to be effective. However, the Austrian situation was investigated and it turned out that the situation was not as serious as thought it would have been. Soon afterwards, the bilateral measures imposed by the fourteen mem-

¹⁰³ Philip Alston and J.H.H. Weiler, 1999, p. 10-11.

¹⁰⁴ Paul Craig and Gráinne De Búrca, 2003, p. 349.

¹⁰⁵ Ibid.

¹⁰⁶ Philip Alston and J.H.H. Weiler, 1999, p. 10.

¹⁰⁷ S. Blockmans, 2001, p.332.

¹⁰⁸ Vaughne Miller, 2000, p. 14; Steve Peers, 1999, p. 168-169; This is known as the so-called passerelle procedure.

¹⁰⁹ Art. 6(1) TEU.

¹¹⁰ S. Blockmans, 2001, p.332; Paul Craig and Gráinne De Búrca, 2003, p. 350.

ber states were lifted. Art. 7 TEU was subsequently amended in the Treaty of Nice, making it a more useful tool against possible future fundamental rights breaches by any of the member states¹¹¹. However, an independent human rights monitoring tool, such as the Agency, would be able to identify such possible human rights breaches under Art. 7 TEU by a member state in an earlier phase and would be able to advise the EU which measures to take in order to correct the situation.

In practice the establishment of the provisions such as Art. 6 and 7 TEU was merely an expression of already existing practices: the ECJ already took into account the ECHR and the jurisprudence created over the course of years by the European Court of Human Rights (ECtHR)¹¹². At that time the EU faced several developments, such as an ever closer, yet expanding Union, completion of the Single Market and the introduction of a single currency. Moreover, in Europe an increasing occurrence of racism, xenophobia and ethnic hate could be observed, together with tighter asylum policies that paved the way for a ‘fortress Europe’. Also, through the *passerelle* procedure, several third pillar provisions were transferred to the first pillar, whereas the EU competences in the second and third pillar substantially grew after the Treaty of Maastricht¹¹³. The increased complexity and bureaucracy of the EU also stressed the importance for a genuine EU human rights policy. Moreover, the forecast of having in between five and thirteen new member states entering the EU within a decade added to the sense that a new fundamental rights policy was necessary. This resulted in the view that human rights protection should become an objective of the EU, calling for the development of Community sources of competences for that¹¹⁴. A so called *Comité des Sages* (Group of Wise Persons) played an important role in this process.

The Comité des Sages presented a report, funded by the European Commission and presented at the European University Institute in Florence, calling for a EU Human Rights Agenda that should possess the following characteristics¹¹⁵:

1. The EU should recognize its legal obligations. Implementation of EU law, whether by institutions or by member states, should always be accompanied by full respect of international human rights obligations, derived from international treaties concerning human rights.
2. The EU human rights policy should be based on principles of universality and indivisibility.

¹¹¹ Ibid.

¹¹² Bruno de Witte, 1999, p. 866.

¹¹³ Vaughne Miler, 2000, p. 14.

¹¹⁴ Paul Craig and Gráinne De Búrca, 2003, p. 351.

¹¹⁵ Christopher McCrudden, 2001.

3. The policy should be consistent between internal and external policies, whereas the Union's external rhetoric on human rights should be matched with the development of the Union's internal policies and instruments on human rights.
4. The EU human rights policy needs a solid information base.
5. A process of mainstreaming should ensure that consideration is given to human rights concerns within the development of EU legislation and the activities of the EU, therefore making human rights an integral part of the EU's activities.

Besides these visible initiatives, there are several Treaty provisions that can serve as a basis for protection of certain human rights. Art. 12 and 13 of the EC Treaty provide the grounds to take measures to combat discrimination. Moreover, the Community has powers to promote fundamental workers rights as well as powers to develop policies for asylum, immigration and the free movement of persons. Another relevant Treaty provision is Art. 308 EC Treaty that states that "if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers". Obviously these provisions are only confined to the first pillar and it does not change the fact that neither the EU nor the EC has a general power to promote fundamental rights¹¹⁶. Two initiatives have tried to change that. Firstly, there is the debate whether the EU should accede to the ECHR and secondly there is the establishment of the EU Charter of Fundamental Rights. Both initiatives will be dealt with in the next section.

3.2.2 EU accession to the ECHR

The debate on the question whether the EU should accede to the ECHR is a long lasting debate. Already in 1979 the European Commission expressed its wish for the EC to accede to the ECHR. No consensus among the member states could be reached however. In 1982, the European Parliament adopted a resolution in which it pleaded for accession. After the Commission consulted the member states about the matter, again it appeared no consensus could be reached. In 1990 the Commission repeated its plea for accession and asked the European Council for a negotiation mandate. The European Council then turned to the ECJ to ask for a legally grounded opinion¹¹⁷. In 1996 the ECJ presented its Opinion 2/94, in which it stated that the Community lacked the competence to accede under article 308 EC Treaty¹¹⁸: 'No Treaty provision confers any general power on the Community institutions to enact rules on human rights or to conclude international conventions in this field'¹¹⁹. It means that,

¹¹⁶ Website EU: Fundamental rights protection within the Union.

¹¹⁷ Arjan Kleinhout, 2004, p. 831; Vaughne Miller, 2000, p. 16; Paul Craig and Gráinne De Búrca, 2003, p. 351.

¹¹⁸ Vaughne Miller, 2000, p. 16; Paul Craig and Gráinne De Búrca, 2003, p. 351.

¹¹⁹ Opinion of the Court of 28 March 1996, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94.

from an EU perspective, a treaty amendment is necessary to make EU accession possible¹²⁰. The ECJ opinion may have closed the door for EU accession to the ECHR, but the topic is still considered and discussed, mainly since it would add to the coherence of an EU human rights policy¹²¹. Arjen Kleinhout mentions several advantages of EU accession to the ECHR¹²²:

1. Accession would have a symbolic value, expressing the EU's interest in and commitment to safeguarding human rights protection within its structures.
2. Accession would allow for external review of the EU's progress and performance on human rights protection.
3. Accession would prevent divergent interpretations of the rights guaranteed in the ECHR and thus improve legal certainty, since the ECHR is not always interpreted in the same way by the ECJ and the ECtHR¹²³.
4. Accession would strengthen the position of both the ECHR and the ECtHR as safe guard for human rights in Europe.
5. Accession would prevent the possibility that the EU would be indirectly held accountable in a case before the ECtHR. The Court in Strasbourg in its jurisprudence has started to hold EU member states collectively accountable for EU acts¹²⁴.
6. Accession would fill current gaps in legal protection concerning fundamental rights. Most notably would it extend the possibility for the EU citizen to get legal protection, since access to the ECtHR is not restricted to certain kind of acts in contrary to access to the ECJ and the CFI¹²⁵.

Although formally there is no link between the ECJ and the ECHR, there is a strong material connection as all the EU member states are also party to the ECHR. However, it does not prevent that sometimes different interpretations of the ECHR between the ECJ and the ECtHR emerge. Critics argue that the ECJ uses human rights rhetoric to essentially enhance economic rights within the EC, thus favoring market rights above fundamental rights¹²⁶. Other critics argue that the ECJ has attempted to act as another ECtHR, while not specifically entrusted with the task of protecting human rights within the EC. Another critical voice points out that the ECJ has tried to extend its influence on matters that remain the primary concern of member states, given the political, societal and cultural differences between member states¹²⁷. However, according to Dean Spielmann, there is no behavioristic explanation

¹²⁰ According to the procedure set out in Article 48 TEU.

¹²¹ Jean-Claude Juncker, 2006, p. 4; PACE doc. 11001, The accession of the European Union/European Community to the European Convention on Human Rights, Motion for a resolution presented by Mr Van Thijn and Mr Kox and others, 5 July 2006.

¹²² Arjen Kleinhout, 2004, p. 836-838.

¹²³ Arjen Kleinhout, 2004, p. 832.

¹²⁴ *Ibid.*, p. 833.

¹²⁵ Arjen Kleinhout, 2004, p. 833.

¹²⁶ Paul Craig and Gráinne De Búrca, 2003, p. 363.

¹²⁷ *Ibid.*

for why sometimes the ECJ takes into account human rights issues, why sometimes the ECJ does not and why sometimes the Court takes a much more constructive approach regarding human rights issues¹²⁸. Others too, have noted that the pattern of case law the ECJ took concerning human rights law is varied and complex¹²⁹. Recent case law however, suggests both Courts are converging concerning their human rights interpretations¹³⁰. A telling example of this development is the *Bosphorus* case¹³¹. Bosphorus, a Turkish airline company, leased an airplane from Yugoslavian airline company JAT. When this airplane arrived in Ireland, the Irish authorities decided to impound the aircraft on the basis of EC Regulation 990/93. This regulation was an implementation of economic sanctions imposed by the UN against the Former Republic of Yugoslavia. Bosphorus then went before the Irish High Court that decided to ask a preliminary ruling from the ECJ. The ECJ decided that the impounding of the aircraft was appropriate, since matters of general interest (the UN sanctions) should precede above the specific interest of Bosphorus. The Turkish airline company then decided to lodge a complaint with the ECtHR, stating that its rights under Art. 1 of Protocol 1 of the ECHR had been violated. The central question in this case is if a member state can be held applicable if the implementation of Community law by that member state would mean a violation of fundamental rights. The ECtHR has ruled that if an international organization can uphold a level of fundamental rights protection equal to that of the ECHR, its member states can, without hesitation, implement the obligations of membership of that organization. In the *Bosphorus* case, the ECtHR ruled that within the EC, fundamental rights were indeed sufficiently guaranteed and that the rights held by the Turkish airline company under Art. 1 of the 1st Protocol of the ECHR were not violated¹³².

However, as has been noted, from the EU's perspective one major technical issue needs to be resolved before the EU can accede: the EU Treaty needs to be altered. EU accession to the ECHR is foreseen in Art. I-9(2) of the Treaty establishing a Constitution for Europe, which would thus provide the necessary Treaty alteration¹³³. After the failure to ratify the Constitution by France as well as the Netherlands, the debate of EU accession to the ECHR is placed within the reflection period, effectively putting the debate on EU accession to the ECHR on hold. Added to that, also the ECHR itself needs to be altered to make EU accession possible, as currently only states are allowed to accede to the ECHR¹³⁴.

An increased EU focus on human rights issues also connects the debate on ECHR accession to the establishment of the Agency, since one might question the benefit of establishment of the Agency

¹²⁸ Dean Spielmann, 1999, p. 776.

¹²⁹ Paul Craig and Gráinne De Búrca, 2003, p. 364.

¹³⁰ Dean Spielmann, 1999, p. 777; R.A. Lawson and L.F.M. Verhey, 2006, p. 1806.

¹³¹ Case C-84/95, *Bosphorus v. Ireland*, [1996], ECR I-3953.

¹³² R.A. Lawson and L.F.M. Verhey, 2006, p. 1806.

¹³³ Article I-9(2) Treaty establishing a Constitution for Europe provides the legal ground for EU accession to the ECHR.

¹³⁴ Arjen Kleinhout, 2004, p. 838.

when the EU will accede to the ECHR and thus places itself under its scrutiny. Accession is important as it will prevent the emergence of a ‘double standard’ on human rights in Europe. This will benefit a uniform explanation of fundamental rights between the EU member states, which forms the basis of the Agency’s tasks. Secondly, as will be argued, the Agency can provide an *ex-ante* check on fundamental rights issues connected to EU policies, whereas judicial review by the ECHR is a *post-ante* check on fundamental rights compliance by member states. In the latter case, the possible breach of a fundamental right has already occurred¹³⁵. This leads to the conclusion that from the perspective of a common standard on fundamental rights within Europe, it is firstly important that the EU accedes to the ECHR. Secondly, EU accession to the ECHR does not mean that the Agency’s role and tasks will be redundant. Both structures have their intrinsic value to the overall state of human rights protection within the EU.

3.2.3 The EU Charter of Fundamental Rights

At the European Council meeting in Cologne in 1999, another important initiative to further enhance the protection and promotion of fundamental rights within the EU was taken. When it was clear that ECHR accession needed an explicit base in the EU Treaty which would require an amendment to the EU Treaty, the EU presented its own bill of rights in 2000: the EU Charter of Fundamental Rights¹³⁶. The European Council at Cologne in 1999 launched the initiative to draft a Charter of Fundamental Rights. The Charter was approved by the European Commission, the European Parliament and the European Council at the Nice summit in 2000¹³⁷. Not all member states wanted the Charter to be included into the Treaties because the relation of the Charter with the ECHR was too unclear as the ECHR already provided a European Bill of Rights¹³⁸. Therefore, its legal status and possible integration in the EU Treaty after the stalled ratification process of the European Constitution remains unclear. However, the Charter already made its way into the constitutional practice of the EU as it provides a better visibility of human rights within the EU’s legal order¹³⁹. This allows for an easier referral by national courts to fundamental rights when asking prejudicial questions to the CFI. Added to that, individuals can better see if application of EU law violates their rights in one way or another¹⁴⁰.

The existence of the Charter, however, can lead to further ambiguity in human rights interpretation in Europe, as that interpretation between the Charter and the ECHR may sometimes differ. The Charter, for example, includes prohibitions for human cloning, offers a higher degree of protection regarding right to a fair trial, contains provisions for good governance, data protection and mentions social and

¹³⁵ Loesewies van der Laan and Laura Prat Bertrams, 2005, p. 36.

¹³⁶ Olivier de Schutter, 2004, p. 2.

¹³⁷ Paul Craig and Gráinne De Búrca, 2003, p. 43.

¹³⁸ Jan Willem Sap, 2003, p. 13.

¹³⁹ Paul Craig and Gráinne De Búrca, 2003, p. 358,363; Jan Willen Sap, 2003, p. 13-14; Olivier de Schutter and Philip Alston, 2005, p. 3.

¹⁴⁰ Olivier de Schutter and Philip Alston, 2005, p. 3-4.

political rights. On the other hand, the Charter omits several provisions, for example regarding the rights of minorities, which the ECHR does include. Several considerations may help to explain whether this will become problematic or not. First of all, the ECHR serves to provide a minimum of standards on human rights. A Charter that includes more rights does not pose a threat to the ECHR, because that would only express the EU's will to provide more protection when desired. Where the Charter provides less protection, things might get trickier. Fortunately, Art. 307 EC Treaty states that “...*The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty...*”. Since the ECHR is older than the EC Treaty, Art. 307 provides the means to let the ECHR precede EC law¹⁴¹. The ECHR confirmed this practice in the *Matthews* case¹⁴². Art. 52(3) and Art. 53 of the EU Charter of Fundamental Rights actually promote harmony with the ECHR, but do not prevent the EU from taking more extensive steps in fundamental rights protection when desired and where the Charter provides that possibility¹⁴³. This ensures that EU member states are still subject to external human rights review, promotes continuity of human rights interpretation in Europe as a whole and leaves the vast array of ECtHR jurisprudence intact and ready to be used by the ECJ¹⁴⁴. At the same time it ensures that the EU can go further in codifying fundamental rights than is the case in the Council of Europe.

Although the Charter's legal status still remains unclear, it opened the possibility for a political form of monitoring of member states' human rights performance. In 2000 the European Parliament established a monitoring structure that eventually led to the establishment of the EU Network of Independent Experts on Fundamental Rights (CFR-CFD) in 2002¹⁴⁵. The CFR-CFD publishes annual reports on the state of fundamental rights in the EU and its member states, to create thematic reports for the Commission when requested and to assist the Commission and the Parliament in developing EU policy on fundamental rights. The CFR-CFD also annually presents a Thematic Comment on more fundamental issues relating to human rights, thereby taking into account international and European law on human rights¹⁴⁶. The work of the Network does not depend or rely on whether its assessments lead to actual policy recommendations, although the Network does present policy recommendations in the form of best practices of different member states¹⁴⁷. It is therefore considered as a 'light' structure, although well equipped to provide the EU institutions information on member states' compliance with

¹⁴¹ Rick Lawson, 2000, p. 945.

¹⁴² Case of *Matthews v. The United Kingdom*, Application No. 24833/94, Judgement by the ECtHR, 18-02-1999.

¹⁴³ Paul Craig and Gráinne De Búrca, 2003, p. 360-361..

¹⁴⁴ Rick Lawson, 2000, p. 939.

¹⁴⁵ Olivier De Schutter, 2004, p.5.

¹⁴⁶ CFR-CFD website.

¹⁴⁷ Martin Scheinin, 2004, p. 84-85.

their fundamental rights obligations deriving from the Charter¹⁴⁸. The Network ceased its operation in September 2006. Since the Agency has not received a mandate in monitoring individual member states, the work of the Network will not be taken over by the Agency.

3.2.4 Respect for fundamental rights in EU policy development

The Charter is used by the European Commission in its so-called *Impact Assessments* (IAs). IAs serve as a mainstreaming tool to incorporate human rights commitments into EU policies and activities. Mainstreaming of fundamental rights can be defined as “...the systematic integration of fundamental rights in all policies with a view to promoting fundamental rights and mobilizing all general policies and measures specifically for the purpose of realizing them by actively and openly taking into account, at the planning stage, their impact on fundamental rights...”¹⁴⁹. Some important characteristics can be distilled from this general definition. First of all, mainstreaming suggests that fundamental rights should be included in all the fields of policy and law making, making fundamental rights an integral part of both policy and law development and implementation. Mainstreaming is a horizontal and pro-active process that functions ex-ante in the sense that it influences the way in which different policy options and law making are considered in light of their fundamental rights consequences¹⁵⁰. Mainstreaming fundamental rights into EU policies provides several advantages¹⁵¹:

- Mainstreaming can serve as an incentive to develop new policy instruments. When fundamental rights are being mainstreamed into the general policy framework of the EU, it forces policy makers to rethink their policy themes in light of their implications to fundamental rights.
- Mainstreaming is a source of institutional learning. When policy makers are forced to rethink their policy themes in light of fundamental rights, it obliges them to learn about the implications following from their renewed considerations and it identifies issues in their policy themes that may have gone unnoticed in the past. Policy makers will gain in expertise and over time the institutional culture within the organization will evolve to a state in which the role and place of fundamental rights considerations and the capacity to address them will substantially increase.
- Mainstreaming will better involve civil society into the policy making process. An increased focus on fundamental rights caused by mainstreaming calls for increased expertise, which can be consulted externally at community stake-holders.
- Mainstreaming improves transparency and accountability. The above-mentioned advantages lead to a better consideration of policy alternatives (by impact assessments, for example), as well as better justifications for a particular route chosen, since the choice of that particular route has to be explained by the policy makers compared to other policy alternatives.

¹⁴⁸ Olivier de Schutter, 2005, p. 40-41.

¹⁴⁹ Ibid., 2005, p. 43-44.

¹⁵⁰ Ibid., 2005, p. 44.

¹⁵¹ Ibid., 2005, p. 46-50.

- Mainstreaming improves coordination between different departments within the EU's institutions (the Commission). Since most policy themes belong to different departments within the Commission, the risk that different departments do not have an overview of the impact of policies made elsewhere, which may lead to contradicting policies, is valid. Since mainstreaming effects the general policy framework, it serves as an horizontal bridge between different policy sectors within the EU.
- Lastly, mainstreaming identifies problems at their root causes, rather than at their manifestations at the surface. Post-hoc monitoring allows for impact measurement of policies. Yet, mainstreaming can include fundamental rights consideration at the initial stages of policy making and implementation and it thus has the capacity to develop a far greater impact on the transformation of policies than post hoc monitoring has. In this respect, mainstreaming invokes a positive duty onto the EU policy makers to include respect for fundamental rights as a policy objective amongst other policy objectives of a given policy development trajectory.

Currently, the objective of mainstreaming fundamental rights into the general EU policy framework is being executed by the IAs. The Commission lists ‘...*the impact on fundamental/ human rights, compatibility with the Charter of Fundamental Rights...*’ as considerations to be taken on board in the IAs¹⁵². Impact assessments serve to ensure the decision-maker has all the relevant information required to make a sound decision which policy alternative to follow¹⁵³. The current practice of fundamental rights inclusion into the IAs, however, is problematic from several points of view:¹⁵⁴:

- First of all, the Commission lacks expertise. The expertise needed for the Commission to adequately determine the impact of certain policy initiatives on fundamental rights needs to be obtained externally. Although an Agency could provide the Commission an independent and expert opinion and advice on fundamental rights consideration of various policy initiatives, it must be said that expertise on various fundamental rights issues is already present within the Council of Europe. The advantage of an Agency here may not be the dissemination of information, but rather the embedment of the Agency into the EU's institutional structures, which enables it to better connect EU matters to fundamental rights considerations.
- A second difficulty arises from the confusion between mainstreaming fundamental rights and ensuring compliance with fundamental rights. As has become clear, mainstreaming fundamental rights means that the impact of various policy alternatives on fundamental rights in all policy areas is taken into account. In this light, respect for fundamental rights is a process which leads to a certain direction of institutional practice (of, in this case, ensuring respect for fundamental

¹⁵² Olivier de Schutter, 2005, p. 54.

¹⁵³ Ibid, p. 52.

¹⁵⁴ Ibid., 2005, p. 54-65.

rights). On the contrary, measuring compliance with fundamental rights leads to a clear answer that can be either positive or negative; either there is fundamental rights compliance or there is not. Both are different modes of evaluation and need their own methods. IAs may not be the best tool to mainstream fundamental rights into EU policies, since the IAs' goals are to provide objective information, preferably measurable and quantitative. Fundamental rights considerations and the balance between fundamental rights interests and other interests are hard to translate into quantitative data.

- The way in which participation of civil society in the drafting of IAs is structured, leaves much to be desired for. No structural consultation of expert non-governmental organizations (NGOs) exist. Although the Agency could prove to fulfill a valuable role here, it must be noted that the Council of Europe has an extensive network of NGO contacts. Any direct advantage of an Agency is therefore not immediately apparent.
- In essence, IAs serve to investigate the impact of certain policy initiatives on the protection and promotion of fundamental rights. However, the development of the policy initiative itself remains the goal. It means that IAs can choose to preserve the status quo on the fundamental rights impacts of certain policy choices, which is at odds with the goals of mainstreaming, since mainstreaming aims at including respect for fundamental rights as a policy objective. Such a no-policy option may have effects on the state of fundamental rights within the Union and in its member states. An Agency could prove to be an effective screening mechanism to warn the EU institutions when certain policy options lead to a worsening state of fundamental rights in the EU member states as a consequence of the no-policy option.

It can be concluded that mainstreaming fundamental rights is a powerful tool to provide an ex-ante consideration of various fundamental rights issues that are at stake in various policy initiatives developed by the EU. However, it can also be concluded that the current practice of mainstreaming fundamental rights into EU policies and activities is up for improvement. The Agency could fulfill the role of a centre of expertise on fundamental rights issues to deliver expertise on fundamental rights to the IAs. In doing this, the Agency can build on expertise of the Council of Europe, which it can connect to EU policy initiatives that are being examined in the IAs. An even further step would be the possibility of the Agency to perform mainstreaming of respect for fundamental rights into the EU's policies in which the Agency has an active role in monitoring of member states' compliance with fundamental rights. Problems regarding fundamental rights can be identified at an early stage and solved using existing EU machinery. The Agency would therefore act as a facilitator towards the EU institutions, able to direct the EU institutions into a form of organizational learning concerning of respect and promotion of fundamental rights, which, in the end, forms the basis of the preventive nature of mainstreaming fun-

damental rights into EU policies and activities¹⁵⁵. Such a role would be beneficial not only in the first pillar, but also in the third pillar, since many human rights sensitive policies are being dealt with in the third pillar. Therefore, the next subsection will look at the human rights competences in the third pillar.

3.2.5 Human Rights in the Third Pillar

As has been noted, the Amsterdam Treaty moved many of the third pillar provisions to Title IV of the EC Treaty. It means that these provisions are subject to human rights review of the ECJ¹⁵⁶. However, it is more difficult to determine if there are sufficient grounds for human rights review over provisions that remain in the third pillar. As Steve Peers notes, “Art. 6(2) TEU is the only *written* source of third pillar human rights rules”¹⁵⁷. However, Art. 6(2) TEU states that the Union is bound by general principles of Community law, of which the third pillar is no part. To add to the confusion, Amsterdam saw the introduction of Art. 46(d) that gives the ECJ jurisdiction to apply Art. 6(2) to third pillar provisions¹⁵⁸. However, Steve Peers concludes that “since the amendments to the Treaty are clearly an attempt to authorize the Court’s jurisdiction over human rights principles in the first and third pillar, it is submitted that the reference to ‘Community law’ is vestigial, and that the Article should be read as referring to *Union* law”¹⁵⁹.

The question that arises, is if current human rights review in the third pillar is sufficient. Next to review by the ECJ, the EU member states are also bound by the ECHR when applying directives and framework decisions, since these translate into national legislation. Decisions taken in the third pillar not necessarily translate into national law, which means a lacuna concerning the application of human rights standards exists¹⁶⁰. Added to that, the Amsterdam Treaty introduced the development of an area of security, freedom and justice¹⁶¹. This development led to more cooperation on police and judicial matters between EU member states and resulted in the Hague Program, presented in 2004 by the Commission and adopted at the European Council in 2004¹⁶². The Program aims at improving the area of freedom, security and justice within the EU by providing a program for EU action in asylum, immigration, police and judicial cooperation in criminal matters and judicial cooperation in civil and family matters. It sets out ten priorities in order to strengthen the area of freedom, security and justice in which fundamental rights play an important role in the Program. The first priority mentioned is strengthening fundamental rights and citizenship by, amongst other things, establishing an EU Fundamental Rights Agency. Other priorities concerning human rights include securing children’s rights and combating vio-

¹⁵⁵ Olivier de Schutter, 2005, p. 70-71.

¹⁵⁶ Steve Peers, 2004, p. 118-119.

¹⁵⁷ Steve Peers, 1999, p. 171.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Steve Peers, 1999, p. 171.

¹⁶¹ P.J. Slot, R. Barents and R.A. Lawson, 2004, p. 219-220.

¹⁶² Website The Hague Programme; COM/2005/184 final.

lence against women (Daphne & Daphne II programs), protection of personal data and improving rights deducted from European citizenship. Next to the establishment of the Agency, the Commission will introduce a *Fundamental Rights and Justice Framework*. The Program also focuses on nine other areas, such as combating terrorism, developing balanced immigration policies, setting up a common asylum procedure, maximizing the positive impact of immigration, developing an integrated management of the EU's external borders, balancing the need for security and privacy, tackling organized crime, developing a European area of justice and sharing responsibilities on freedom, security and justice. The Hague Program involves respect and promotion of several fundamental rights connected with the third pillar and therefore lists the establishment of the Agency as one of its ten main targets. The Agency can play a vital role within the Hague Program. Together with the ongoing development of EU competences in third pillar areas, demonstrated by the Hague Program, mainstreaming internationally accepted human rights standards into these policy areas should be actively pursued, since third pillar areas are human rights sensitive¹⁶³. It is therefore that the Hague Program lists the establishment of the Agency as a major component for the execution of its goals¹⁶⁴.

However, apart from the question if an Agency will add anything to a more satisfying human rights review of third pillar areas, two issues remain that could prevent a role of the Agency in third pillar matters. Firstly, matters within the scope of the third pillar are matters that are treated intergovernmentally, whereas the Agency has a remit confined to the application of human rights review to Community law. It means there is no sound legal basis for a remit of the Agency in these matters and thus the Agency has not received a mandate in third pillar matters. It has been proposed to add a separate Council decision to the regulation establishing the Agency which would empower the Agency in third pillar matters. This decision then would be based on Art. 30, 31 and 34(2)(c). However, Art. 30 and 31 refer to specific policing and criminal law issues and there is no equivalent of Art. 308 TEC in the third pillar¹⁶⁵. Art. 34 (2)(c) is used to be able to refer to Art. 6 TEU, however the ambiguity within Art. 6 TEU has already been noted: Art. 6 TEU concerns itself with the general principles of Community law, of which the third pillar is no part.

Secondly, EU member states are bound by the ECHR when implementing directives and framework decisions that fall within the scope of the third pillar, since these translate into national law. Nevertheless, mainstreaming and harmonizing fundamental rights across EU member states concerning third pillar matters could be a valuable contribution made by the Agency and should not be rejected altogether simply because current legal arrangements prove not to be sufficient to form a solid framework for an Agency's remit in these issues.

¹⁶³ House of Lords report, 2006, p. 25

¹⁶⁴ Steve Peers, 2004, p. 120.

¹⁶⁵ Steve Peers, 2004, p. 120-121.

3.4 Prospects for the future: external human rights competences

Whereas the internal EU competences on human rights have developed over the course of years, a significant reservation must be made. Although it has become clear that structures and tools exist to ensure fundamental rights compliance within the EU, its institutions and its member states, it is worth noting that the EU has not committed itself to any international human rights treaty, nor is there any independent human rights structure that monitors the EU institutions itself for human rights compliance. Although some form of mainstreaming of fundamental rights exist, through the Impact Assessments made by the Commission, it is also clear that the use of IAs to mainstream fundamental rights needs improvement. Lastly, the EU itself states that it has no general power to promote fundamental rights.

However, the EU's external policies concerning third countries heavily emphasize respect and promotion of human rights. Not only when countries apply for EU membership are they strictly monitored for human rights compliance through the Copenhagen criteria, since 1992, all cooperation with third countries is done on the basis of respect for human rights¹⁶⁶. Moreover, the EU is not afraid to use economic measures against countries that do not respect fundamental rights and has powerful sanctioning tools available through its assistance programs for third countries, such as the TACIS assistance program for former Soviet states, CARDS for Balkan states and the Cotonou agreements with African and Caribbean countries¹⁶⁷. Notable in these assistance programs is that they indirectly or directly try to promote human rights, democracy and the rule of law. This is done by monitoring of human rights compliance, election observation, improving the impartiality of the judicial system, support for judicial and constitutional reforms amongst other things¹⁶⁸. The EU's external human rights competences are based on a strategy paper presented in 2001 by the European Commission in which the Commission explained its external human rights strategy¹⁶⁹. The Commission's strategy mainly focuses on EU relations with third countries around three policy objectives: promoting coherence and consistency across EC/EU policies through mainstreaming human rights and democratization objectives in the EU's relation with third countries. This should be accomplished through political dialogue with these third countries and a strategic use of the EU's external assistance programs, especially through the use of the European Initiative for Democracy and Human Rights (EIDHR)¹⁷⁰. The EIDHR was established in 1994 on request of the European Parliament. Its main aim is to promote human rights, democracy and conflict prevention in third countries by funding activities pursuing these goals. Every initiative that falls under the EIDHR has to be reviewed by a Human Rights and Democracy Committee (HRD). The

¹⁶⁶ Loesewies van der Laan and Laura Prat Bertrams, 2005, p. 35.

¹⁶⁷ Andrew Moravcsik, 1995, p. 164-168; Hans van der Meulen, 2006, p. 5.

¹⁶⁸ Hans van der Meulen, 2006, p. 6.

¹⁶⁹ COM/2001/252 final.

¹⁷⁰ Website EIDHR; Council Regulation (EC) No 975/1999; Council Regulation (EC) No 976/1999.

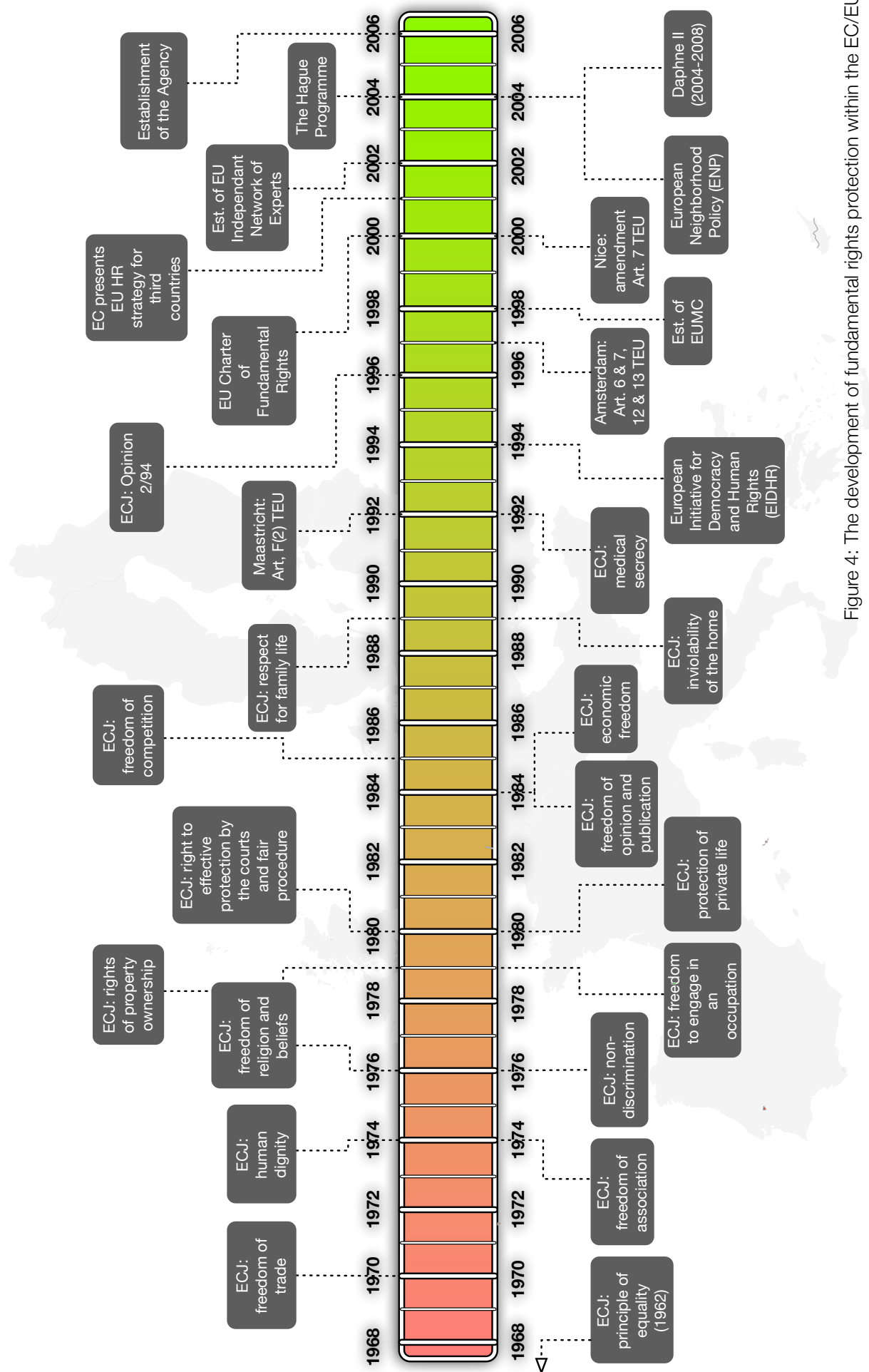


Figure 4: The development of fundamental rights protection within the EC/EU.

Committee is composed of representatives of the member states. Funded projects focus on promoting justice and the rule of law, fostering a culture of human rights, promoting a democratic process and supporting equality, tolerance and peace.

Next to the different assistance programs and EIDHR, in 2004 the European Neighbourhood Policy (ENP)¹⁷¹ was established within the context of the enlargement process with ten new member states. The ENP is not primarily targeted at human rights situation in third countries, but human rights do play an important role in the implementation of ENP Action Plans. The ENP provides countries that neighbor the EU a privileged partnership promoting, amongst others, a mutual commitment to common values such as democracy, human rights and the rule of law. The ENP is implemented through so-called ENP Action Plans, which are effectively bilateral agreements between the EU and respective countries. In many instances the implementation of the ENP is executed via so-called Joint Programs with the Council of Europe.

If the EU wants to improve on its legitimacy to development these kind of external policies towards third countries, it is necessary that the same values on fundamental rights that play such a vital role in these external contacts, find their place in internal EU policies and activities as well. Through the mainstreaming, and the possible role of the Agency in this process, the EU is able to improve its legitimacy in its contacts with these third countries through the various assistance programs that exist nowadays.

3.5 Concluding remarks: a genuine need for an Agency?

In order to determine the added value of an EU Fundamental Rights Agency from an EU perspective, the current human rights competences of the EU have been assessed. Over the course of years, different institutions have contributed to the development of those human rights competences. The European Court of Justice took the first steps towards the inclusion of fundamental rights within the EC's legal structure by introducing the principles of direct effect and supremacy. Together with the gradual recognition of the ECHR, international treaties and common traditions of member states, although the link to these is indirect and not formally binding, the ECJ has contributed to the development of a legal order that is able to provide fundamental rights where that concerns Community law. However, some reservations must be made. Firstly, the ECJ did not take a consistent approach towards inclusion of fundamental rights considerations. In this respect, critics have argued that, amongst others, the ECJ favors market rights above fundamental rights. Secondly, the ECJ's competences are confined only to first pillar provisions, whereas most human rights sensitive policies are developed in the third pillar. Thirdly, as the *Omega Laserdrome* case and other examples have shown, the ECJ cannot entirely prevent the existence of different interpretations of fundamental rights within the member states as well as bal-

¹⁷¹ Website ENP; COM/2004/373 final

ancing the importance of fundamental rights with respect to other policy areas. One can question if that should be the role of the ECJ altogether. However, the examples mentioned illustrate a friction between the EC's internal market on the one hand and the different levels of respect and protection of fundamental rights in the member states on the other hand.

The EU Treaty somewhat improved this situation by introducing Art. 6 TEU and later Art. 7, 12 and 13 TEU. Furthermore, a more positive approach to fundamental rights within the EU itself was formulated by establishing the EU Charter of Fundamental Rights, after finding out that accession to the ECHR needed an explicit treaty base. With the Charter, fundamental rights found a firmer place within the EU's constitutional practice. Although its legal status still remains unclear, which prevents the EU and the EC to actively promote fundamental rights based on the Charter, the Charter opened up possibilities for forms of political monitoring on human rights. Since then, the European Commission presented several initiatives aimed at both improving the internal as well as the external dimension of the Union's human rights policies. Notable initiatives are the EU Independent Network of Experts, the improvement of the EIDHR and the Hague Program. Most notably, Art. 6 and 7 TEU and the EU Charter of Fundamental Rights are the culmination of those developments, through which the EU committed itself to respect and promotion of fundamental rights. However, apart from the establishment of the EU Monitoring Centre on Racism and Xenophobia (EUMC), which focuses on racism and xenophobia, and the Charter, which still has no legal status, no specific implementation has been given to Art. 6 and 7 TEU. With regard to Art. 7 TEU, it can be said that the Council of Europe monitors the member states on their fundamental rights requirements, but as regards Art. 6 TEU, a gap exists concerning the activities of the EU institutions and the member states when they implement Community law. Added to that, the EU's external powers regarding human rights are better developed than its internal powers. The EU can take economic sanctions towards third countries, it can present monitoring reports on human rights performance of third countries, it can adopt declarations and determinations on various human rights issues in third countries and it can force third countries into co-optation through the strategic use of its assistance programs. To improve the legitimacy of the EU's external human rights policies, the EU should develop a credible internal policy on the protection and promotion of human rights.

It is in this light thereof that two times a Comité des Sages proposed to enhance the EU human rights monitoring machinery through a EU Fundamental Rights Agency. Firstly, the report *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000* proposes a list of policy initiatives that would enhance the EU's commitment to ensuring respect for fundamental rights. One of these proposals is the transformation of the EUMC to a European Union Human Rights Monitoring Agency, which is now commonly known as the Fundamental Rights Agency. This was not an isolated proposal;

this Fundamental Rights Agency was part of a package that also consisted of firstly the establishment of a Directorate-General within the Commission with responsibility for human rights headed by a separate member of the Commission., Secondly, the establishment of a human rights unit within the office of the High Representative of the Common Foreign and Security Policy has been proposed. Lastly, a mainstreaming approach was envisaged in which all EU institutions should be called upon to take human rights issues into account¹⁷². A second Comité des Sages, erected in 2000 to investigate the situation in Austria following the participation of the right-wing party FPÖ in the government, also advised to enhance the human rights monitoring mechanism in the EU, including extending the remit of the EUMC to a full fledged EU Fundamental Rights Agency¹⁷³.

A genuine need for an Agency?

Apart from filling a clear gap in human rights monitoring in Europe, namely the exclusion of the EU institutions and member states when implementing Community law, the Agency certainly has the potential to become a valuable tool to signal various fundamental rights issues within an EU context. It has been reasoned that the increased and positive interest of the EU in human rights is the result of an ongoing development of EU competences in human rights sensitive areas, as well as the ongoing integration and enlargement process of the EU. These developments call for a positive approach towards human rights, in which the post-hoc evaluation of human rights compliance provided by the ECJ proved to be insufficient. A European Union Fundamental Rights Agency, however, is able to play a role in providing concepts on how to harmonize the differences between fundamental rights interpretations across member states. It has been argued that those differences can cause frictions between the role of fundamental rights in the Community's legal order and the internal market. The Agency can do so by providing examples of good practices within member states. Furthermore, within the framework of mainstreaming fundamental rights into EU policies and activities, the Agency could prove to fulfill a vital role in connecting expertise on fundamental rights issues (for instance expertise gathered by the Council of Europe) to the development and implementation of Community law. Likewise, it could provide the institutions with advise on possible actions against member states in breach of Art. 7 TEU. In general, the Agency would be a tool to alert the EU institutions to the need to address issues concerning fundamental rights. The relevant EU institutions, when in their capacity, then can act upon these issues when these needed to be dealt with at an EU level, as opposed to post-hoc judicial review for human rights compliance when the violation already occurred, as is the case now¹⁷⁴. That would also improve the EU's legitimacy towards third countries when monitoring them for their human rights compliance in light of the various EU assistance programs.

¹⁷² Philip Alston, 2005, p. 173.

¹⁷³ Report by Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, p. 34.

¹⁷⁴ Olivier de Schutter and Philip Alston, 2005, p. 2.

Two issues remain. Firstly, if the EU is to take fundamental rights seriously, it should accede to the ECHR. Currently, the debate on accession is put on hold, but in the light of emerging pressure to continue the debate on a Constitution for Europe, EU accession to the ECHR should take centre stage. Secondly, the possible benefits of the Fundamental Rights Agency are partly dependent on its potential overlap with the human rights protection provided by the Council of Europe. The next chapter will thus characterize the Council of Europe in terms of its human rights competences and the human rights enforcement framework as presented in the second chapter, thereby keeping in mind the question whether the Council of Europe alone can remedy the lacunae in the human rights protection provided by the EU.

4. THE HUMAN RIGHTS DIMENSION OF THE COUNCIL OF EUROPE EXPLAINED

As we have seen in the previous chapter, from an EU perspective, there is a case to be made for the establishment of a Fundamental Rights Agency. However, while there is an apparent widespread agreement within the EU for the establishment of a European Fundamental Rights Agency, the Council

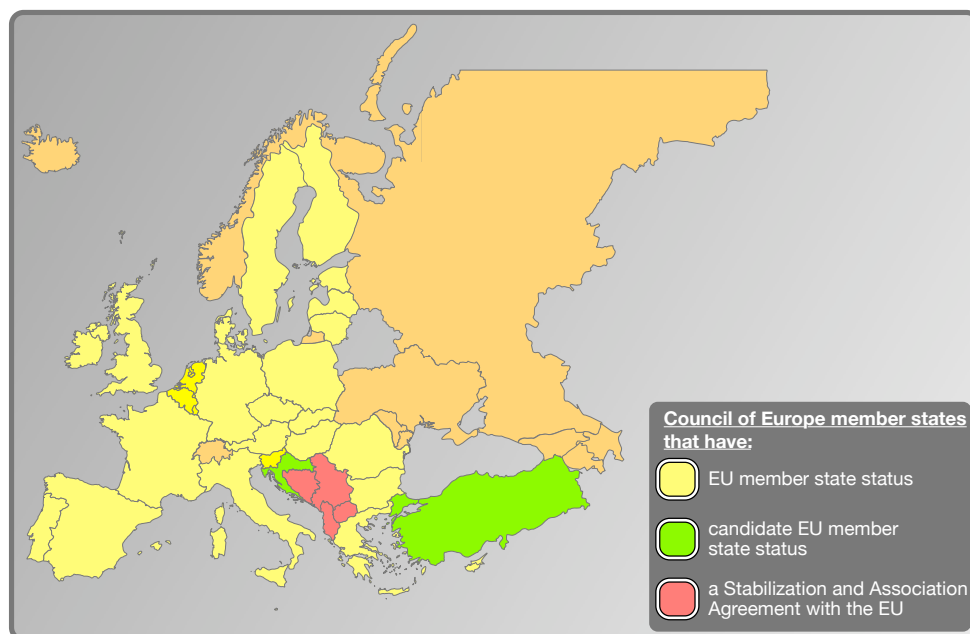


Figure 5: Council of Europe member states and their relationship with the EU.

of Europe has repeatedly expressed its doubts regarding the establishment of such an Agency. Especially, the Council of Europe Parliamentary Assembly (PACE) has expressed its concerns on and dissatisfaction with the establishment of the Agency on several occasions¹⁷⁵. The Committee of Ministers took note of the main concerns as expressed by the PACE¹⁷⁶. Thus, according to the Council of Europe, the EU should¹⁷⁷:

- acknowledge the primary role of the Council of Europe on the protection and promotion of human rights in Europe, and;
- formulate the Agency's mandate in such a way that the Agency will focus on human rights issues within the framework of the European Union and addresses its advice solely to EU institutions.
- The EU should moreover not unfold activities that could duplicate efforts already undertaken by the human rights institutions and mechanisms of the Council of Europe.

Two matters of interest to this thesis arise from these concerns. First of all, the debate on the mandate of the Agency is part of a greater debate concerning the European human rights architecture and the

¹⁷⁵ PACE recommendation 1696; PACE Recommendation 1744; PACE Resolution 1427; PACE Report Doc. 10894; PACE Report Doc. 10449.

¹⁷⁶ CM reply to PACE Recommendation 1696 (CM/AS(2005)Rec 1696).

¹⁷⁷ Ibid.

general relation between the EU and the Council of Europe. The increased EU attention for human rights issues combined with the recent enlargement apparently triggers the Council of Europe to ensure that the organization still is the major reference for human rights protection and promotion within a pan-European context. Therefore, it is needed to generate a clear picture of the ongoing debate between the EU and the Council of Europe about their relationship. Secondly, from these concerns it seems that the Council of Europe apparently has the primary role to play on the protection and promotion of human rights in Europe, which, according to the Council of Europe, may not be duplicated by the EU. As announced earlier in this thesis, it is thus needed to characterize the development of the human rights protection structures of the Council of Europe, just as the previous chapter did with the EU. This chapter will thus firstly explore the Council of Europe's competences in the field of human rights, after which the relation between the EU and the Council of Europe will be dealt with. Having generated a clearer picture of that relationship, the main concerns the Council of Europe has towards the establishment of the Agency will be further explored.

4.1 Council of Europe and the development of Europe's human rights regime

Whereas the EU/EC was originally an organization restricted to purely deal with economic affairs, the Council of Europe is a political and intergovernmental organization that deals with normative issues such as human rights, promoting democracy and the rule of law in its member states. The idea to have closer cooperation between European states already emerged before the Second World War. The Second World War itself proved that closer cooperation was indeed possible, since on many occasions allied forces, resistance movements and governments worked together to fight the common enemy. After the Second World War, the growing Soviet influence on Central and Eastern Europe raised concern, pressing Churchill to call for a "United States of Europe". However, no agreement of the exact form of closer cooperation could be reached: some indeed proposed a European federation, while other preferred a solution that would have the states' sovereignty as a basis¹⁷⁸.

May 1948 saw the gathering of many representatives at the "Congress of Europe", which called for the establishment of a European economic and political union that would deal with various issues. However, the idea appeared to be premature and was not put into practice. Ten Western-European countries then proceeded with the establishment of the Council of Europe 1949 to prevent events such as the Second World War from recurring ever again by developing a structural European integration that would uphold democratic principles, the rule of law and individual freedoms¹⁷⁹. Article 1 of the Statute of the Council of Europe thus reads "*...The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and*

¹⁷⁸ P.J. Slot, R. Barents and R.A. Lawson, 2005, p. 19.

¹⁷⁹ Ibid.

*facilitating their economic and social progress...*¹⁸⁰. This mandate was expanded in later years to include stimulating cultural identity and diversity in Europe, finding solutions to problems in Europe such as discrimination against minorities, xenophobia, intolerance, environmental problems, AIDS, drug addiction and organized crime, sport and contributing to stable democracy in Europe by supporting political, legislative and constitutional reforms¹⁸¹. Especially after the fall of the Soviet Union the role of the Council of Europe became increasingly important. Since 1989, the Council of Europe focused on transforming the former totalitarian states in Eastern Europe in democratic states that uphold human rights, democracy and the rule of law. Since 1993 three major Summits have shaped the activities, which the Council of Europe currently sees as its core tasks. The last Summit, generally referred to as the Third Summit, narrowed the scope of tasks to three core areas: protecting and promoting human rights, promoting democracy and strengthening the rule of law in its member states. Currently, the Council of Europe counts 46 member states, with the newly formed state of Montenegro soon to follow¹⁸². Only Belarus is not a member of the Council of Europe.

4.2 The Council of Europe's main human rights instruments

The main instrument of the Council of Europe to ensure its member states' compliance with its human rights standards is the development and creation of treaties and conventions, which are open for signing and ratification by the Council's member states. In Chapter 1 it was explained that conventions form an important part of soft law. One of the characteristics of the use of conventions is that not all member states have to accede. That is why the degree of human rights protection the Council of Europe offers is not equal amongst its member states. However, the number of treaties currently totals around 200. The main organs, instruments and treaties, which the Council uses to pursue its core tasks are listed below¹⁸³.

Committee of Ministers (CM)

The CM is the Council of Europe's decision making body. The foreign ministers of all the members states meet in the CM to discuss issues that require their attention. Normally, the foreign ministers are represented by their permanent representatives who hold office in Strasbourg. The CM is a intergovernmental body where each member state participates on equal footing. Next to decision making, the CM also fulfills a monitoring role; together with the PACE, it monitors the member states' compliance with the standards on human rights, democracy and the rule of law set by the Council of Europe. It does so by means of recommendations, resolutions and declarations that are forms of soft law¹⁸⁴.

¹⁸⁰ Advice No. 33, Advisory Council on International Affairs, p. 7.

¹⁸¹ Ibid.

¹⁸² Website Council of Europe.

¹⁸³ Website Council of Europe.

¹⁸⁴ P.J. Slot, R. Barents and R.A. Lawson, 2005, p. 194.

Parliamentary Assembly (PACE)

The PACE is a consultative parliamentary body of the Council of Europe. Its consultative status is put into practice through the adoption of recommendations and resolutions that are presented to the CM. The PACE also produces reports on certain thematic issues. Together with the CM, the PACE monitors the member states' compliance to the Council of Europe standards on human rights, democracy and the rule of law. Members of the PACE have a double mandate, which means that they are also member of their national parliaments. Every national delegation represents the political balance within the respective national parliaments. While the PACE only has consultative status, its political influence must not be underestimated: through the adoption of various recommendations, the PACE on numerous occasions has taken the initiative for new conventions¹⁸⁵.

Secretary General (SG)

Both the CM and the PACE are supported by the Council of Europe SG. The SG primarily bears the responsibility for the strategic management of the Council of Europe work program and budget. Next to that, the SG runs the Council of Europe and is responsible for the many activities developed and implemented by the around 1800 officials that fall within the scope of the core tasks of the Council of Europe.

The SG has the power to invoke the Article 52 ECHR procedure. This procedure allows the SG to ask the member states in what way they incorporate the provisions set out in the ECHR in their domestic legislation. Although until recently this procedure has not been used very often, the SG put it into practice when rumors first appeared in the media about alleged secret CIA prisons and flights in Europe¹⁸⁶.

The European Convention on Human Rights (ECHR) & The European Court of Human Rights (ECtHR)

The ECHR is the most important treaty of the Council of Europe, since a member state has to have ratified the ECHR before being able to become a member of the Council of Europe. The ECHR has proved to be a very successful treaty with a unique feature: it provides individual citizens the possibility to lodge a complaint with the ECtHR against actions of a Council of Europe member states that violate their fundamental rights¹⁸⁷. Member states can also lodge complaints against each other, but this procedure is not used very often. The ECHR provides for the right of life (Art. 2), prohibition of torture (Art. 3), prohibition of slavery and forced labor (Art. 4), right to liberty and security (Art. 5), right to a fair trial (Art. 6), no punishment without law (Art. 7), right to respect for private and family life (Art. 8), freedom of thought, conscience and religion (Art. 9), freedom of expression (Art. 10), freedom of assembly and association (Art. 11), the right to marry (Art. 12), the right to an effective remedy (Art. 13) and the prohibition of discrimination (Art. 14). Next to the articles, several Protocols have

¹⁸⁵ Ibid.

¹⁸⁶ For an overview of the procedure under Article 52 as followed by the Secretary General concerning the alleged existence of CIA flights and secret prisons, visit <http://www.coe.int/T/E/Com/Files/Events/2006-cia/>.

¹⁸⁷ Dean Spielmann, 1999, p. 757; P.J. Slot, R. Barents and R.A. Lawson, 2005, p. 199.

been added to the ECHR. Some of these Protocols have added rights to the ECHR, such as Protocol 1 (protection of property, the right to education and the right to free elections) and Protocol 6 (abolishment of the death penalty), but other merely change the institutional procedures of the ECtHR, such as Protocol 11 and Protocol 14.

Despite the extensive human rights protection the ECHR and ECtHR both offer, the Court faces several issues. Together with the technical hurdles of treaty changes both the EU and ECHR must undertake before EU accession to the ECHR is possible¹⁸⁸, these are severe issues that have an impact on the development of a common European standard on human rights. Firstly, the ECtHR faces an excessive workload, an issue already acknowledged a long time ago. Originally, the method of providing human rights protection under the ECHR was institutionalized in the European Court of Human Rights and the European Commission of Human Rights. Complaints of violations of rights protected by the ECHR could be lodged with the latter, after national judicial remedies had been exhausted. The Commission firstly looked at the admissibility of the complaint. If the complaint was deemed admissible, then the Commission proceeded to try and reach a friendly settlement between both parties. Upon rejection of a proposal for a friendly settlement, the case was put forward to the European Court of Human Rights, but only when the member state involved had accepted the jurisdiction of the ECtHR. If the member state had not, then the case was forwarded to the Committee of Ministers¹⁸⁹. However, due to the rising workload the ECtHR faced, reforms were deemed necessary. Protocol 11, added to the ECHR in 1998, tried to relieve this situation by reforming the European Commission for Human Rights and the European Court for Human Rights to one European Court for Human Rights. The involvement of the CM (a political body!) was terminated and all Council of Europe member states accepted the jurisdiction of the ECtHR¹⁹⁰. Protocol 11 proved to be successful, but it did not prevent an increase of complaints lodged with the ECtHR. This flood of complaints can be explained from the accession of many Central and Eastern European countries and of an overall increase of visibility of the ECHR¹⁹¹. Currently, the ECtHR is barely able to address the increased workload, which endangers the system of human rights protection offered by the ECHR and the ECtHR¹⁹². That is why in 2004 the addition of another Protocol was proposed. Protocol No. 14 incorporates more measures aimed at decreasing the workload even more. Current critics, however, argue that much more is needed to effectively decrease the workload of the ECtHR¹⁹³. Added to that, Protocol 14 has not entered into force as it still awaits ratification by one member state, namely the Russian Federation. However, ratification by the Russian Federation is expected shortly.

¹⁸⁸ See also previous chapter.

¹⁸⁹ P.J. Slot, R. Barents and R.A. Lawson, 2005, p. 194.

¹⁹⁰ Ibid, p. 198.

¹⁹¹ H.L. Janssen, 2006, p. 123.

¹⁹² Report of the Group of Wise Persons to the Committee of Ministers, 10 November 2006, Sages (2006) 06 EN Def.

¹⁹³ H.L. Janssen, 2006, p. 133.

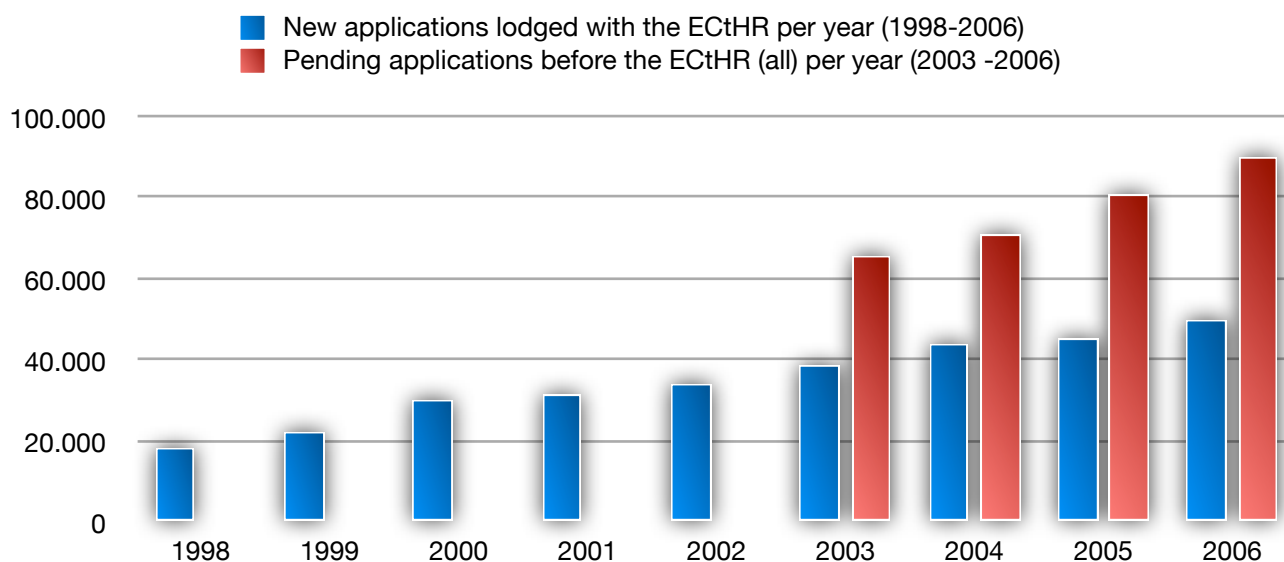


Figure 6: A steady rise of applications lodged with the ECtHR ¹⁹⁴.

The second issue, which the ECtHR faces is the effectiveness of the domestic implementation of the judgments of the ECtHR. The responsibility of implementation of judgments by the ECtHR lies with the member states themselves¹⁹⁵. However, during the Parliamentary Assembly Session of 2-6 October 2006, PACE reporter Mr. Erik Jurgens presented a report criticizing several member states on their ineffective domestic implementation of judgments made by the ECtHR, most notably Italy, the Russian Federation, Turkey, Ukraine and the United Kingdom. But similar difficulties were also signaled in Bulgaria, France, Germany, Greece, Latvia, Moldavia, Poland and Romania. It may be obvious that the credibility and authority of the ECtHR heavily depends on the implementation of its judgments made¹⁹⁶.

The European Social Charter (ESC) & The European Committee of Social Rights (ECSR)

The ESC focuses on a specific subset of human rights, namely social rights such as the right to housing, access to health care, education, employment, social protection, movement of persons and non-discrimination. The ECSR monitors if member states respect the rights set out by the ESC. Member states annually report on their implementation of ESC provisions. These reports are checked by the ECSR and the findings of the Committee are publicly presented every year following the addition of a Protocol to the ESC in 1998. Complaints on violations of the ESC by member states can be lodged with the ECSR by trade unions, employee organizations or certain NGOs.

¹⁹⁴ European Court of Human Rights Statistics 2004; European Court of Human Rights Statistics 2005; European Court of Human Rights Statistics 2006.

¹⁹⁵ P.J. Slot, R. Barents and R.A. Lawson, 2005, p. 198.

¹⁹⁶ PACE Report Doc. 11020; Report of the Group of Wise Persons to the Committee of Ministers, 10 November 2006, Sages (2006) 06 EN Def.

The Convention for the Prevention of Torture & The Committee for the Prevention of Torture (CPT)

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment enables its Committee (commonly referred to as the CPT) to visit places of detention to see how people who are for some reason deprived of their liberty (for example prisoners) are treated. The aim of the CPT is to improve the position of detainees rather than condemning member states. After each visit, the CPT creates a report on the situation found and sends it to the state concerned. These reports and the response of the respective government to it are classified, but it has become common practice for member states to request publication of these reports.

The protection of national minorities

Protection of national minorities is guaranteed through the Framework Convention for the Protection of National Minorities. States party to the Framework Convention are obliged to incorporate the goals of the Framework Convention through national measures and policies. These include ensuring equality before the law, preserving and developing cultures, safeguarding identities, religions, minority languages and traditions. Protection for minority languages is provided by the European Charter for Regional or Minority Languages. The member states' compliance to the Framework Convention and the European Charter for Regional or Minority Languages is monitored by the CM, assisted by respectively an Advisory Committee consisting of 18 independent and impartial members appointed by the CM and the Committee of Experts of the European Charter for Regional or Minority Languages. To this effect member states are required to hand in reports stating the measures and policies developed to meet the Treaty obligations. The reports prepared by the member states are made public.

Combating racism and intolerance

The European Commission against Racism and Intolerance (ECRI) is tasked with combating racism and xenophobia, anti-Semitism and intolerance in the Council of Europe member states. It does so by independently monitoring the member states policies, legislation and other measures against racism, xenophobia, anti-Semitism and intolerance. The results of these monitoring efforts are reported and these reports (and member states' responses to it) are made public. Next to monitoring member states, the ECRI also works on general themes, such as making general policy recommendations and providing examples of best practices.

The Commissioner for human rights

The Commissioner's main tasks are raising awareness for human rights in Council of Europe member states, observing and assisting member states in implementing Council of Europe human rights standards. The Commissioner also promotes the development of national human rights structures. The Commissioner does not have any decision-making powers and his work solely relies on the quality of his reports and presence.

The aforementioned mechanisms constitute the main bodies of the human rights machinery of the Council of Europe. What is apparent is that this machinery mostly consists of tools that can be placed in-between shaming and co-optation. Most committees mentioned use the publication of their reports to gather attention for any human rights breaches. Most tools, most notably the Framework Convention and also the Commissioner for human rights, try to alter domestic practices and policies to be in sync with human rights standards as set by the Council of Europe. This is an example of the use of shaming to force member states' co-optation with these human rights standards.

It is more difficult to characterize the role of the ECtHR within the human rights protection structures. On the one hand, it can be described as a genuine legal order that is able to take binding decisions to which its member states are obliged to comply. The ECtHR has developed an extensive jurisprudence and has built up extensive experience in human rights issues over the course of years. It has been to such an extent that in this respect the ECtHR itself uses the phrase *European legal space*¹⁹⁷. In this sense the ECtHR can be seen as a supranational institution that can take binding decisions to which the member states have to comply. On the other hand however, the enforcement of and member states' compliance with the ECtHR's judgments depend on monitoring by the CM as well as the PACE. As the recent report of Mr. Jurgens shows, execution of judgments is sometimes lacking¹⁹⁸. Not giving effect to the judgments made by the ECtHR can have an adverse impact on the effectivity of the Council of Europe human rights machinery as a whole and the ECtHR in particular.

4.2 Relation between the EU and the Council of Europe.

During the Third Summit of the Council of Europe, held in Warsaw in 2005, it was decided that the Council of Europe should focus on its core tasks, which are the protection and promotion of human rights and promoting democracy and the rule of law in the member states. Several reasons underlie this decision¹⁹⁹:

- The expansion of the Council of Europe, the EU, but also the Organization for Security and Co-operation in Europe (OSCE) and their shared values means that different organizations in Europe are developing activities that share the same goals and objectives, thereby overlapping each other. The Council of Europe has thus somewhat been overshadowed by the EU and the OSCE, which means that its reason for existence has increasingly been called into question.
- The 'old' member states of the Council of Europe that are also member of the EU are less interested in the Council of Europe than they used to be, which has undermined the image and authority of the Council of Europe.

¹⁹⁷ P.J. Slot, R. Barents and R.A. Lawson, 2005, p. 221.

¹⁹⁸ PACE Report Doc. 11020.

¹⁹⁹ Advice No. 33, Advisory Council on International Affairs, p. 9-10.

- In the 1990s a number of countries became member of the Council of Europe while not entirely adhering to its values and standards. This also undermined the image and credibility of the Council of Europe and added significantly to the workload of the ECtHR.
- The range of tasks pursued by the Council of Europe are deemed too broad. In light of the organization's restricted budget, this strained on the functioning of the Council and the execution of its programs.

Therefore, the heads of state and government of the Council of Europe member states gathered at the Third Summit and adopted an Action Plan, aiming to focus the Council of Europe on its core tasks, namely preserving and promoting human rights, democracy and the rule of law²⁰⁰. A major aspect of the defining the 'new' role of the Council of Europe is the determination of its relation with the EU (and also the OSCE). Thus, it has been decided that the relation between the EU and the Council of Europe needs to be clarified. Two separate initiatives have been taken to establish a clear definition of that relation. Firstly, the EU and the Council of Europe have entered negotiation on the conclusion of a *Memorandum of Understanding* (MoU) between the EU and the Council of Europe. These negotiations are still ongoing. Secondly, during the Third Summit, prime minister of Luxembourg, Jean-Claude Juncker, has been asked to report his personal views on the relation between the two organizations. He has presented his report on the 13th of April 2006 and his main conclusions regarding the role of the Council of Europe and the EU in Europe's human rights regime are as follows²⁰¹:

- The EU should accede to the ECHR and the EU bodies should recognize the Council of Europe as the European wide reference source for human rights, thereby acknowledging that the Council of Europe plays the central role in Europe when it concerns human rights.
- Juncker proposes a stronger role for the Commissioner for Human Rights within the EU. The EU should refer its human rights issues when these cannot be covered by existing human rights structures.
- According to Juncker, the Agency should deal with fundamental rights only in connection with Community law. It should not interfere with the instruments used by the Council of Europe to monitor human rights compliance. Furthermore, the Agency should in its statute refer to the ECHR and the Council of Europe's human rights monitoring machinery as the basic reference source and the Commissioner of Human Rights as essential partner.

According to Juncker, the Council of Europe should remain the benchmark for human rights in Europe. Essentially, it does not mean, according to Juncker, that the Agency is undesirable from the

²⁰⁰ Action Plan (CM(2005)80 final).

²⁰¹ Jean-Claude Juncker, 2006, p. 4-9.

perspective of the Council of Europe, but the Agency (and the EU in general) should make use of the Council of Europe's expertise in the field of human rights, thereby confirming the institutional role of the Council of Europe regarding human rights in Europe as envisaged at the Third Summit. The PACE expresses a somewhat dissatisfactory view concerning the Agency and stresses the importance of the Council of Europe's pivotal role on human rights. The PACE therefore does not feel comfortable with the EU setting up the Agency. The next section will give an overview of the main concerns as expressed by the PACE as well as more positive comments as expressed by the Secretary-General and the Committee of Ministers of the Council of Europe.

4.3 Main Council of Europe concerns towards the Agency

Before starting to explain the main concerns the Council of Europe has towards the Agency, it must be noted that the Council of Europe does not have any powers to stop the establishment of the Agency. From a Council of Europe point of view, there is thus no point in being against the establishment of the Fundamental Rights Agency. However, and this shows the importance of the role of the PACE in the debate surrounding the Agency, the members of the PACE have a double mandate. It means that they can block certain aspects of the Agency's mandate through their national parliaments. This is exactly what is happening within the Dutch Senate, that has clearly expressed its dissatisfaction with the establishment of the Agency²⁰². Since the Agency's establishment is based on Art. 308 EC Treaty, the national parliaments cannot stop the establishment of the Agency itself, but the Agency' did not receive a mandate in third pillar matters following pressure from the Dutch Senate amongst other member states who do not wish a remit of the Agency in third pillar matters. Currently, the EU institutions and member states may voluntarily request the Agency on advice concerning fundamental rights in connection with areas of police and judicial cooperation in criminal matters. However, before 2009, the decision to extend the remit of the Agency to third pillar matters will be re-examined and the Commission will submit a proposal to this effect. Chapter five will deal with this matter more extensively.

Returning to the Council of Europe concerns regarding the Agency, the main concerns the PACE has towards the Agency are being explained in several resolutions, reports and recommendations presented to the CM²⁰³. These concerns mainly derive from the notion that the Council of Europe should remain the central organization dealing with human rights in Europe. An Agency that would duplicate the efforts of the Council of Europe would create a double standard on human rights in Europe, since the EU is not a member of the ECHR. Such a double standard could lead to forum shopping, where EU member states can pick those standards and mechanisms that best favor their position. A duplication of effort would also create new dividing lines within Europe, since it creates an unclear situation for

²⁰² Motie Dees (VVD) c.s., 7 maart 2006; Kamerstuk 22.112

²⁰³ PACE recommendation 1696; PACE Recommendation 1744; PACE Resolution 1427; PACE Report Doc. 10894; PACE Report Doc. 10449.

member states being member of two international organization that both deal with the same issues, but one organization having a more limited membership than the other. A duplication of work already done by the Council of Europe would also cause confusion for the European citizen and would constitute an inefficient use of public money. Therefore, according to the PACE, the Agency should be set up according to the following considerations:

- The Agency should not engage in monitoring by country, but should monitor fundamental rights by thematic areas. It should explicitly refer to human rights instruments of the Council of Europe, especially the ECHR, the CPT, the ESC and the Framework Convention for National Minorities.
- The Agency activities should be confined to Community law and the EU's own internal legal order, in order to avoid any duplication with work already undertaken by the Council of Europe.
- Extending the remit of the Agency to pursue activities under Article 7 TEU would create a duplication of effort with the work of the Council of Europe and would not contribute to an effective working of the Agency altogether.
- The geographical mandate should be confined to EU member states only. Extending the mandate to third countries would undermine the expression of the political will to emphasize the importance of fundamental rights to and within the EU. Furthermore, it would also mean a duplication of efforts. EU candidate countries can be included, but only when that relates to the accession process.
- The establishment of the Agency should not mean that a new forum for human rights should be erected. The Agency's mandate, therefore, should explicitly mention that any duplication with the work of the Council of Europe should be avoided.
- The Council of Europe should be represented in the managerial structures of the Agency and should be given voting rights. The position of the Council of Europe representative should be at least equal to the current representation of the Council of Europe within the EU Monitoring Centre on Racism and Xenophobia.
- The legal basis of the Agency should be without doubt. The principle of subsidiarity should be considered thoroughly in relation to national human rights agencies as well as the Council of Europe.
- The PACE proposes that a postponement of the establishment the Agency should be considered in order to firstly arrange the EU accession to the ECHR as well as giving the EU Charter of Fundamental Rights binding effect as proposed in the Treaty establishing a Constitution for Europe. Especially, from a Council of Europe point of view, EU accession to the ECHR is seen as an important sign for a genuine political will of the EU for respect for fundamental rights.

- The view of national parliaments should be taken into consideration, since their views may add to the concerns expressed by the PACE.

The report presented at the PACE General Assembly of April 2006 connected the debate on the Agency to the more general debate on the relation between the Council of Europe and the European Union by demanding that final decisions on the creation and mandate of the Agency should not be taken before the MoU has been concluded between the Council of Europe and the EU. Furthermore, the cooperation agreement foreseen between the Agency and the Council of Europe should not be completed before the mandate of the Agency is established.

Concerns expressed by the Committee of Ministers

In its reply on PACE resolution 1696, the CM pointed out its position on the establishment of the Agency²⁰⁴. Principally, the CM shares the views expressed by the PACE, most notably those that underline the role of the Council of Europe as the primary forum for the protection and promotion of human rights in Europe. The CM is of the opinion, however, that during the Third Summit and the negotiations surrounding the conclusion of a MoU, concerning the relation between the Council of Europe and the EU regarding the strengthening of the cooperation in the field of human rights, the groundwork for a stronger, more structured and better defined relationship with the EU has been laid, in which the Council of Europe's position as primary forum for human rights in Europe has been reaffirmed²⁰⁵.

The CM emphasizes the need for prevention of duplication of work between both organizations and, as will be shown in the next chapter, many PACE concerns regarding the supposed duplication of efforts have already been taken into account in the legislative proposals for the establishment of the Agency. The tasks of the Agency will therefore be complementary to the work already undertaken in the field of human rights, according to the CM. Furthermore, the CM affirms that the Council of Europe will be institutionally embedded in the structures of the Agency and that a bilateral agreement between the Agency and the Council of Europe will be concluded to define the relation between the both. Lastly, the CM acknowledges that the Agency's mandate should focus on human rights issues within the framework of the EU and emphasizes that one of the Third Summit's conclusions stated that the Agency could help contribute to increase the cooperation between the EU and the Council of Europe, which in turn, contributes to a greater coherence and enhanced complementarity in the fields of human rights in Europe. Current cooperation between the Council of Europe's ECRI and the EU's EUMC can serve as an example of good cooperation between both organizations.

²⁰⁴ CM reply to PACE Recommendation 1696 (CM/AS(2005)Rec 1696).

²⁰⁵ Ibid.

Concerns expressed by the Secretary General

Most of the concerns the SG has expressed, correspond to the concerns already expressed by the PACE. During the Public Consultation, launched by the European Commission in 2004 to gather ideas and opinions for the establishment of the Agency, the SG, represented by the deputy SG, welcomed the establishment of the Agency²⁰⁶. According to the SG, the Agency can help to contribute to an enhancement of the protection of human rights in the EU. The Agency's key role should be the incorporation of human rights into EU policies, legal acts and daily practice of EU institutions, according to the SG. Therefore, the Agency should fulfill certain conditions. Firstly, the Agency should build on the existing human rights machinery developed by the Council of Europe and should avoid any overlap with that machinery. Therefore, the SG sees the role of the Agency as an institution that collects data, prepare studies on specific issues and proposes solutions for them. Furthermore, the Agency should identify best practices (using the human rights standards of the Council of Europe). The Agency should fill an existing gap in the human rights protection structure in Europe and should therefore be given a mandate that is restricted to EC/EU law. In this respect, the Agency should focus on data collection and analysis, awareness raising in relation to human rights, advising the EU institution in the preparatory phase of EU legislation and the Agency should adopt a thematic approach in its work program. The Agency should, according to the SG, not be engaged in the monitoring of member states and therefore the Agency should use a cautious approach in applying the provisions under Art. 7 TEU, since the Council of Europe already monitors the individual EU member states on their compliance with human rights standards. The information gathered by the Council of Europe in this respect could be used by the EU in the sense of Art. 7 TEU. In order to clearly define the relation between the Agency and the Council of Europe, a bilateral agreement should be concluded, just as the PACE suggested.

The SG also presented some more critical points that focused on the establishment of the Agency. According to the SG, the most urgent problem that needs attention is the place and role of the Council of Europe representative in the Management Board and the Executive Board of the Agency. The representative should get full voting rights in both structures, as is the case in the current EUMC. It would also contribute to consistency and complementarity regarding human rights work in Europe. Secondly, the SG argues that current proposals to include countries with which the EU has concluded a Stability and Association Pact within the geographic scope of the mandate cannot bear the approval of the Council of Europe. Thirdly, the Council of Europe has insisted on inclusion of references to Council of Europe human rights monitoring structures in the mandate of the Agency. Currently, a reference to Art. 6 TEU (which in its turn refers to the ECHR) is included, but other structures should be mentioned as well. Fourthly, the Council of Europe has good relations with different NGOs. According to

²⁰⁶ EPEC Public Hearing Report, 2005, p. 19-20.

the SG, the Agency should make use of the network of NGOs provided by the Council of Europe. Lastly, the Agency includes a Scientific Committee that is responsible for the scientific quality of the Agency's work. In the eyes of the SG the Council of Europe should be embedded in the structures of the Agency in such a way that the Council of Europe is able to inform the Scientific Committee about relevant Council of Europe standards and activities in order to ensure consistency and complementarity.

4.4 Concluding remarks

The Council of Europe possesses an impressive human rights monitoring machinery that, although it mainly consist of soft law, can be described as effective and efficient. Most notably the ECHR and the accompanying ECtHR, but also the CPT and the ESC are considered as valuable human rights bodies that have proven their worth. The Council of Europe, therefore, can be considered as the centre of expertise on human rights issues in Europe. This is acknowledged by the EU, not only through the conclusion of a MoU or through the report of Mr. Juncker, but also by daily practice. The Council of Europe and the EU work together on various human rights fields, such as human rights screening of EU candidate countries. The cooperation is considered a good working relationship by both parties²⁰⁷.

However, some reservations regarding the human rights role of the Council of Europe have to be made. Firstly, the Council's main human rights body, the ECtHR, faces an excessive workload for many years already. The restricted budget adds to further concerns over the capability of the Council of Europe to take effective measures against this workload. Secondly, not all of the EU policies and activities are under the review of the Council of Europe. This is the case concerning EU institutions as well as member states when they implement Community law. Thirdly, the competences of the EU in (mostly) the third pillar require an adequate protection of fundamental rights that accompanies the various legislative proposals of the EU in the third pillar, such as the European Arrest Warrant or data protection in criminal matters²⁰⁸. Lastly, the Council of Europe may be regarded as a central reference point regarding human rights in Europe, this does, however, not mean that the Council of Europe has an exclusive role in the field of human rights in Europe.

However, the pivotal role of the Council of Europe regarding human rights issues in Europe is confirmed by the EU during and after the Third Summit, when the EU member states, together with the rest of the Council of Europe member states, expressed their support for the Warsaw declaration and the accompanying Action Plan. The Third Summit also saw the start of a process to better define the relation between the EU and the Council of Europe. Within this relation, it has been emphasized that the Council of Europe should be the primary forum for human rights protection and promotion in

²⁰⁷ House of Lords report, 2006, p. 18.

²⁰⁸ House of Lords report, 2006, p. 25.

order to prevent the occurrence of double standards. This makes the concerns of the Council of Europe regarding the Agency legitimate and broadens the debate on the establishment of the Agency to a wider debate on the relation between both organizations. An Agency that would perform the same work as the human rights monitoring and protection structures of the Council of Europe would naturally create confusion on what human rights standards to apply. It could therefore create new dividing lines in Europe and open up the possibility for forum shopping by EU member states. The financing of an Agency that duplicates the work of the Council of Europe would also be considered as an inefficient use of public money, since the same work would be done twice. Therefore, the different bodies of the Council of Europe, the PACE, the CM and the SG, have called upon the EU to take note of their concerns when developing the proposal to create the Agency. The three bodies have made demands to which the Agency and its work should adhere. The most notable demands made by the bodies are the inclusion of a Council of Europe representative in the management structures of the Agency, the confinement of the Agency's mandate to strictly Community law, no human rights monitoring of member states by the Agency, a geographical scope limited to the EU and possibly candidate states (but no countries that have a Stability and Association Agreement with EU), close cooperation with the Council of Europe and clear references in the Agency's mandate to the relevant Council of Europe human rights monitoring structures. The PACE has also suggested to put the establishment of the Agency on hold until the general relationship between the EU and the Council of Europe has more thoroughly been defined in an MoU, however the Agency has already been established.

In what way the concerns of the Council of Europe are heard by the EU will be dealt with in the next chapter, which will explain the regulation establishing the Agency, what role and tasks are given to it and how it should execute these tasks. After that, the scope and remit of the Agency can be held against the needs of the EU and concerns of the Council of Europe.

5. THE COMPETENCES OF THE FUNDAMENTAL RIGHTS AGENCY

Chapter three discussed the benefits an Agency could provide to the overall promotion of and respect for human rights within the EU. Chapter four discussed the issues the Council of Europe has towards the Agency. This chapter will highlight the way in which the Agency firstly addresses the needs of the EU and secondly addresses the concerns of the Council of Europe. This is done by examining the final version of the proposal for the establishment of the Agency²⁰⁹. The conclusion of this effort will lead to a clear understanding of what role the Agency will get within the European human rights structure and if that role fills a gap and brings a complementary contribu-

tion to the overall human rights protection structure that exists in Europe nowadays. The impact the establishment of the Agency will have on Europe's human rights architecture will also be assessed.

5.1 Goals originally envisaged

Chapter three already gave an insight in the reasons behind the desire for a EU Fundamental Rights Agency. Already in the report of the Comité des Sages in 1998 the possible extension of the remit of the EU Monitoring Centre on Racism and Xenophobia (EUMC) to a Fundamental Rights Agency was mentioned, situated in a context in which it was apparent that the EU needed to increase its efforts on human rights protection and promotion hereof. Initially, the proposal for an Agency was met with mixed feelings. The Commission stated, in a communication in 2001 explaining the EU's proposed strategy concerning human rights in Third Countries, that the EU already possessed sufficient sources of information in the form of reports from the Council of Europe, the United Nations and International NGOs, which made the establishment of the Agency unnecessary, according to the Commis-

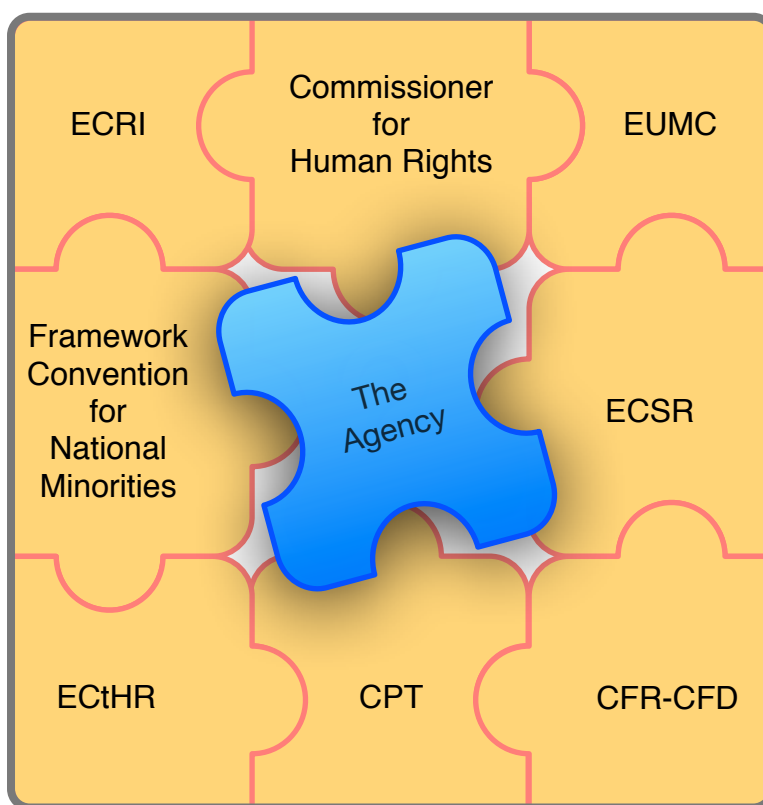


Figure 7: Does the Agency fill a gap in Europe's human rights architecture?

²⁰⁹ The regulation establishing the EU Fundamental Rights Agency has not been published yet. However, during the Justice and Home Affairs Council Meeting of 4 December 2006, an agreement was reached concerning the establishment of the Agency. See also Annex 1. Although the final regulation is not available yet, the proposal that has been approved during this meeting has been used to give an overview of the Agency's mandate.

sion²¹⁰. The decision of the European Council, taken at the European Council Meeting in 2003, to extend the mandate of the EUMC therefore took many by surprise²¹¹. The European Council defined the objectives of the Agency as follows: “*The Representatives of the Member States meeting within the European Council, stressing the importance of human rights data collection and analysis with a view to defining Union policy in this field, agreed to build upon the existing European Monitoring Centre on Racism and Xenophobia and to extend its mandate to become a Human Rights Agency to that effect*”. The Council also stressed the importance “*for further implementation of the agreement by the representatives of the Member States meeting within the European Council in December 2003 to establish an EU Human Rights Agency which will play a major role in enhancing the coherence and consistency of the EU Human Rights Policy*”. Based on these objectives, the Commission started to work on a proposal for the establishment of the Agency. Prior to that, it conducted a Public Consultation procedure that led to an Impact Assessment of the Fundamental Rights Agency. The Impact Assessment signaled several problems concerning the observation of fundamental rights in the Union²¹². Firstly, there is a lack of information on fundamental rights at the EU level²¹³. On the other hand, there is a lot of information available on the state of fundamental rights in the member states. But it is often fragmented, covers different time periods and come from different sources. Member states often have different interpretations of fundamental rights and have different ways of collecting data on fundamental rights. Also, information stemming from international organizations (such as the Council of Europe) have quality issues as it is sometimes the result of self-reporting by states (for example the Framework Convention of National Minorities). Information from NGOs is often aimed at specific features of fundamental rights and seldom gives a complete and general overview of the state of fundamental rights in a given country. Therefore, the EU would benefit from an information and management tool that collects and processes all the relevant information in one place in order to ensure its reliability and comparability. Secondly, the Commission noted that shortcomings exist in systematic observation of the state of fundamental rights within the EU and its member states when implementing EU law²¹⁴. It is the task of the European Commission to monitor the implementation of EU law, also where that concerns fundamental rights. Art. 6 TEU explicitly refers to respect for fundamental rights when implementing Community law. The Commission has several pools of information at its disposal, mainly international organizations (such as the Council of Europe), to control respect for fundamental rights, but several issues remain:

²¹⁰ COM/2001/252 final.

²¹¹ Philip Alston and Olivier de Schutter, 2005, p. 2-3.

²¹² COM/2005/280 final

²¹³ COM/2001/252 final.

²¹⁴ COM/2001/252 final.

- The coverage and timing of monitoring fundamental rights issues is not comparable throughout the EU. Moreover, there is also a lack of quantitative data on respect of fundamental rights by member states when implementing EU law.
- Several international organization that provide the Commission with their information (such as the Council of Europe) rely on self-monitoring, which makes the data less reliable.
- The institutional setting in which fundamental rights monitoring takes place is very complex. Complementarity and cooperation between different structures is needed. Added to that, the information available is very extensive, while there is genuine need to specifically relate it to the effects of EU legislation and policy.
- At the national level, different member states have different national human rights structures. These structures differ considerably in terms of their competences, scope, resources and independence. As has been argued in chapter three, differences in fundamental rights protection across member states can cause friction with the internal market, regardless of the fact that all EU members are also members of the Council of Europe. Furthermore, the growing objective of the Hague Program also stresses the need for harmonization across member states.
- The EU Network of Independent Experts does not have the resources the conduct comprehensive monitoring of fundamental rights in the EU member states. Moreover, it has ceased to exist as of September 2006²¹⁵.

Thirdly, there is the issue of screening mechanisms for the purposes of Art. 7 TEU²¹⁶. One of the issues surrounding the screening of Art. 7 TEU is how the EU institutions act to identify a breach requiring the Art. 7 TEU procedure. It seems necessary to base such action on regular, systematic and independent monitoring of respect for fundamental rights within the EU member states. Fourthly, the Commission identified that there is a lack of coordination and networking between national and European level human rights institutions²¹⁷. Coordination and networking mostly takes place between the Council of Europe (mostly via the Commissioner of Human Rights) and the national human rights institutions. This coordination and networking is implemented through biannual round table meetings. However, this is not sufficient for the Union. Reason for this is the wider scope of the EU Charter on Fundamental Rights compared to the ECHR, the large body of EU policies that have implications for fundamental rights and the differences between the member states concerning their national human rights structures and promoting respect for fundamental rights in general. Furthermore, the Commission noted that there is a lack of systematic and permanent dialogue between the EU and national and European NGOs²¹⁸. An Agency could provide the flexibility of having a broad dialogue with civil soci-

²¹⁵ House of Lords report, 2006, p. 28.

²¹⁶ COM/2001/252 final.

²¹⁷ Ibid.

²¹⁸ Ibid.

ety, as well as engage in debate with NGOs specialized in fundamental rights on specific fundamental rights issues related to EU policy making. Currently, no regular and systematic consultation between the various NGOs and the EU institutions exists. Moreover, there is a lack of public awareness of their fundamental rights. Lastly, the Commission concluded that there is a need for more coherence in respecting and promoting fundamental rights in EU policies²¹⁹. This conforms to what was already concluded in the third chapter of this thesis, namely that there is a lack of internal focus on respect for fundamental rights in EU policy making compared to the external EU initiatives concerning human rights. There is no centre of expertise within the EU institutions to advise on fundamental rights aspects of legislation and policy through the policy cycle.

After the Impact Assessment signaled these problems, the Commission went on to formulate the desired policy option that would define the Agency's mandate in order to meet the objectives set by the European Council. The Commission distilled several operational policy objectives for the Agency²²⁰. These objectives included:

- The improvement of definitions, existence and comparability of data on fundamental rights;
- Objectively following and analyzing existing reports, studies, judgments and other evidence on fundamental rights pertaining to EU policy;
- Developing a strong analytical capacity and to act as a centre of expertise on fundamental rights;
- Observing the application of fundamental rights standards in practice stemming from EU policy and its institutions;
- Monitoring the application of fundamental rights standards on the ground by member states outside of Union law framework for the purposes of Article 7 of the TEU;
- Identifying and promote good practices in respecting and promoting fundamental rights by the EU institutions, bodies, agencies and member states;
- Formulating independent opinions on fundamental rights policy developments in the EU;
- promoting dialogue with civil society, coordinate and network with various actors in the field of fundamental rights;
- raising public awareness in the EU of fundamental rights;
- providing incentives for candidate member states to fully respect fundamental rights.

On the basis of the above, a "*focused observation and assessment mandate*" was thought to be the most appropriate for the Agency to reach the policy objectives set out by the European Council. Thus it was proposed that the Agency should collect information on fundamental rights on several thematic areas,

²¹⁹ COM/2001/252 final.

²²⁰ COM/2005/280 final

with a responsibility to observe the EU institutions and member states when they implement Community law. The Agency would also carry out assessments and present opinions to the EU institutions and the member states²²¹. The Commission then set out its proposal for the establishment of the Agency. Key features of this initial proposal foresaw that the Agency builds upon the existing EUMC, that it be managed independently and that it be mandated to define its annual work program, where necessary in consultation with relevant stake-holders. The thematic areas in which the Agency will operate, will be determined through a Multi-annual Framework, which will be adopted by the Commission. In its Impact Assessment, the Commission envisaged the following activities to be performed by the Agency²²²:

- Collect and analyze data on how fundamental rights are affected by the implementation of EC/EU policies. The Agency will have to cooperate with national statistical institutes and other relevant national structures to improve the comparability and quality of the data collected at the national level.
- Carry out research and surveys and provide grants to fund research by external partners. These research endeavors should be based on the needs in the work of the Agency (as defined in the Multi-Annual Framework and the Annual Work Program).
- Prepare annual reports on how fundamental rights are respected in EU member states and by EU institutions when implementing EU law and policies. Concerning these reports, best practices should be identified. These reports should not be country reports.
- Next to these reports, thematic reports on issues relevant to EU policies should be prepared, containing best practices as well as recommendations for improvement.
- The Agency should also formulate conclusions and opinions to the EU's institutions and member states concerning respect for fundamental rights when implementing EU law and policies.
- Lastly, the Agency should raise public awareness on their fundamental rights as well as promote dialogue with civil society in order to create a network of relevant stake-holders in the field of fundamental rights.

In performing these tasks, the Agency should coordinate its work and consult other international organizations that operate in the field of fundamental rights, such as the Council of Europe. The Agency should also use information on fundamental rights issues gathered by these organizations. Concerning the Council of Europe, the Commission identified possible tools to ensure the cooperation between the Agency and the Council of Europe, such as formal participation of a Council of Europe representative in the Management Board of the Agency, the conclusion of a cooperation agreement between the Agency and the Council of Europe, the organization of regular meetings and consultation rounds.

²²¹ Ibid.

²²² COM/2005/280 final.

The overall conclusion the Commission made in its Impact Assessment was that the Agency would contribute to the availability, quality and comparability of data on respect and promotion of fundamental rights. The cooperation with national structures as well as civil society would lead to better coordination. In this sense the Agency will act as a centre of expertise on applying fundamental rights standards in the development and implementation of EU policies and law and thus contribute to the coherence of the overall fundamental rights policy of the EU.

In June 2005, the Commission presented the proposal for a Council regulation establishing a European Agency for Fundamental Rights together with a proposal for a Council decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty of the European Union (the third pillar). The next section will look at these proposals and the final regulation establishing the Agency to identify in which way the initial objectives of the Agency are met.

5.2 Analysis of the Agency's mandate

The legal basis on which the Agency has been established is Art. 308 TEC: *'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures'*. There have been doubts if this legal base is sufficient, as Art. 308 only allows action when it contributes to the objectives of the European Community and not of the European Union. Promoting respect and protection of human rights is a Union objective and therefore does not fall within the scope of Art. 308 TEC. However, the Court of Justice has repeatedly stated that respect for fundamental rights forms a part of the general principles of Community law. Furthermore, when checking the legality of Community acts, compliance with fundamental rights is an important condition²²³. Lastly, in various external agreements between the EU and third countries, human rights clauses form an important part. Therefore, it can be concluded that the promotion of respect and protection of fundamental rights can be considered a Community objective²²⁴. Activities of the Agency within the remit of the third pillar require a separate decision of the European Council that will empower the Agency to develop activities on third pillar matters. Firstly, it was proposed that this decision will be based on Art. 30, 31 and 34(2)(c) TEU. However, some member states expressed their dissatisfaction with a remit of the Agency in third pillar matters. This is the result of the double mandate of PACE parliamentarians, who, in their national parliaments, instructed their governments not to agree on a remit in third pillar matters. Therefore, it has been decided that EU institutions and member states can choose to voluntarily ask the Agency for ad-

²²³ House of Lords report, 2006, p. 15-16.

²²⁴ House of Lords report, 2006, p. 16.

vice on third pillar matters. Furthermore, before the end of 2009 the proposal to extend the remit of the Agency to third pillar matters will be re-examined²²⁵.

Regarding the geographical scope of the Agency candidate member states are allowed to participate in the Agency, however, these countries have an observatory status. Countries that have concluded a Stabilization and Association Agreement (SAA) with the EU can be invited by the European Council as observers, provided the Council decides unanimously to do so. Such a participation is further limited to the purpose of gradually aligning to Community law of the respective country²²⁶. This more or less addresses one of the concerns expressed by the Council of Europe, as noted in chapter four, since the Council of Europe believes that fully including candidate countries and SAA countries will mean a duplication of effort of the work already done by the Council of Europe, since these countries are already member of the Council of Europe.

The Agency's bodies

The Agency consists of four bodies. The Agency's Management Board is responsible for the implementation of the Agency's tasks by defining the annual work program in accordance with the multi-annual framework²²⁷. A Council of Europe representative is appointed to the Management Board²²⁸. This representative has voting rights on issues concerning the Annual Work Program and the composition of the Scientific Committee, but not when it concerns the Agency's organizational issues²²⁹. The Management Board is assisted by the Executive Board, which is composed of the Chairperson and Vice-chairperson of the Management Board, two elected members of the Management Board and the Commission Representative of the Management Board. The Council of Europe representative also participates in the meetings of the Executive Board and has full voting rights²³⁰.

The Director of the Agency can take part in the meetings of the Executive Board, but does not have voting rights. The Director is appointed by the Management Board and is responsible for the execution of the Annual Work Program and in general the tasks entrusted to the Agency. The Director is also responsible for cooperation with National Liaison Officers as well as Civil Society. Lastly, the Director is responsible for administrative matters²³¹. The Scientific Committee will be composed of independent members whose tasks is to guarantee the scientific quality of the Agency's work and will guide the work to that effect²³².

²²⁵ Press Release, Justice and Home Affairs Council Meeting 4 December 2006, p. 10.

²²⁶ Art. 27 of the Proposal for a Council Regulation establishing a EU Agency for Fundamental Rights.

²²⁷ Art. 11 of the Proposal for a Council Regulation establishing a EU Agency for Fundamental Rights.

²²⁸ Art. 9 of the Proposal for a Council Regulation establishing a EU Agency for Fundamental Rights.

²²⁹ Art. 11(8) of the Proposal for a Council Regulation establishing a EU Agency for Fundamental Rights.

²³⁰ Art. 12 of the Proposal for a Council Regulation establishing a EU Agency for Fundamental Rights.

²³¹ Art. 13 of the Proposal for a Council Regulation establishing a EU Agency for Fundamental Rights.

²³² Art. 12a (5) of the Proposal for a Council Regulation establishing a EU Agency for Fundamental Rights.

Some general remarks can be made about the aforementioned bodies and the organizational structure of the Agency. Cooperation with the Council of Europe is institutionalized within the working structures of the Agency, through the Council of Europe representative. A sufficient Council of Europe representation prevents unnecessary duplication of efforts, as this representative can inform the Agency about the Council of Europe's work and standards on fundamental rights issues. In reply to a question of the PACE, the Committee of Ministers stated that: "...the Committee of Ministers recalls that the existing arrangements for cooperation between the Council of Europe and the European Observatory on Racism and Xenophobia (EUMC) have worked to the full satisfaction of both organizations and wishes to see a similar arrangement for the Council of Europe's participation in the Agency's bodies..."²³³. Within the EUMC, the Council of Europe representative has voting rights within the Executive Board and the representative can vote on the rules of procedure of the EUMC; apart from the voting remit on procedural matters, the representation of the Council of Europe representative will thus exactly be the same as in the EUMC.

The proposal to add a Scientific Committee initially caused concerns within the Council of Europe, since the Council of Europe representative would not be represented in this Committee. However, the final responsibility of reports made by the Agency lies with the Management Board, which also appoints the members of the Scientific Committee. In this way, the Council of Europe representative can make sure that the Scientific Committee is informed about the Council of Europe standards on fundamental rights issues at an early stage, ensuring consistency and complementarity.

The Agency's tasks

The objective of the Agency shall be to "*provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights*"²³⁴. This objective is limited to fundamental rights issues in the European Union and its member states when implementing Community law²³⁵. The tasks the Agency will perform following its objective are listed below²³⁶:

- The Agency will collect, record, analyze and disseminate relevant, objective and comparable information and data. This also includes data coming from research and monitoring of member states, as well as EU institutions, other bodies and other international organizations, in particular the competent bodies of the Council of Europe.
- The Agency will develop methods and standards to improve the comparability, objectivity and reliability of data at European level. The Agency will also carry out, or outsource, scientific re-

²³³ CM reply to PACE Recommendation 1696 (CM/AS(2005)Rec 1696).

²³⁴ Art. 2 of the Proposal for a Council Regulation establishing a EU Agency for Fundamental Rights.

²³⁵ Art. 3 of the Proposal for a Council Regulation establishing a EU Agency for Fundamental Rights.

²³⁶ Art.4 of the Proposal for a Council Regulation establishing a EU Agency for Fundamental Rights.

search, surveys preparatory and feasibility studies. It can do so at the request of the European Parliament, Commission or Council, provided it falls within the annual work program. The Agency will also be able to organize expert meetings and ad-hoc working groups on fundamental rights issues.

- The Agency will formulate conclusions and opinions on specific thematic issues important to the EU and the member states when implementing EU law. The Agency may do this on its own initiative or at the request of the European Parliament, Commission or Council.
- The Agency will publish annual reports on fundamental rights issues covered by the areas of the Agency's activity, also highlighting examples of good practice. The Agency will also publish thematic reports based on its analysis, research and surveys as well as annual reports on its activities.
- Lastly, the Agency will develop a communication strategy and promote dialogue with civil society in order to raise awareness amongst the public on fundamental rights. The Agency will also inform relevant stake-holders actively about its work.

Some general remarks can be made about the aforementioned tasks to be performed by the Agency. The tasks performed by the Agency are encapsulated in a Multi-annual Framework, which determines the Agency's thematic areas. These thematic areas must include the fight against racism, xenophobia and intolerance to ensure the current activities of the EUMC remain intact²³⁷. The current activities of the EUMC will only partly remain intact however, since the Agency's remit is confined to the implementation of Community law, whereas the remit of the EUMC does not have this limitation and is able to make full fledged country reports. The Multi-annual Framework also includes provisions that facilitate the cooperation with other international organizations in the fields of human rights, explicitly the Council of Europe.

The Agency will not get an obvious role in monitoring member states in the sense of Art. 7 TEU. Instead, the member states opted for a solution in which the European Council can ask the Agency's advice in a situation to which Art. 7 TEU refers²³⁸. The Agency will thus not be able to regularly monitor individual member states in the sense of Art. 7 TEU, which corresponds with the demands made by the Council of Europe. Furthermore, the Agency will not get a legislative scrutiny role in the sense of Art. 230 TEC, but the Agency will be able to provide conclusions, opinions and reports in the sense of Art. 250 TEC²³⁹. It means that the Agency will not be able to review the legality in relation to fundamental rights of acts adopted jointly by the European Parliament and the European Council, of acts of the Council, of the Commission (other than recommendations and opinions) and of acts of the Euro-

²³⁷ Art. 5 of the Proposal for a Council Regulation establishing a EU Agency for Fundamental Rights.

²³⁸ House of Lords report, 2006, p. 13.

²³⁹ Art. 4(2) of the Proposal for a Council Regulation establishing a EU Agency for Fundamental Rights; House of Lords report, 2006, p. 13.

pean Parliament intended to produce legal effects vis-à-vis third parties. It can, however, review proposals from the Commission. This opens the way for an Agency's role in providing expertise on fundamental rights issues in the IAs of the Commission's proposals or, going one step further, mainstreaming fundamental rights into the EC/EU's legal order.

The Agency shall perform its tasks in absolute independence²⁴⁰. In executing its work, the Agency is required to take account and to refer to findings of the different monitoring bodies of the Council of Europe, including the Commissioner for Human Rights. The Agency is also required to coordinate its work and its Annual Work-program with that of the Council of Europe, ensuring the prevention of any duplication of efforts²⁴¹. To this end, a cooperation agreement in the sense of Art. 300 TEC between the Community and the Council of Europe will be concluded. This cooperation agreement will focus on organizing regular meetings between experts and officials of the Council of Europe and the Agency as well as making sure both organizations make use of each other's data and research to avoid any duplication of work done.

The Agency's activities in the Third Pillar

A perceived role of the Agency in third pillar areas requires an unanimous decision of the European Council. Third pillar policy areas cover Union activities to promote police and judicial cooperation in criminal matters between member states, as well as preventing and combating racism and xenophobia²⁴². These are human rights sensitive areas and it thus makes sense to increase the Agency's remit in these areas, as has been argued in Chapter 3²⁴³. Moreover, the Agency's role within third pillar areas forms an important part of the Hague Program that envisages an area of freedom, security and justice. However, the required unanimity to include third pillar into the remit of the Agency has not been reached during the Justice and Home Affairs Council Meeting that took place December 4th 2006. The Council instead opted for a solution in which a *rendez-vous* clause is foreseen. In this solution, EU institutions and member states can voluntarily choose if the Agency will have a say on matters in the area of police and judicial cooperation. Before the end of 2009, the decision to empower the Agency in third pillar matters will be re-examined²⁴⁴. The Commission will be tasked to draft a proposal to this effect. It must be stressed however, that a full fledged remit in third pillar areas greatly contributes to the overall effectiveness of the Agency's mandate. International human rights NGOs such as Amnesty International have come to similar conclusions²⁴⁵.

²⁴⁰ Art. 15 of the Proposal for a Council Regulation establishing a EU Agency for Fundamental Rights.

²⁴¹ Art. 6(2) of the Proposal for a Council Regulation establishing a EU Agency for Fundamental Rights; Art. 9 of the Proposal for a Council Regulation establishing a EU Agency for Fundamental Rights.

²⁴² Art. 29 TEU.

²⁴³ House of Lords report, 2006, p. 13.

²⁴⁴ Hence the name "rendez-vous" clause.

²⁴⁵ Amnesty International, January 2007, p. 6.

5.4 Concluding remarks

The establishment of the Agency itself is a logical consequence of the wish for a stronger EU commitment to human rights within the EU. The Commission prepared an Impact Assessment describing the needs of the EU in this field and determined the mandate the Agency should receive in order to meet these needs. According to the Commission, the Agency should receive a “*focused observation and assessment mandate*” in order to best meet the needs of the EU. The Commission then proceeded with a public consultation round to ensure consultation with various stake-holders. This led to a proposal for the establishment of the Agency that describes the institutional structure of the Agency as well the tasks it will perform. From this proposal as well as the final regulation, the Agency’s mandate has been distilled. Several conclusions can be drawn regarding the mandate of the Agency. Firstly, the Agency will focus on monitoring fundamental rights connected to the implementation of Community law by the EU institutions and the member states. In this sense, the Agency fills a gap existing in the human rights protection structure present in Europe, since neither the Council of Europe nor the EU itself perform monitoring actions towards the EU institutions concerning fundamental rights issues. Secondly, the EU has addressed many of the Council of Europe’s concerns in order to avoid any duplication of effort. The effort to avoid any duplication is explicitly mentioned in the regulation establishing the Agency. The geographical scope of the Agency’s mandate is confined to EU institutions, member states and candidate member states, which will receive an observatory status. SAA countries can only participate after an unanimous decision of the European Council. Third countries cannot participate in the Agency. Moreover, the Agency will not be able to create and publish country reports, it can only create reports with the purpose of providing advice to the EU institutions and the member states on fundamental rights issues when implementing Community law.

Added to that, the Council of Europe is represented in the Agency through a representative who has a seat in both the Management Board as well as the Executive Board. Therefore, the Council of Europe is able to deliver input to the benefit of the Multi-annual Work Program, the Annual Work Program as well as the reports the Agency prepares. Although indirectly, the regulation also refers to the EHRM since the regulation refers to Art. 6 TEU. Lastly, the Agency will take the activities, bodies (especially the Commissioner for Human Rights) and reports of the Council of Europe into consideration. A co-operation agreement between the Council of Europe and the EU will be concluded to this effect.

It thus can be concluded that most of the concerns expressed by the Council of Europe have been addressed during the negotiations leading to the establishment of the Agency. The next chapter will proceed with comparing the Agency’s competences to the needs of the EU as discussed in Chapter three and the concerns of the Council of Europe discussed in Chapter four. It will generate a complete pic-

ture of the place of the Agency within the institutional and human rights structures of both organizations in order to be able to answer the main research question of this thesis.

6. FINAL CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions

The main research question of this thesis is:

What is the added value of the establishment of a European Union Fundamental Rights Agency in relation to existing human rights protection by the Council of Europe?

Added value has been defined as providing a complementary contribution, which means that the tasks, as defined in the regulation establishing and defining the Agency, must not overlap the development of law, policy and activities already undertaken by the Council of Europe in the field of protecting and promoting human rights in the member states of the European Union. In this respect, the Agency certainly provides an added value, since it concerns itself with fundamental rights in an area that previously has not been covered: the EU institutions and the implementation of Community law by the EU member states. Next to that, the Agency has the tools available to establish *ex-ante* monitoring of respect for fundamental rights within EU policies, which can be used to harmonize fundamental rights interpretations between EU member states.

However, to understand the debate on the role of the Agency and the relationship between the Council of Europe and the EU, first the concepts of human rights and human rights protection were clarified in order to characterize the European human rights regime and the discourse and the political underpinnings it is based on. Human rights thinking has developed most notably after the Second World War in order to secure a firm place in both the Council of Europe as well as the EU. This has mostly been done by developing legal arrangements and instruments. Therefore, the present day discourse on human rights largely focuses on the legal role of human rights and human rights protection systems, which exist to safeguard a minimum human rights standard for which an active approach is needed. Within the EU, a gradual shift towards a positive approach to human rights is visible. In this approach, respect for human rights forms an important overall EU objective, to which a Fundamental Rights Agency can provide a helpful contribution. It shows that the European human rights regime is still under development. Insight in why these kind of human rights regime exist and are being developed can be sought in the republican liberalist theory, which focuses on the sovereignty cost versus decreased future political uncertainty. Countries joining human rights regimes curb the behavior of future governments by giving in a part of their sovereignty. This theory may explain why the possibility of inclusion of candidate countries and SAA countries into the geographical mandate of the Agency is foreseen. This inclusion not only would allow the EU to connect fundamental rights issues to the accession process, but also more firmly anchors respect for fundamental rights into these countries' policies. Fur-

thermore, decent internal structures that ensure respect for fundamental rights improve the EU's legitimacy in its many (financial) external assistance programs aimed at third countries, through which respect for fundamental rights is ensured in these third countries.

However, compared to the Council of Europe, which has developed an extensive toolset of soft law in order to enforce compliance with its human rights standards and has assembled an unmatched expertise on fundamental rights issues in a wider Europe, it must be noted that, apart from the EUMC, the European Union did not develop such an extensive toolset on human rights in its internal policies. The Fundamental Rights Agency will improve this situation considerably, but it will not be of the same level as the instruments of the Council of Europe. Therefore, to confirm the EU's commitment to fundamental rights, it has been repeatedly proposed that the EU should accede to the ECHR. For various reasons, this has not happened and currently the debate on accession is connected to the future and direction of the Constitution, effectively putting the debate on hold.

The reason why the Agency will not be as effective as the Council of Europe's human rights machinery have to be sought in the debate surrounding the role of the Agency within Europe's human rights regime. This debate is part of a bigger debate trying to define the relation between the Council of Europe and the EU and what the role and place of the Agency should be in Europe's human rights architecture. A major part of the debate on the role of the Agency focused on what the EU should not do in order to avoid overlap with activities already undertaken by the Council of Europe. However, given the Agency's mandate, it seems more useful to look at how both organizations complement each other in promoting respect for fundamental rights in Europe. This is because a friction exists between addressing the needs of the EU regarding fundamental rights protection within its member states on the one hand, and addressing the concerns of the Council of Europe on the other hand. The resulting mandate of the Agency has been watered down as a result of this friction. The needs of the EU concerning its emerging human rights policy focuses on different aspects. Firstly, currently within the EU there is a lack of expertise on fundamental rights issues that can be used in the Impact Assessments prepared by the Commission. This expertise can be used to simply provide the Commission with information on fundamental rights considerations, but it could be extended to the use of expertise in order to mainstream fundamental rights considerations into the EU policy fields, ensuring a truly proactive role towards human rights in the EU. Secondly, it is noted that interpretation of fundamental rights across EU member states differs, which leads to situations in which frictions develop between the EU's own legal order and the different levels of fundamental rights protection between the member states. There is a need to harmonize these differences, not only related to the internal market, but also related to the Hague Program. Thirdly, two reports of a Comité des Sages reported that there is a lack of monitoring of EU member states on their fundamental rights compliance in the sense of Art. 7

TEU. Although the Council of Europe provides valuable information regarding the state of fundamental rights within the EU, the decision to take action against a member state in the sense of Art. 7 TEU remains a decision at the discretion of the EU. Therefore, the EU's possibilities to take action following a possible breach of Art. 7 TEU by a member state should rely on valid, comparable and independent data on fundamental rights issues that is connected to the implications of Art. 7 TEU and Community law in general.

The concerns expressed by the Council of Europe focuses on the geographical mandate of the Agency, a solid representation of a Council of Europe representative in the managerial structures of the Agency. Furthermore, the Council of Europe insists on inclusion of provisions in order to ensure references are made to the Council of Europe bodies as well as that their expertise will be taken into account. Also, the role of the Council of Europe regarding contacts between the Agency and civil society should be made explicit. Most important, however, is the demand of the Council of Europe that the Agency only addresses the EU institutions with its advices, thereby excluding the EU member states. When looking at the course of the negotiations leading to the establishment of the Agency as well as the regulation itself, it becomes clear that the EU has addressed many of the concerns expressed by the Council of Europe. A relation between the Agency and the Council of Europe will be institutionalized through a Council of Europe representative within the Management Board and the Executive Board of the Agency, who has voting rights. Secondly, the Agency (although indirectly) refers to Council of Europe bodies as well as includes in its reports regards to Council of Europe expertise. Furthermore, the Agency will not get an obvious role in Art. 7 TEU matters and will not perform monitoring of individual member states. Moreover, the Agency's mandate is restricted to EU member states and candidate member states, while SAA countries require an unanimous Council decision to participate. Lastly, to ensure prevention of possible duplication of effort, a cooperation agreement between the Agency and the Council of Europe will be concluded.

Interestingly, there is a difference in the way the different bodies of the Council of Europe have reacted to the perceived role of the Agency during the negotiations. Both the Committee of Ministers as well as the Secretary General of the Council of Europe regard the Agency as an opportunity to further enhance the cooperation between the EU and the Council of Europe, provided the Council of Europe demands were met. However, the Parliamentary Assembly of the Council of Europe expressed harsh criticism on the establishment of the Agency. While the PACE only has a consultative status towards the CM, its parliamentarians have greatly influenced the final mandate of the Agency through their national parliaments. In this respect it is notable that the Agency has not received a remit in EU third pillar matters, since the Dutch Senate repeatedly expressed its dissatisfaction with such a remit.

When looking at the tasks of the Agency, it becomes clear the Agency partly fulfills the needs of the EU. Firstly, through tasks related to data collection, standard setting, references to Council of Europe bodies and the inclusion of the Council of Europe representative in the managerial structures of the Agency, the Agency has the potential to become a centre of expertise on fundamental rights issues at the disposal of the EU institutions, including the Commission. In what way this expertise will be used by the EU institutions remains to be seen; it is not yet clear if the Commission will use this expertise in its IAs on various EU policies or even in mainstreaming fundamental rights across EU policies in general. Secondly, the Agency will publish reports on fundamental rights issues, including good practices. Together with the standard setting task, the Agency is potentially able to develop concepts in order to harmonize the different levels of fundamental rights protection in the member states. However, the Agency has not received an obvious mandate in monitoring of member states in the sense of Art. 7 TEU, although the Agency will be able to make its expertise available when requested by one of the EU institutions. Furthermore, the Agency is not able to publish country reports. Thirdly, the remit of the Agency in third pillar areas will have a great impact on the functioning and use of the Agency and of the Hague Program. It has been made clear that within the third pillar, many human rights sensitive policies have been and still are being developed. Therefore, the overall effectiveness of the Agency remains to be seen now that a mandate in third pillar areas has not been given. It will also be of influence on the Hague Program, in which the Agency was foreseen to play a vital role in ensuring an area of justice, security and freedom. Added to that, the internal EU human rights structures have eroded with the establishment of the Agency. The EU Network of Independent Experts has already ceased to exist. Subsequently, the transformation of the EUMC to the Agency means that the tasks under mandate of the EUMC have been considerably narrowed, since the Agency's mandate is confined to (the implementation of) Community law. In this sense, the establishment of the Agency actually means a worsening of the state of monitoring and safeguarding respect for fundamental rights within the EU.

Although the Agency fills a genuine gap within Europe's human rights architecture, namely providing (an *ex-ante*) human rights review of the (acts of) EU institutions and member states when implementing Community law, it must also be concluded that the focus on preventing overlap with the Council of Europe's activities has contributed to limiting the Agency's mandate. It can be questioned if this has been a useful exercise after all when looking at Europe's human rights regime, not only because of aforementioned reasons, but also because the EU has created its own legal order that creates its own problems regarding respect for fundamental rights within the EU and its member states. The Council of Europe simply has little business in these internal EU matters other than making its expertise on fundamental rights available to the EU. Therefore, several recommendations can be made that are open for debate to improve the role of the Agency in Europe's human rights structures. The next and final section will deal with these recommendations.

6.2 Recommendations and suggestions for further debate

As already noted, the debate on establishing the Agency took place in a broader debate on the relation between the EU and the Council of Europe, which has been covered by the report prepared by Mr. Jean-Claude Juncker. In the case of the Agency, the debate has focused on restricting the Agency's mandate, effectively limiting the EU's activities in the field of human rights, in order to prevent overlap with activities already undertaken by the Council of Europe. It has been concluded that this might not be a useful approach. It has been argued that the Council of Europe has built up an unmatched expertise on various aspects of promoting and ensuring respect for fundamental rights, while it has been argued that the EU is more effective at enforcing its policy aims. The Council of Europe is an intergovernmental organizations that mainly relies on soft law (such as naming and shaming) to reach its goals, which are mostly political and normative. The EU, on the other hand, for a great deal is a supranational organization that can take binding decisions on mainly economic issues. When defining what exactly a complementary contribution means, the focus should thus be on these different roles, attitudes and nature of both organizations. In essence, it would be more useful if both organizations went on to debate where both organizations can be complementary to each other with respect to promoting and ensuring respect for fundamental rights, instead of arguing about both organization's boundaries concerning its human rights competences.

It then would be easier to include not only the EU member states and candidate member states, but also SAA and third countries into the mandate of the Agency. These countries would greatly benefit from a firm commitment to ensuring respect for fundamental rights within their countries. A combined effort to this effect of the Council of Europe and the EU can be more efficient and effective than when both organization decide to follow their own route in these countries and continue to discuss their organizational limits regarding promoting respect for fundamental rights.

In order to proceed the debate as proposed above, two conditions must be met. Firstly, the EU has to acknowledge the Council of Europe's expertise on fundamental rights issues and the Council of Europe's pivotal role in promoting respect for fundamental rights in a wider Europe by acceding to the ECHR. Not only will this confirm the EU's active commitment to human rights, it will also ensure that no divergent standards on fundamental rights in Europe will emerge. Secondly, the EU should be willing to financially contribute to the Council of Europe's human rights bodies. After all, many of these bodies deliver expertise to the Agency, while at the same time many of these bodies will have to cut down on their activities because of financial limitations related to the restricted budget of the Council of Europe. If the EU values the expertise delivered by these bodies, it should also be willing to ensure the future deliverance of this expertise by financially contributing to these bodies. The cooperation agreement to be concluded between the EU and the Council of Europe might open possibilities to direct funds from the EU towards the Council of Europe.

A last recommendation concerns the remit of the Agency in third pillar matters. This remit should be established as soon as possible. It is almost unthinkable that an EU Fundamental Rights Agency does not have a say on fundamental rights issues in areas where that is most needed. It would greatly contribute to the effectiveness and credibility of the Agency if it would be able to connect matters of fundamental rights to areas in police and judicial cooperation in criminal matters.

Hopefully, the acknowledgment of each others complementarity and an extended mandate to cover third pillar matters will lead to a better suited Fundamental Rights Agency that contributes to the promotion of and respect for fundamental rights within the EU, thereby genuinely adding to the overall European human rights architecture.



7. LIST OF ABBREVIATIONS

CARDS	-	<i>Community Assistance for Reconstruction, Development and Stabilization.</i>
CFI	-	<i>Court of First Instance.</i>
CFR-CFD	-	<i>European Union Network of Independent Experts on Fundamental Rights.</i>
CM	-	<i>Committee of Ministers (of the Council of Europe).</i>
CPT	-	<i>European Committee for Prevention of Torture.</i>
EC	-	<i>European Community.</i>
ECHR	-	<i>European Convention on Human Rights and the Fundamental Freedoms.</i>
ECJ	-	<i>European Court of Justice.</i>
ECRI	-	<i>European Committee against Racism and Intolerance.</i>
ECSC	-	<i>European Coal and Steel Community.</i>
ECSR	-	<i>European Committee of Social Rights.</i>
ECtHR	-	<i>European Court of Human Rights.</i>
EDC	-	<i>European Defense Community.</i>
EIDHR	-	<i>European Initiative on Democracy and Human Rights.</i>
EP	-	<i>European Parliament.</i>
EPC	-	<i>European Political Community.</i>
ENP	-	<i>European Neighborhood Policy.</i>
ESC	-	<i>European Social Charter.</i>
EU	-	<i>European Union.</i>
EUMC	-	<i>European Union Monitoring Centre on Racism and Xenophobia.</i>
HRD	-	<i>Human Rights and Democracy Committee.</i>
IA	-	<i>Impact Assessment.</i>
MoU	-	<i>Memorandum of Understanding.</i>
NGO	-	<i>Non-governmental Organization.</i>
OSCE	-	<i>Organization of Security and Cooperation in Europe.</i>
PACE	-	<i>Parliamentary Assembly of the Council of Europe.</i>
SAA	-	<i>Stability and Association Agreement.</i>
SG	-	<i>Secretary General (of the Council of Europe).</i>

- TACIS - *EU Program for Technical Assistance to former CIS (Commonwealth of Independent States) countries.*
- TEC - *Treaty on the European Community.*
- TEU - *Treaty on the European Union.*
- UN - *United Nations.*

8. REFERENCES

8.1 Books, articles and reports

1. Advisory Council on International Affairs advice No. 33, October 2003, *The Council of Europe. Less can be more.*
2. Alston, Philip and J.H.H. Weiler, 1999, *An EU Human Rights Policy*, in: Philip Alston, Mara Bustelo and Lames Heenan (1999), Eds., *The EU and Human Rights*, Oxford: Oxford University Press.
3. Alston, Philip, *The Contribution of the EU Fundamental Rights Agency to the Realization of Economic and Social Rights*, in: Philip Alston and Olivier de Schutter (2005), Eds., *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Oxford and Portland: Hart Publishing
4. Amnesty International EU Office, January 2007, *The ambivalent state of EU human rights policy - Amnesty International's ten-point programme for the German Presidency of the EU.*
5. Babbie, Earl, 1998, *The Practice of Social Research. Eight Edition*, Belmont CA: Wadsworth Publishing Company.
6. Binder, Darcy S., *The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Action*, Harvard Jean Monnet Working Paper No. 4/95, <http://www.jeanmonnetprogram.org/papers/95/9504ind.html>.
7. Blockmans, S., 2001, *Van Wenen naar Nice : nieuwe voorwaarden voor het instellen van sancties door de EU tegen een lidstaat die de grondrechten schendt*, in: *Ars aeqi*, Volume 50, Issue 5, pp. 331-338.
8. Brown, Chris, 2001, *Human Rights*, in: John Baylis and Steve Smith (2001), Eds., *The Globalization of World Politics: An Introduction to International Relations*, Oxford: Oxford University Press.
9. Committee of Ministers of the Council of Europe (CM/AS (2005)Rec1696 final, 17 october 2005, *Plans to set up a fundamental rights agency of the European Union. Parliamentary Assembly Recommendation 1696 (2005). Reply adopted by the Committee of Ministers on 13 October at 939th meeting of the Ministers' deputies.*
10. Committee of Ministers of the Council of Europe (CM(2005)80 final, 17 may 2005, *Action Plan.*
11. Communication from the Commission (COM/2004/693 final), *The Fundamental Rights Agency Public Consultation Document.*
12. Commission Staff Working Paper (COM/2005/280 final), 2005, *Proposal for a Council Regulation establishing a European Agency for Fundamental Rights, and to the Proposal for a Council Decision empowering*

the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union.

13. Communication from the Commission to the Council and the European Parliament (COM/2001/252 final), *The European Union's Role in Promoting Human Rights and Democratization in Third Countries.*
14. Communication from the Commission (COM/2004/373 final), *European Neighbourhood Policy: Strategy Paper.*
15. Communication (COM/2005/0184 final) from the Commission to the Council and the European Parliament - *The Hague Programme, Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice.*
16. Council of Europe Parliamentary Assembly Recommendation 1744 (2006), *Follow-up to the 3rd Summit: the Council of Europe and the proposed fundamental rights agency of the European Union.*
17. Council of Europe Parliamentary Assembly Resolution 1427 (2005), *Plans to set up a fundamental rights agency of the European Union.*
18. Council of Europe Parliamentary Assembly Resolution 1696 (2005), *Plans to set up a fundamental rights agency of the European Union.*
19. Council of Europe doc. 10894, *Follow-up to the Third Summit: the Council of Europe and the Fundamental Rights Agency of the European Union*, Report Committee on Legal Affairs and Human Rights Rapporteur: Mr. Erik Jurgens, Netherlands, Socialist Group.
20. Council of Europe doc. 11020, *Implementation of judgments of the European Court of Human Rights*, Report Committee on Legal Affairs and Human Rights Rapporteur: Mr. Erik Jurgens, Netherlands, Socialist Group.
21. Craig, Paul and Gráinne De Búrca, 2003, *EU Law, Text, Cases and Materials*, Oxford: Oxford University Press.
22. Donnelly, Jack, 2003, *Universal Human Rights in Theory and Practice*, Ithaca: Cornell University Press.
23. Dunne, Tim, *Liberalism*, in: John Baylis and Steve Smith (2001), Eds., *The Globalization of World Politics: An Introduction to International Relations*, Oxford: Oxford University Press.
24. Dunne, Tim and Brian C. Schmidt, *Realism*, in: John Baylis and Steve Smith (2001), Eds., *The Globalization of World Politics: An Introduction to International Relations*, Oxford: Oxford University Press.
25. Eerste Kamer der Staten-Generaal, Kamerstuk 22.112, nr. 392, fiche 1, *Oprichting van een Bureau van de EU voor de grondrechten.*
26. EPEC Public Hearing Report, February 2005, *Preparatory Study for Impact Assessment and Ex-ante Evaluation of Fundamental Rights Agency*, European Policy Evaluation Consortium (EPEC).

27. EPEC, 2005, *Preparatory Study for Impact Assessment and Ex-ante Evaluation of Fundamental Rights Agency. Analysis of Responses to Public Consultation*, European Policy Evaluation Consortium (EPEC).
28. EPEC, 2005, *Preparatory Study for Impact Assessment and Ex-ante Evaluation of Fundamental Rights Agency. Final Report*, European Policy Evaluation Consortium (EPEC).
29. European Convention for the Protection of Human Rights and Fundamental Freedoms (EHRM), <http://echr.coe.int/>.
30. Evans, Tony, 2005, *International Human Rights Law as Power/Knowledge*, in: Human Rights Quarterly, Volume 27, pp. 1046-1068.
31. Ferejohn, John and Frances Rosenbluth, February 2006, *Toward a Republican Liberalism*, Yale University: <http://www.yale.edu/polisci/rosenbluth/Papers/RepublicanLiberalism.pdf>.
32. George, Stephen, Ian Bache, 2001, *Politics in the European Union*, Oxford University Press: Oxford.
33. House of Lords European Union Committee, 2006, *Human rights protection in Europe: the Fundamental Rights Agency. Report with Evidence*, London: the Authority of the House of Lords.
34. Janssen, H.L., 2006, *Protocol 14 bij het EVRM. Met maatregelen in Straatsburg zijn we er nog niet: de toekomst van het Hof ligt in handen van de verdragspartijen bij het EVRM*, in: NJCM-Bulletin, Volume 31, Issue 1, pp. 123-133.
35. Jong, H.M. de, B.R. Dorbeck-Jung, 1997, *Juridische Staatsleer*, Bussum: Coutinho.
36. Juncker, Jean-Claude, 2006, *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 to the attention of the Heads of State or Government of the Member States of the Council of Europe.
37. Kleinhout, A., 2004, *Toetreding EU tot het EVRM. Eén Europa voor de mensenrechten?*, in: Ars aeqi, Volume 53, Issue 12, pp. 831-838.
38. Laan, Loesewies van der and Laura Prat Bertrams, 2005, *Mensenrechten zijn de kern van Europa*, in: Internationale Spectator, Volume 59, Issue 1, pp. 35 -38.
39. Lawson, Rick, 2000, *Ululare vel Iubulare? Het EU-Handvest als verwarrend verjaar dagscadeau voor het EVRM. Inleiding gehouden op de Algemene Ledenvergadering van het NJCM, 14 april 2000*, in: NJCM-Bulletin, Volume 25, Issue 5, pp. 938-946.
40. Lawson, Rick, *The Contribution of the Agency to the Implementation in the EU of International and European Human Rights Instruments*, in: Philip Alston and Olivier de Schutter (2005), Eds., *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Oxford and Portland: Hart Publishing.
41. Lawson, Rick, 2006, *Over laserguns, rode sterren en een ontluikende liefde tussen twee dames op leeftijd. Kroniek van de relatie Straatsburg-Luxemburg 2000-2005*, in : NJCM-Bulletin, Volume 31, Issue 1, pp. 642, 653.

42. Lawson, Rick and L.F.M. Verhey, 2006, *Kroniek van de grondrechten*, in: Nederlands Juristenblad, Volume 81, Issue 31, pp. 1801-1810.
43. Leben, Charles, 1999, *A European Approach to Human Rights?*, in: Philip Alston, Mara Bustelo and Lames Heenan (1999), Eds., *The EU and Human Rights*, Oxford: Oxford University Press.
44. McCrudden, Christopher, *The Future of the EU Charter of Fundamental Rights*, Harvard Jean Monnet Working Paper No. 10/01, <http://www.jeanmonnetprogram.org/papers/01/013001.rtf>.
45. Meulen, Hans van der, 2006, *De EU als waardengemeenschap: wat merkt de rest van de wereld ervan?*, in: Kernvraag, Volume 34, Issue 1, pp. 9-17.
46. Miller, Vaughne, 2000, *Human Rights in the EU: the Charter of Fundamental Rights*, House of Commons Research Paper 00/32.
47. Moravcsik, Andrew, 2000, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, in: International Organization, Volume 54, Issue 2, pp. 217-252.
48. Moravcsik, Andrew, 1995, *Explaining International Human Rights Regimes: Liberal Theory and Western Europe*, in: European Journal of International Relations, Volume 1, Issue 2, pp. 157-189.
49. Motie-Dees (VVD) c.s., EK 22.112, O 7 maart 2006, *inzake het niet instemmen met een verordening tot oprichting van een agentschap van de EU voor de grondrechten*, Eerste Kamer, vergaderjaar 2005/2006.
50. Mutua, Makau, 2006, *Human rights. A Moral Expression of Democracy*, Harvard Law School.
51. Nickel, James D., 1987, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights*, Berkeley: California University Press.
52. Nickel, James D., 2006, Human Rights, Stanford Encyclopedia of Philosophy: <http://plato.stanford.edu/entries/rights-human/>.
53. Official Journal of the European Communities: Council Regulation (EC) No 975/1999 of 29 April 1999.
54. Official Journal of the European Communities: Council Regulation (EC) No 976/1999 of 29 April 1999.
55. Peers, Steve, 1999, *Human Rights and the Third Pillar*, in: Philip Alston, Mara Bustelo and Lames Heenan (1999), Eds., *The EU and Human Rights*, Oxford: Oxford University Press.
56. Peers, Steve, 2004, *The Contribution of the EU Fundamental Rights Agency to Civil and Political Rights*, in: Philip Alston and Olivier de Schutter (2005), Eds., *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Oxford and Portland: Hart Publishing.
57. Council of the European Union Press Release, 2768th Council Meeting, Justice and Home Affairs, 4-5th December 2006.
58. Report by Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, adopted in Paris on 8 September 2000.
59. Report of the Group of Wise Persons to the Committee of Ministers, 10 November 2006, Sages (2006) 06 EN Def.

60. Sap, Jan Willen, 2003, *Het EU-Handvest van de grondrechten. De opmaat voor de Europese grondwet*, Deventer: Kluwer.
61. Scheinin, Martin, 2004, *Relationship between Agency and the Network of Independent Experts*, in: Philip Alston and Olivier de Schutter (2005), Eds., *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Oxford and Portland: Hart Publishing.
62. Schutter de, Olivier, *The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination*, Harvard Jean Monnet Working Paper No. 07/04, <http://www.jeanmonnetprogram.org/papers/04/040701.pdf>.
63. Schutter, Olivier De and Philip Alston, *Introduction. Addressing the Challenges Confronting the EU Fundamental Rights Agency*, in: Philip Alston and Olivier de Schutter (2005), Eds., *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Oxford and Portland: Hart Publishing.
64. Schutter, Olivier De, *Mainstreaming Human Rights in the European Union*, in: Philip Alston and Olivier de Schutter (2005), Eds., *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Oxford and Portland: Hart Publishing.
65. Shestack, Jerome J., 1998, *The Philosophic Foundations of Human Rights*, in: *Human Rights Quarterly*, Volume 20, Issue 2, pp. 201-234.
66. Slot, PJ, R. Barents and R.A. Lawson, 2005, *Inleiding Europees Recht*, Groningen: Wolters-Noordhoff.
67. Spielmann, Dean, 1999, *Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities*, in: Philip Alston, Mara Bustelo and Lames Heenan (1999), Eds., *The EU and Human Rights*, Oxford: Oxford University Press.
68. Tomuschat, Christian, 2003, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press.
69. White, Nigel D., 2005, *The Law of International Organisations*, Manchester; Manchester University Press.
70. Witte, Bruno de, 1999, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in: Philip Alston, Mara Bustelo and Lames Heenan (1999), Eds., *The EU and Human Rights*, Oxford: Oxford University Press.

8.2 Websites

1. Website Council of Europe, visited 2nd of October, <http://www.coe.int>.
2. Protection of Fundamental Rights within the Union, website EU, <http://europa.eu/scadplus/leg/en/lvb/l33021.htm>.
3. European Monitoring Centre on Racism and Xenophobia website, visited at 26 September 2006, <http://www.eumc.europa.eu/eumc/index.php>.

4. The Hague Programme website, visited at 25 September 2006,
http://ec.europa.eu/justice_home/news/information_dossiers/the_hague_priorities/index_en.htm.
5. European Neighbourhood Policy website, visited at 25 September 2006,
http://ec.europa.eu/world/enp/index_en.htm.
6. European Initiative for Democracy and Human Rights website, visited at 25 September 2006,
http://ec.europa.eu/comm/europeaid/projects/eidhr/index_en.htm.
7. European Union Network of Independent experts (CFR-CFD) website, visited at 22 September 2006, http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm#.

8.3 Interviews

1. Interview with Mr. Th. Veling of the Netherlands Ministry of the Interior and Kingdom Relations, conducted at October 4th, 2006.
2. Interview with Prof. Mr. E.C.M. Jurgens, member of the Dutch Senate, conducted at October 17th, 2006.
3. Interview with Mr. M. Kuijer of the Netherlands Ministry of the Justice, conducted at October 24th, 2006.
4. Interview with Prof. Dr. R.A. Lawson, holder of the Kirchheimer Chair on Protection of the Integrity of the Individual, Department of Public Law, Faculty of Law of the University of Leiden, conducted at October 26th, 2006.

ANNEX 1: RELEVANT NEWS-ITEMS

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Raad van Europa verwijt EU geldverspilling

Uitgegeven: 2 oktober 2006 19:16

Laatst gewijzigd: 2 oktober 2006 20:02

STRAATSBURG - Topman René van der Linden van de organisatie voor mensenrechten Raad van Europa heeft maandag fel uitgehaald naar de Europese Unie (EU). Hij verwijt de EU van geldverspilling.

De EU overweegt namelijk met een nieuw agentschap voor mensenrechten min of meer hetzelfde werk te gaan doen als de Raad van Europa. "Dubbel werk, dat leidt tot dubbele normen", zei Van der Linden bij aanvang van de vergaderweek van de Raad van Europa in Straatsburg.

Overlapping

De Raad van Europa controleert al decennia de naleving van mensenrechten in 46 Europese landen. Daartoe heeft het ook het Europees Hof voor de Rechten van de Mens opgericht.

De Raad van Europa kost ongeveer 18 miljoen euro per jaar. Het nieuwe EU-agentschap krijgt op den duur 30 miljoen euro per jaar.

Van der Linden kwam met zijn waarschuwing met het oog op een EU-vergadering over het agentschap eind deze week. Hij vraagt grotere waarborgen tegen overlapping. Van der Linden maakte zich al eerder boos, toen de Europese Commissie het idee lanceerde.

Goedkoop

De CDA-politicus vindt dat zijn organisatie goedkoop werkt. Dat bleek bij een toonaangevend rapport over de CIA-kampen en -vluchten. Het rapport was opgesteld door een politicus met slechts drie medewerkers.

De oud-staatssecretaris van Europese Zaken waarschuwt bovendien dat de EU het agentschap via een achterdeurtje wil regelen. "Ik ben altijd erg voor versterking van de Europese integratie, maar niet op deze manier", aldus Van der Linden.

Ministers van Justitie van de EU-landen bespreken het nieuwe agentschap in Wenen waarschijnlijk eind deze week. De Nederlandse regering heeft eveneens aarzelingen, onder meer op aandringen van de Eerste Kamer.

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2. 'Wapen Deventer moordzaak mogelijk in graf'
3. Rechtbank dreigt proces Samir A. te stoppen
4. 'Corrigerend optreden leraar werkt averechts'
5. Britten zijn twee terreurverdachten kwijt

Knock-out (video)

Even haar hondje uitlaten in de buurt van de Diepenveense golfvereniging de Hoek kwam eigenaresse Lien de Kruiff afgelopen vrijdag duur te staan. Haar bastaardhondje zou zijn geslagen door een golfer met een golfstick. Porec liep niet aangelijnd en rende al spelend de golfbaan op.

eu2006.fi

Press release, Justice and Home Affairs

EU Agency for Fundamental Rights launched

05 Dec 2006, 13:28 en fi sv

The last Justice and Home Affairs Council of the Finnish Presidency reached an agreement on the establishment of the European Union Agency for Fundamental Rights. The Agency should be operational early next year.

Ms Leena Luhtanen, Chairman of the Council, was pleased to see the Council approve the Presidency's compromise proposal. "We have succeeded in fulfilling the assignment given to us by the European Council. I believe the negotiations have resulted in an Agency that will improve the level of protection for fundamental rights in the European Union, adding significant value to the important work carried out by other institutions, such as the Council of Europe."

"Establishing an effective Agency has been one of Finland's key objectives during our Presidency. I am pleased to say that the agreement we have reached will enable the Agency to function in the areas of police and judicial cooperation in criminal matters right from the beginning," Ms Luhtanen added.

The mandate of the Agency in the fields of police and judicial cooperation in criminal matters is based on voluntary consultation. The Council, European Parliament and Commission as well as the Member States may consult the Agency in questions concerning the police and criminal justice cooperation. The Council is also committed to reviewing the Agency's mandate on these areas by the end of 2009.

The Council has also found a solution to the question concerning the Agency's geographical scope. The Agency will focus on the Community and its Member States when implementing the Community law. However, the candidate countries may participate in its work as observers, and the Agency's mandate can be extended to them, if the relevant Association Council so decides. Similarly, the Council may decide to invite the Western Balkan countries to participate in the Agency's work.

The establishment and work of the Agency for Fundamental Rights will not affect the Council of Europe's position as the primary source and interpreter of European human rights standards. The new Agency will focus on the fundamental rights in the area of the Community law. The Agency will be a centre of expertise on fundamental rights, advising the Union and its Member States on how to better implement fundamental rights related Union legislation and other Union activities. The independent Agency will collect, analyse and disseminate data on fundamental rights when implementing Community law. One of its functions is to publish an annual report on the state of fundamental rights in the European Union. However, it will not monitor the state of fundamental rights in individual Member States. The Agency will continue to work of the European Monitoring Centre on Racism and Xenophobia.

The Agency will work closely with the NGOs, the NGOs providing the Agency with information on the state of fundamental rights. A special body, the Fundamental Rights Forum, will be set up to act as a link between the Agency and NGOs.

Further information: Päivi Leino-Sandberg, Legal Counsellor (Ministry of Justice), mobile + 358 50 576 1575, and Joni Heliskoski, Senior Specialist (Finland's Permanent Representation in the EU), mobile + 32 2 473 485 024