



## **SUMMARY AND POLICY RECOMMENDATIONS**

**‘EU Policy Perspectives’ seminar series  
Clingendael European Studies programme (CESP)**

### ***Ensuring rights for all in Europe: Challenges for the Council of Europe and the European Union***

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On 3rd November 2009, the seminar “Ensuring rights for all in Europe: Challenges for the Council of Europe and the European Union” took place at the Netherlands Institute for International Relations ‘Clingendael’, organised in close cooperation with the Netherlands Ministry of Foreign Affairs. Gathering policy-makers and academics, the debate was structured around three sessions. The present report summarises the discussion and highlights the main policy recommendations formulated that day.

#### **1 Human rights, the Council of Europe and the EU: From fragmentation and competition towards complementarity and cooperation?**

This year marks the sixtieth anniversary of the Council of Europe (CoE), a period in which much has been achieved in the field of human rights, democracy and the rule of law in Europe. There is, however, no room for complacency in the European Human Rights’ field. The work of the CoE is still very much needed. In parallel, the European Union (EU) has become increasingly active in the field of human rights (HR).

##### *1.1 Council of Europe and EU – a mirror image?*

In some ways the Council of Europe can be seen as the mirror image of the EU. Where the CoE is weak, the EU is strong, as in the case of ensuring compliance. While the EU has more funding and political leverage, the CoE has sixty years of experience in HR and its standards are widely acknowledged. The CoE enjoys respect, more than it can ensure compliance.

The Roma policy is one of the concrete examples where one can see how the two institutions can complement each others’ work. The CoE produced excellent recommendations on the issue, but is confronted with the lack of political will from its member states when it comes to implementation. The EU which has established an EU Roma Platform, where policymakers can discuss the policy options with Roma themselves, has no specific legal framework in place to tackle the issue. The EU can provide funding, but has no competence.

There are many more examples of how the two institutions benefit from each other. The Parliamentary Assembly of the Council of Europe (PACE) had formulated criteria for CoE enlargement. This

catalogue of requirements became more and more sophisticated over the years. The EU has integrated these political criteria into the Copenhagen criteria conditioning EU's enlargement.

The CoE and the EU work together in the co-operation instrument known as joint programmes. These programmes are financed by the EU and based on EU priorities. A much more closely tailoring of the joint programmes would enable the joint programmes to also address CoE priorities and follow up on the concrete findings of the CoE monitoring mechanisms.

In recent years, the relationship between the EU and the CoE is improving. It is significant that the newly elected Secretary General of the CoE, Thorbjørn Jagland, paid a first visit to the EU in Brussels. Within Brussels and Strasbourg the natural reflex to think about the other institution's role and contribution when designing policy could be improved to avoid overlap. In the discussion it was also mentioned that while the CoE only sets minimum standards, the EU should not go below them and thoroughly check whether new EU regulations are 'Strasbourg' proof. Mainstreaming the CoE *acquis* is a mentality, not an administrative process.

### *1.2 A multitude of new actors on the HR field*

Over the last sixty years, we have witnessed the multiplication of new actors active in the human rights field in Europe. This is due to the fact that the human rights agenda has evolved from a foreign policy agenda, to a domestication agenda, leading to the diversification and professionalization of actors at the national level. There is increased knowledge about human rights, which is not anymore an elitist project, but which finds its roots for instance also at municipal level.

In addition to the CoE and the EU, the important work done by the Organisation for Security and Cooperation in Europe (OSCE) was also noted. There is, however, a tendency to establish additional monitoring agencies, while the required cooperation between the existing actors is lacking. A certain 'monitoring fatigue' has been observed. Some have even referred to 'human rights tourism', caused by unsystematic planning of such visits which devaluates the impact of monitoring. In order to palliate to the multiplication of monitoring reports and increase their impact on policy-makers, some have suggested to create a concise yearbook of the state of human rights in Europe. This yearbook could serve as an inventory of what is happening in all countries and what the CoE, the OSCE and the EU are doing in this field.

Best practice of complementary work between the Fundamental Rights Agency (FRA) and the CoE was presented. While the CoE is present on the Management Board of the FRA, cooperation between the FRA and monitoring bodies like the European Commission against Racism and Intolerance (ECRI) or the Human Rights Commissioner is occurring on a regular basis.

### *1.3 The functioning of the ECtHR*

While the subject of the functioning of the European Court of Human Rights (ECtHR) could not be dealt with in great detail, several recommendations were made to improve its functioning. In particular it was suggested that national parliamentarians in PACE could hold their governments nationally responsible for the implementation of ECtHR rulings.

### *1.4 The accession of the EU to the ECHR*

The European Convention of Human Rights (ECHR) is a dated instrument, nonetheless updated by protocols and the case law of ECtHR. It is a 'living instrument'. More recently the EU has created its own Charter on Fundamental Rights, which will bind the actions of the EU institutions once the Lisbon Treaty enters into force. The Charter and the ECHR strike a different balance between the interests at stake in human rights protection. The adjusted balance is indeed the product of the several

decades passed between the two instruments, when views evolved in the light of social, economic and political developments in Europe.

While one could understand the argument to have a separate bill of rights within the EU, it was stressed that this would only function if the EU would simultaneously accede to the ECHR. Particularly in recent years there has been informal cooperation between the European Court of Justice and the ECtHR, which are taking each other's jurisprudence extensively into consideration. This situation could nonetheless change when the EU accedes to the ECHR.

The accession of the EU to the ECHR depends on the acceptance by all member states of the CoE. It is likely that there will be a time gap in accession in which the Charter will become more important for EU. This creates problems because of dual instruments. Both instruments list the same rights, but in different wordings. Also the Charter is seen as going far beyond the ECHR, which might not be justiciable and therefore not enforceable, leading to frustration. Moreover the Charter is only binding on the EU member states in so far as it concerns the implementation of EU law. The existence of dual instruments in the period of awaiting EU accession to the ECHR could open a divide between the EU member states and the non-EU CoE member states. In short, there could be a serious threat of fragmentation and competition, with the establishment of double-standards. It was therefore noted that policy-makers should be wary of creating new human rights instruments.

**Policy recommendations: Human Rights, the Council of Europe and the EU - From fragmentation and competition towards complementarity and cooperation?**

- *Joint programmes should be continued and intensified, and better tailored to address and integrate the results of the CoE monitoring mechanisms.*
- *The yearbook on the state of Human Rights in Europe could function as an incentive to better cooperate between the monitoring bodies (of CoE, EU and OSCE) and to provide an overview of the current situation.*
- *The double mandate of the national parliamentarians, who hold at the same time a national mandate and are members of the PACE, could be better used to ensure the implementation of ECtHR rulings by their national governments.*
- *CoE member states strengthen domestic judicial remedies to avoid repetitive questions brought by claimants at the ECHR.*
- *Both the CoE and the EU would benefit from a rapid EU accession to the ECHR.*
- *The EU Charter on Fundamental Rights should be seen as supplementary to the ECHR.*
- *There should be regular contact between the two courts to ensure good cooperation.*

## **2 Ensuring human rights and rule of law in the EU's Area of Freedom, Security and Justice: Roles of the Council of Europe and the EU**

Following the principle of subsidiarity, the EU and its member states are primary responsible for human rights within its own order. There are however still major challenges in ensuring the rule of law and human rights within the Union, notably in the Area of Freedom, Security and Justice (AFSJ). Trust in the human rights protection and rule of law is essential for EU's Third Pillar measures, like the European Arrest Warrant. Similarly, the Dublin Regulation requires an equal level of trust and human rights protection among EU member states in the treatment of asylum applicants. The response of the EU to these challenges should be high on the agenda the coming years. It is about learning how to mainstream the CoE *acquis* in the EU's AFSJ.

### *2.1 Major challenges within the EU*

In EU's AFSJ, there is an underlying assumption that we all have common values. There are several perspectives on this. Since 9/11 the focus has been on security measures, at the expense of civil liberties. This new 'unbalance' has been caused by a shift of political colours of the government leaders within the EU Council, which is reflected in the security-heavy EU proposals.

It was argued that the EU should reflect on what has been built in recent years and amend or withdraw the existing measures. The existing *acquis* should also be evaluated. Here the quality of implementation by administrative and security service practitioners of existing measures is essential to establish a new balance between civil liberties and security measures.

Also the role of the European Parliament (EP) in the EU's Area of Freedom, Security and Justice was discussed. The EP is involved in evaluation, however this aims at EU internal evaluation, and does not necessarily draw from external sources like the CoE *acquis*. The EP is not well equipped for an oversight function of the JHA *acquis*. It was argued that the EP committee on Civil Liberties, Justice and Home Affairs does not have the same capacity scrutinise EU legislation, as the House of Lords. Its oversight function has also been impaired by the secret nature of the trialogues between the EP *rapporteurs*, the Council presidency and the Commission before even reaching the first reading of the co-decision procedure.

### *2.2 Added value of CoE's action within EU's AFSJ*

The EU member states are in the process of negotiating the new multi-annual programme for the EU's AFSJ, the Stockholm Programme; on which the CoE had the opportunity to react. The draft Stockholm Programme reflects the need for mainstreaming of the CoE *acquis* within the EU policy process. However, as it stands, the current draft of 16 October 2009 does not take into account the specific work already done by the CoE. There are however several examples where the EU could build on existing experience and legal instruments of the CoE, like the rights of children and human trafficking.

During the discussions on the Stockholm Programme, the Netherlands proposed the creation of an EU evaluation mechanism to strengthen the trust amongst EU member states in the field of police and judicial cooperation. As the CoE already has numerous mechanisms in this field, it was suggested that in order to ensure the success of this evaluation mechanism, good cooperation with the EU would be crucial. The initiative will be further developed under the Stockholm Action Programme in 2010. The experience of the CoE in establishing effective monitoring mechanisms is very valuable to ensure that the proposed evaluation mechanism is not focused on blaming other member states, but on bringing about effective dialogue. It was also noted that the EU's Fundamental Rights Agency could contribute

expertise – either by providing data or by doing parts of the analysis – to the new evaluation mechanism.

The new mechanism could also be beneficial to the functioning of the CoE. The CoE recommendations have the strongest impact on the member states with the perspective of joining the EU. Once these member states become member of the EU there is a decrease in their enthusiasm to comply with CoE recommendations. The new evaluation mechanism could tackle this situation.

### *2.3 Closer cooperation between the two organisations*

Several suggestions were made to better ensure close cooperation between the EU and the CoE. Out of 200 CoE conventions, there are currently 47 CoE conventions open to EU accession. The EU has acceded to 30 of them. It would be best to make use of the existing conventional measures to ensure human rights and rule of law in the EU's AFSJ. It could also be argued, as it was mentioned in the Juncker report, that it would be desirable for the EU to accede to the CoE as such, instead of acceding to separate conventions.

#### **Policy recommendations: Ensuring Human Rights and Rule of Law in the EU's Area of Freedom, Security and Justice - Roles of the Council of Europe and the EU**

- *Evaluate the existing AFSJ acquis and the quality of implementation of existing measures by practitioners in order to balance the need for security with civil liberties*
- *Strengthen the oversight function of the European Parliament in the Area of Freedom, Security and Justice*
- *The Stockholm Programme and its Action Programme should avoid general references to the CoE and refer to the CoE's acquis in formulating specific plans.*
- *The CoE should play an important role in the evaluation mechanism the EU could create within the framework of the Stockholm Programme.*
- *The accession of the EU to the CoE as such would best reflect the commitment of close cooperation between the two organisations.*

### **3 Enlarging the EU and partnership with the neighbors: a Council of Europe perspective.**

Session 3 discussed how EU's external relations with countries like Russia and Turkey (non EU members) impact upon the Council of Europe's agenda. Seen from outside, EU's external relations may seem quite paradoxical: while the European Security Strategy recognizes the importance of regional organizations, such as the CoE and the OSCE to pursuing EU's interests, some unilateral EU-led approaches, for instance in the field of human rights, raises questions about the quality of EU's external multilateralism. On the one hand, acting like it does not need regional organizations beyond its own membership anymore, the EU keeps on deepening its own external relations regardless of such a wider context. Most of the policy recommendations formulated by the participants looked at how one could foster relations between the CoE and the EU, in regard to non-EU members of the CoE.

#### *3.1 Multilateralism and a Pan-European legal space: strategic advantage of the CoE*

First, the CoE provides the unique advantage of being a multilateral and pan-European institution. Multilateralism is not an obvious fact of international relations; it can be challenged and needs to be constantly defended. Strasbourg provides the 47 member states with a unique arena for multilateralism and conference diplomacy where traditional international relations tactics can be exercised and dialogue can take place easily. You do have shifting coalitions depending on the various agenda, your allies of the morning agenda might become your enemies in the afternoon session. This unique advantage as perceived notably by non-EU members should be strategically used by the EU and its members.

The EU is also dependent on the CoE and relies extensively on the CoE *acquis* to discuss human rights with third countries. The CoE has the advantage to have access to certain areas where the EU has no access in non-EU member states. This is strengthened by the fact that the CoE provides the EU with a unique European legal space, which constitutes a huge inspiration for the EU and its members to make reference to the CoE commitments, especially in relation to EU's neighbours.

#### *3.2 Enhancing coordination on the Global Agenda on Human Rights*

The debate also focused on the possibility to further enhance cooperation between the CoE and the EU, on the Global Agenda on Human Rights. As pointed out in the overview paper,<sup>1</sup> the EU position has recently been weakened within the United Nations (UN) Security Council and the Human Rights Council, in marshalling support for its human rights diplomacy. Countries like Russia and China are often in the counter-coalitions, defeating the EU on its position. The idea of using the CoE membership's support strategically to explore possibilities of diplomacy on human rights with non-EU member states should therefore be seriously considered.

#### *3.3 Strengthening the monitoring bodies of the Council of Europe*

The CoE presents also an interesting system of monitoring which non-EU members like Russia are actually quite eager to enforce. For instance, in the 23 case-laws that Russia lost at ECtHR, it paid compensation to the complainants, without any pressure from the EU. However, prosecution of violators who are responsible is still awaited.

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<sup>1</sup> Available at [http://www.clingendael.nl/cesp/events/20091103/20091103\\_cesp\\_paper\\_wolff.pdf](http://www.clingendael.nl/cesp/events/20091103/20091103_cesp_paper_wolff.pdf)

The main problem when it comes to the implementation of the case-law in the Committee of Ministers is that there is an absence of political debate. In addition other monitoring mechanisms like the Human Rights Commissioner, Thomas Hammarberg, lack the resources and the staff needed for more effective follow-up.

### *3.4 Enhancing political dialogue between the Council of Europe and the EU*

For the future of CoE-EU relations, it is quite telling that it took more than two years to negotiate the Memorandum of Understanding between those two institutions. Cooperation should be encouraged, and it is one of the priorities of the new CoE Secretary General Jagland. Political dialogue between the two institutions should be encouraged, not only technical cooperation. To this effect the Memorandum of Understanding signed in 2007, foresees for instance more frequent consultations on an informal basis at the level of the Political and Security Committee (PSC).

### *3.5 Improving the coordination between the CoE and the European Parliament*

Finally, further recommendations were formulated in the concluding session. Regarding the role of parliamentarians, it was noted that the European Parliament is quite absent from that debate. There is some informal cooperation, but it would be interesting to look into the possibilities of formalizing relations.

#### **Policy recommendations: Enlarging the EU and partnership with the neighbors - a Council of Europe perspective.**

- *The EU should strategically use the CoE for traditional diplomacy with non-EU member states, like Russia and Turkey.*
- *The EU and the CoE should coordinate their positions on the Global Human Rights Agenda, and develop common human rights policy thus joining two European UN-regions.*
- *The CoE would work more effectively on the global stage if it would have liaison offices in New York and Geneva.*
- *Instead of inventing new monitoring mechanisms, more resources should be invested in strengthening the effectiveness of the existing monitoring mechanisms.*
- *Consultations between the Chairmanship and Vice-Chairmanship of the Committee of Ministers and Secretary General of the Council of Europe on an informal basis in the Ministers' Deputies on the one hand and at the level of the EU's Political and Security Committee (PSC) on the other should start taking place in 2010.*
- *The European Parliament could promote the idea of a CoE consultation when this is relevant.*
- *Human Rights Commissioner should come more regularly in front of relevant European Parliament Committees like the Subcommittee on Human Rights.*