"The Two Europes of Human Rights. The Emerging Division of Tasks Between the Council of Europe and the European Union in Promoting Human Rights in Europe"

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Ian H. Eliasoph

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Olivier De Schutter

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Jason J. Kilborn

STUDENT NOTE

Suppressing Dissent: The Pivotal Role of the Prosecutor in Criminal Defamation Proceedings in Countries Subject to the European Court of Human Rights

Dean Chapman

CASE LAW

Case C-432/05 Unibet- Some Practical Remarks on Effective Judicial Protection

LEGISLATIVE DEVELOPMENT

THE TWO EUROPES OF HUMAN RIGHTS: THE EMERGING DIVISION OF TASKS BETWEEN THE COUNCIL OF EUROPE AND THE EUROPEAN UNION IN PROMOTING HUMAN RIGHTS IN EUROPE

Olivier De Schutter*

This article addresses the division of tasks between the Council of Europe and the European Union in the protection of fundamental rights in Europe. As part of its project to establish an area of freedom, security, and justice, the EU has recently sought to develop a more proactive fundamental rights policy. However, in the debate on the shape of the EU’s fundamental rights policy, one issue that has repeatedly surfaced is the EU’s relationship with the Council of Europe, the leading regional organization for standard-setting and monitoring in the field of human rights. In particular, some have questioned whether the principles of subsidiarity and proportionality which should guide the Union’s exercise of the powers it shares with the member states should take into account either the fact that the Council of Europe has already defined standards in the area of fundamental rights for the EU member states, or the fact that the forum of the Council of Europe might be better suited than the EU for the development of new standards where new problems emerge. This study is an attempt to answer this question in a rapidly changing political environment.

I. INTRODUCTION...........................................................................................510
II. THE CONTEXT ............................................................................................512
III. THE DEBATE SURROUNDING THE EU FUNDAMENTAL RIGHTS AGENCY.....517
   A. Reactions within the Council of Europe to the Proposal for an EU Fundamental Rights Agency ..........................................................517
   B. The Reality of the Duplication of Tasks between the EU Fundamental Rights Agency and the Council of Europe Bodies ....522
      1. Two meanings of monitoring.....................................................523
      2. The EU Member States implementing Community law ..........524
      3. Third countries...........................................................................526
   C. An Evaluation ..................................................................................529
      1. The risk of “dividing lines in Europe”.......................................529
      2. Economizing resources..............................................................530
      3. The risk of weakening the European system of human rights protection ..............................................................................532

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I. INTRODUCTION

The Europe of human rights is at a crossroads. The European Union ("EU"), while not yet a "human rights organization" whose objective it would be to promote and protect human rights,\(^1\) has come to acknowledge that, having achieved its current degree of integration, it cannot ignore the issue of human rights as a condition both for continued cooperation between its Member States\(^2\) and for cooperation with outside countries.\(^3\) But the EU’s immense leverage, both due to its financial power and due to its power of attraction—especially for outside States for whom accession to the Union is a reasonable prospect—is seen as a threat by some other intergovernmental organizations, in particular the Council of Europe.\(^4\) As a

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\(^2\) Articles 6 and 7 of the Treaty on European Union define human rights, along with democracy and the rule of law, as part of the values on which the Union is founded. Treaty on European Union, Nov. 10, 1997, 1997 O.J. (C 340), arts. 6–7 (hereinafter “EU Treaty”). They give the Council the possibility of adopting sanctions against a State which, according to the determination made by the Council, has seriously and persistently breached the principles mentioned in Article 6(1) of the EU Treaty. See id. art. 7(2) to (4). For the implementation of these sanctions in the framework of the EC Treaty, see the Treaty Establishing the European Community, Aug. 31, 1992, 1992 O.J. (C 224), art. 309. Since the entry into force of the Nice Treaty on February 1, 2003, the Council may also determine that there exists a clear risk of a serious breach by a Member State of the common values on which the Union is based and addressing recommendations on that basis to the Member State concerned. See Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 1, 2001, 2001 O.J. (C 80). In addition, a number of instruments adopted in the field of judicial cooperation in criminal matters contain a human rights clause. See the examples cited at infra note 113.


\(^4\) The Council of Europe was established in 1949 in order to “achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles
result, there is a tension, or a paradox, at the center of recent debates on the division of functions between the EU and the Council of Europe: while the EU is called upon to better protect and promote human rights in its law- and policy-making, it is at the same time asked to act with restraint in this field. The concern is that, if the EU becomes too active in this area, it might preempt the efforts of the Council of Europe and progressively render irrelevant that organization’s standard-setting and monitoring roles regarding human rights on the European continent. The Memorandum of Understanding between the Council of Europe and the EU, adopted in May 2007, seeks to overcome this tension. It does so by specifying that, when developing its standards in the field of human rights, the EU will refer to the relevant Council of Europe norms and will take into account the decisions and conclusions of its monitoring bodies, although this should not prevent the Union from providing a higher level of protection. This follows a proposal made in the Juncker report on the future of the EU’s relationship with the Council of Europe, released on 11 April 2006, and immediately endorsed by the Parliamentary Assembly of the Council of Europe. In this report, Prime Minister Jean-Claude Juncker proposed that a working rule be established, according to which “the decisions, reports, conclusions, recommendations and opinions of [the Council of Europe] monitoring bodies: 1. will be systematically taken as the first Europe-wide reference source for human rights; 2. will be expressly cited as a reference in documents which they produce.” As noted by the report, this merely confirms existing practice. But it does mean taking something which today is simply a practice, and turning it into a rule for EU

which are their common heritage and facilitating their economic and social progress.” Statute of the Council of Europe, Europ. T.S. No. 1 art. 1a (London, May 5, 1949). Following the accession of Montenegro after it declared its independence from Serbia, the Council of Europe has 47 Member States.


See id. ¶¶ 17–19.


See EUR. PARL. ASS., Memorandum of Understanding Between the Council of Europe and the European Union, Recommendation No. 1743 (2006) (hereinafter “Recommendation 1743”), in which the PACE recommends to the Committee of Ministers to propose to the European Union to formally acknowledge in the memorandum of understanding between the two organizations that that “the Council of Europe must remain the benchmark for human rights, the rule of law and democracy in Europe, in particular ensuring that the European Union bodies recognise the Council of Europe as the Europe-wide reference in terms of human rights and that they systematically act in accordance with the findings of the relevant monitoring structures.” This Recommendation was adopted on April 13, 2006, immediately following the presentation by Mr. Juncker of his report before the Parliamentary Assembly of the Council of Europe. It was based on a report prepared within the Political Affairs Committee by Mr. Kosachev (rapp.).
institutions on all levels. This explicit formula will enhance the status of the Council of Europe’s human rights instruments and monitoring machinery in all its member states, both EU members and others. It will also make for more effective co-operation between the two organisations.

Encouraging though it is, the Memorandum has left some important issues unsettled. Nor has the new context created by the progress of integration within the EU brought about the paradigm shift which it requires from the institutional actors concerned. Most observers see the Memorandum as something like a truce concluded between two international organizations, bound to agree to cooperate because of their overlapping membership. In this article, I propose to see it, rather, as a first step towards the full normalization of the situation of the EU vis-à-vis the Council of Europe—a normalization which shall be complete only when the EU shall have become one member among others of the Council of Europe, alongside its member States.

This article describes the broader context in which the debate on the division of tasks between the two organizations is taking place. It argues that, in the current stage of integration within the EU, it is only by doing more, not less, to protect and promote human rights that the EU can alleviate the suspicion with which its interventions are sometimes met. The objective is not to set clear rules for the division of labor between the two organizations, in an attempt to avoid having the EU take over the Council of Europe’s functions and render the latter increasingly irrelevant. There is no such intention; and there is no such risk. The objective, rather, is to ensure that, like the Member States of the Council of Europe, the EU ensures a protection of human rights under its jurisdiction that is at least equivalent to, and if possible higher than, the minimum standards set by the Council of Europe—and that, instead of being perceived as a threat by the Council of Europe, the EU will be seen as a powerful ally for the implementation of its standards.

The article proceeds in five steps. Part II describes the overall context in which the current debate is taking place and discusses the position of the EU vis-à-vis the standards developed by the Council of Europe. Parts III, IV and V, address a number of issues on which the debate about the respective roles of the EU and the Council of Europe has focused in recent years: it examines successively the questions raised by the establishment of a Fundamental Rights Agency for the EU, the insertion of “disconnection clauses” in Council of Europe instruments, and the role of fundamental rights in the establishment of the area of freedom, security, and justice. Part VI offers a brief conclusion.

II. THE CONTEXT

We should not underestimate, of course, the fear of marginalizing the Council of Europe. When, in 1999-2000, the EU adopted its own Charter of Fundamental Rights, this was denounced at the time as indicating a desire to create a “two-speeds

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9 The Charter of Fundamental Rights of the European Union was proclaimed jointly by the Council of the European Union, the European Commission, and the European Parliament, at the Nice Summit of December 2000. Dec. 18, 2000, 2000 O.J. (C 364) 1. It has been proclaimed, in a revised form, on December 13 2007, in order to be referred to by the Treaty
Europe,” with the EU deciding to define its own human rights standards instead of simply referring to the instruments adopted in the framework of the Council of Europe. This interpretation was seen as plausible because that process was not immune from a certain selectivity—certain instruments, in particular the European Convention on Human Rights, received a privileged position in the Charter, while others, such as the European Social Charter and the Framework Convention for the Protection of National Minorities, were comparatively neglected.

Yet other factors have fueled fears about the Council of Europe’s marginalization. The successive enlargements of the Union, now to 27 Member States since the recent accessions of Romania and Bulgaria, have led to a situation in which the Member States of the EU form a majority of the Council of Europe’s 47 members. As a result, the Council of Europe’s role may change from that of a standard-setter to that of a standard-receiver: where the Union has taken action, especially legislative action—in the field of trafficking of human beings, for instance, or in combating child pornography and sexual exploitation of children—it is difficult for the Council of Europe not only to ignore those standards, but also, quite simply, not to align itself with them. Of course, this is not unprecedented. Earlier instruments concluded under the framework of the Council of Europe also have been inspired by instruments adopted within the European Community or the EU in the same field. However, it is clear that the more the European Community
or the Union adopt instruments in the field of human rights, the more narrow the margin of appreciation will be in the negotiation of Council of Europe instruments, especially since most of the Council of Europe Member States are now members of the EU.\textsuperscript{13} The Parliamentary Assembly of the Council of Europe clearly seemed to recognize this when, in April 2006, it recommended that the Committee of Ministers of the Council of Europe propose to the EU in the memorandum of understanding between the two organizations the setting up of “a co-ordination committee in the field of standard setting with a view to increasing co-operation in the drafting of new international legal instruments.”\textsuperscript{14} While not going quite as far in institutionalizing the process, the final version of the memorandum states that “legal co-operation should be further developed between the Council of Europe and the European Union with a view to ensuring coherence between Community and European Union law and the standards of Council of Europe conventions. This does not prevent Community and European Union law from adopting more far-reaching rules.”\textsuperscript{15}

In 2003-2005, two further developments helped to place the issue of the division of tasks between the Council of Europe and the EU in protecting and promoting human rights in Europe on the top of the political agenda. In December 2003, the European Council decided to set up a Fundamental Rights Agency for the EU, which was to absorb the EU Monitoring Centre on Racism and Xenophobia.\textsuperscript{16} This naturally raised concerns that the EU would be occupying a field which was previously a domain reserved to the Council of Europe. In 2013, the Fundamental Rights Agency’s budget should represent one fifth of the total budget of the Council of Europe.\textsuperscript{17} This state of affairs is particularly troubling because the Council of Europe’s budget is widely perceived as insufficient to meet its mandate, and in 2006 the budget did not grow at all in real terms.\textsuperscript{18} In 2005, the debate on the so-called


\textsuperscript{14} Recommendation 1743, \textit{supra} note 8, ¶ 9.5.7.

\textsuperscript{15} Id. ¶ 24.

\textsuperscript{16} See infra Part III.

\textsuperscript{17} This calculation does not include the budget of the European Court of Human Rights, in charge of supervising the European Convention on Human Rights.

\textsuperscript{18} Together with the Partial Agreements and other budgets, the Council of Europe total budget amounted to 262.60 million euros for 2006; of this total, 44,189,000 euros serve for the
disconnection clauses,” inserted into the three conventions opened for signature at the Third Summit of the Heads of State or government of the Council of Europe Member States held in Warsaw on May 16-17, 2005, has brought to the surface the underlying tension between the deepening of integration within the EU and the undertakings of the EU Member States under Council of Europe instruments, since such clauses were seen as an attempt by the EU Member States to exempt themselves, to a certain extent, from the requirements of these Council of Europe instruments.

The human rights community has been divided on these developments. Some have called upon the Union to fully embrace mainstream human rights in its activities and to develop a more proactive fundamental rights policy, at the risk of ignoring in the process the concerns raised in Strasbourg, perhaps because such concerns were seen as too parochial. Others have been staunch defenders of the unique role of the Council of Europe in setting standards for the protection of human rights in Europe, and have sought to develop strategies against the annexation of human rights by an international organization, the European Community and now the Union, where respect for human rights has sometimes appeared as little more than a figleaf, or at best, an instrument allowing for further market integration and, now, deepened cooperation in the establishment of an area of freedom, security, and justice. I believe we should not address the issue in such categorical terms. But if we refuse to adopt such an approach, how should we re-conceptualize the relationship between the Council of Europe and the EU? We need, of course, to explore the complementarities between the two organizations—how they can support one another and benefit from one another’s strengths. Yet, this way of describing the challenge we are currently facing still remains within the classical view, which many actors hold spontaneously, that the EU is one international organization among others, and that the question is one of how to divide the tasks between the Union and the Council of Europe. This view leads quite naturally to the conclusion that the Union should do less in this field, in order not to preempt, or compete with, the Council of Europe in setting human rights standards and in monitoring these standards in Europe. It has sometimes been argued in this vein that considerations of comity for the Council of Europe—or, indeed, an enriched understanding of the functioning of the European Court of Human Rights, and 1.63 million euros fund the Office of the Council of Europe Commissioner for Human Rights. The 2007 budget decided by the Committee of Ministers of the Council of Europe in December 2006 raised the ordinary budget by 3.72 %, representing a rise of 1.52 % in real terms. In comparison, the 13 million euros provided annually for the EU Fundamental Rights Agency when it will be set up, which should be progressively raised to attain 39 million euros in 2013, is a very significant sum.


20 See, e.g., Olivier De Schutter, Anchoring the European Union to the European Social Charter: The Case for Accession, in SOCIAL RIGHTS IN EUROPE 111, 111–52 (Gráinne de Búrca & Bruno de Witte eds., 2005) (on the need to better take into account the Council of Europe European Social Charter in the development of EU law- and policy-making).
requirement of subsidiarity—should constitute an obstacle to the Union’s taking action where standards have been developed by the Council of Europe, or for that matter, in any other international forum in which the EU Member States also participate.

The approach adopted here is premised instead on the view that the EU is not simply another international organization, whose membership overlaps with that of the Council of Europe, and whose activities increasingly converge with those of this organization, requiring that they consult extensively with one another in order to maximize the potential for synergies and cooperation and in order to limit the risks diverging standards might entail for legal certainty. Instead, the EU is a polity in the making that exercises certain competences that have been transferred to it by the Member States, who have thereby—albeit in limited fields—renounced exercising their sovereign powers. It is not only an institution; it is a process: all the EU Member States have agreed “to continue the process of creating an ever closer union among the peoples of Europe.” Even more importantly, a characteristic feature of the current phase of integration within the EU is that national administrations, national courts, and national law enforcement agencies increasingly are working with one another horizontally, developing direct relationships going beyond classical intergovernmentalism. In the future, little will distinguish the nature of the relationship between Belgium and Poland in the EU from, say, the relationship of two German Länder or two Autonomous Communities in Spain.

It is this paradigm shift that the concept of mutual recognition of judicial decisions and the principle of availability of personal data clearly exhibit. But in order to effectuate this paradigm shift, the EU must further develop common standards in the field of fundamental rights: “negative” integration, as exhibited by the removal of obstacles to cooperation between the national authorities of the EU Member States, calls for “positive” integration in the form of the development of common standards, which could justify the mutual trust on which such cooperation is premised. However, when the EU adopts instruments ensuring a better protection of rights of the accused in criminal proceedings, or an improved protection of personal data processed by law enforcement authorities, should this be seen as a threat to the leading role of the Council of Europe in developing human rights standards on the European continent? By re-exploring the recent debates on the establishment of the EU’s Fundamental Rights Agency and on the “disconnection clauses” inserted for the EU Member States in Council of Europe instruments—as

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21 See EUR. PARL. ASS., Follow-Up to the Third Summit: The Council of Europe and the Fundamental Rights Agency of the European Union, Report of the Committee on Legal Affairs and Human Rights, 14th Sess., Doc. No. 10894 (2006), ¶ 31 (“What is clearly missing from the EU definition of subsidiarity . . . is the relationship between EU action and the activities of other international organisations, notably those with an essentially intergovernmental structure such as the Council of Europe.”). See also EUR. PARL. ASS., Follow-Up to the 3rd Summit: The Council of Europe and the Proposed Fundamental Rights Agency of the European Union, Recommendation No. 1744 (2006), ¶¶ 11.9 and 11.10 (hereinafter “Recommendation 1744”), based on that report.

22 Preamble to EU Treaty, supra note 2, recital 12.

23 See infra Part V.B.
well as, more generally, on the legislative activity of the EU in the name of strengthening the “mutual trust” between the EU Member States—we may hope to shed some light on the evolving relationship between the two organizations. The EU’s more active role in the field of human rights presents both risks and opportunities. This analysis helps to identify the emerging general architecture of human rights protection in Europe.

III. THE DEBATE SURROUNDING THE EU FUNDAMENTAL RIGHTS AGENCY

The EU Fundamental Rights Agency was officially launched on 1 March 2007, after over three years of discussion among the EU Member States about its structure and mandate, including the geographical scope of its activities.24 It is clear from the Regulation establishing the Agency that it is not entrusted with the task of supervising compliance with fundamental rights in the Union, even as regards the activities of the institutions or bodies of the Union or of the Member States when they implement Union law. Rather, the Agency is to be seen as a pole of expertise in human rights, which will provide advice to the institutions and the Member States in order to improve their understanding of the requirements of fundamental rights and to better inform any initiatives they adopt in this field.25 Thus, important as this development may be, the outcome is a relatively modest one in comparison not only to certain hopes which had been entertained by civil society organizations, but also to the initial proposals of the European Commission. To a large extent, this can be explained by the role played by the Council of Europe in the process leading up to the establishment of the Agency.

A. Reactions within the Council of Europe to the Proposal for an EU Fundamental Rights Agency

After the European Council decided, in December 2003, to transform the Vienna EU Monitoring Centre on Racism and Xenophobia26 into a “Human Rights Agency” for the EU, both the Secretariat of the Council of Europe and its Parliamentary Assembly expressed the fear that the Agency would “duplicate” the work of the monitoring bodies of the Council of Europe. Thus, at the public hearing organized by the European Commission on 25 January 2005, where a number of participants presented their views on the consultation document presented in the

25 See id. art. 2 (“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.”).
26 This Monitoring Centre, sometimes referred to as the Vienna Observatory, was created by Council Regulation 1035/97, Establishing a European Monitoring Centre on Racism and Xenophobia, 1997 O.J. (L 151) 1 (EC), since amended by Council Regulation 1652/2003, 2003 O.J. (L 245) 33 (EC).
form of a Communication of the Commission,\textsuperscript{27} the Deputy Secretary General of the Council of Europe, Ms. de Boer-Buquicchio, sought to distinguish the function the EU Fundamental Rights Agency could fulfill—crafted along the lines of a national institution for the promotion and protection of human rights for the Union—from the tasks entrusted to the Council of Europe’s monitoring bodies. In order to underscore this distinction, Ms. de Boer-Buquicchio mainly emphasized the difference between monitoring as collection and analysis of data on the one hand (what might be called “advisory monitoring”), and monitoring as evaluation of compliance with certain standards on the other (or “normative monitoring”).\textsuperscript{28}

This roughly corresponded to the views adopted simultaneously by the Parliamentary Assembly of the Council of Europe (PACE). Acting on the basis of the McNamara report prepared within the Committee on Legal Affairs and Human Rights,\textsuperscript{29} the Parliamentary Assembly adopted Resolution 1427 on 18 March 2005. This Resolution stressed the importance of the human rights acquis developed by the Council of Europe through intergovernmental cooperation, the Council of Europe’s monitoring of compliance with these standards by its member states,\textsuperscript{30} the Council of Europe’s practical assistance work designed to facilitate attainment of the requisite standards, and its activities in the field of human rights education and awareness-raising. While welcoming the establishment of a Fundamental Rights Agency of the EU, the PACE insisted that “there is no point in reinventing the wheel by giving the agency a role which is already performed by existing human rights institutions and mechanisms in Europe. That would simply be a waste of taxpayers’ money.”\textsuperscript{31} It therefore concluded that

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\text{the role of the agency should be that of an independent institution for the promotion and protection of human rights within the legal order of the} \]

\footnote{\textsuperscript{27} The Fundamental Rights Agency Public Consultation Document, COM (2004) 693 final (Oct. 25, 2004).} \footnote{\textsuperscript{28} Maud De Boer-Buquicchio, Deputy Sec’y Gen. of the Council of Europe, Public Hearing on the Agency on Fundamental Rights (Jan. 25, 2005), available at http://europa.eu.int/comm/justice_home/news/consulting_public/fundamental_rights_agency/index_en.htm (Monitoring “can also be understood as comprising the verification of actual compliance, identifying violations, shortcomings and best practices as well as addressing recommendations to individual states. It is in this latter sense that monitoring is understood and carried out within the Council of Europe.”).} \footnote{\textsuperscript{29} See EUR. PARL. ASS., Plans to Set Up a Fundamental Rights Agency of the European Union, Doc. No. 10241 (2005), the draft resolution and draft recommendation adopted unanimously by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe on January 27, 2005.} \footnote{\textsuperscript{30} The Resolution notes in this regard: “Such monitoring is carried out by several well-established independent human rights bodies with recognised expertise and professionalism, both on a country-by-country basis (including through country visits and on-the-spot investigations) and, increasingly, also thematically. Through these mechanisms, the Council of Europe monitors compliance with all the human rights obligations of its member states (including the twenty-five member states of the European Union), identifies issues of non-compliance, addresses recommendations to member states and, in the case of the European Court of Human Rights, issues judgments binding on states parties whenever these standards are not respected.” Id. ¶ 4.} \footnote{\textsuperscript{31} Id. ¶ 10.}
EU, along the lines of similar national institutions that exist in several member states. The agency should collect and provide to the EU institutions information about fundamental rights that is relevant to their activities, and thus contribute to mainstreaming human rights standards in the EU decision-making processes.32

In the view of the PACE, this understanding of the role of the EU Fundamental Rights Agency had three implications. First, it should have a mandate limited to the scope of application of Union law, including the implementation by EU Member States of Union law, but it should not intervene in areas outside EC/EU competence where member states act autonomously. The trust on which mutual recognition mechanisms within the Union are built presupposes that the EU Member States comply with fundamental rights in general rather than only in the implementation of Union law.33 Yet, the PACE considered that the Agency should only monitor fundamental rights to the extent that they are recognized as general principles of Union law that already apply under the supervision of the European Court of Justice, or to the extent that they lie within the scope of application of the EU Charter of Fundamental Rights.34

Second, the Agency should work on a thematic, not a country-by-country basis, focusing on certain specified themes having a special connection with EC/EU policies. While this restriction does not follow from the definition of the Fundamental Rights Agency as a “national institution for the promotion and the protection of human rights” for the Union, it was put forward, presumably, to limit any risk of the Agency competing with the monitoring bodies of the Council of Europe, and in particular of the Agency arriving at different conclusions than those of these bodies as regards specific situations arising in the Member States. Indeed, in a later recommendation, the PACE therefore stated very clearly that “the agency should be explicitly excluded, in its mandate, from engaging in activities that involve

32 Id. ¶ 13.
33 See infra Part V.
34 On the precise delineation of the situations in which the Member States are bound by fundamental rights as general principles of EC or EU law, see esp. J.H.H. Weiler, The European Court at a Crossroads: Community Human Rights and Member State Action, in Droit International au Droit de l'Intégration: Libé Amicorum Pierre Pescatore 821 (Francesco Capotorti et al. eds., 1987); J. Temple Lang, The Sphere in Which Member States are Obliged to Comply with the General Principles of Law and Community Fundamental Rights Principles, 1992 Legal Issues of European Integration 23 (1991/2); J.H.H. Weiler, Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights, in The European Union and Human Rights 56 (Nanette Neuwahl & Allan Rosas eds., 1995); and K. Lenaerts, Le Respect des Droits Fondamentaux en Tant que Principe Constitutionnel de l’Union Européenne, in Mélanges en Hommage à Michel Waelbroeck 423 (1999). The wording of the Charter of Fundamental Rights is more restrictive than what the case-law of the European Court of Justice would suggest, since it refers not in general to the scope of application of Union law—which would include situations where the Member States act under exceptions provided by EC/EU law (see, e.g., Case C-368/95, Familiapress v. Zeitungsverlag, 1997 E.C.R. I-3689, ¶ 24; Case C-112/00, Schmidberger, 2003 ECR I-5659, ¶ 81.)—but only to the situation where the EU Member States implement Union law (see Article 51 of the Charter, supra note 9).
assessing the general human rights situation in specific countries, in particular those that are members of the Council of Europe.\textsuperscript{35}

Thirdly, the PACE considered that the future Agency should include within its reference instruments not only the European Convention on Human Rights, but also the other human rights instruments of the Council of Europe.\textsuperscript{36} The PACE also recommended that the Council of Europe be included in the management structures of the Agency, and that a cooperation agreement be concluded to that effect between the Council of Europe and the Union.\textsuperscript{37}

The governments of the Member States of the Council of Europe reacted to the Parliamentary Assembly’s position in two ways. At their Third Summit held in Warsaw on May 16-17, 2005, the Heads of State and Government of the Council of Europe adopted a Declaration that expressed a determination to “ensure complementarity of the Council of Europe and the other organizations involved in building a democratic and secure Europe,” and resolved to “create a new framework for enhanced co-operation and interaction between the Council of Europe and the European Union in areas of common concern, in particular human rights, democracy and the rule of law.”\textsuperscript{38} In an annex to the Declaration, the Heads of State and Government called upon the Council of Europe to “strengthen its relations with the European Union so that the Council of Europe’s and the European Union’s achievements and future standard-setting work are taken into account, as appropriate, in each other’s activities.” They also emphasized that the new framework of enhanced cooperation and political dialogue between the Council of Europe and the EU should focus on “how the European Union and its member states could make better use of available Council of Europe instruments and institutions, and on how all Council of Europe members could benefit from closer links with the European Union.”\textsuperscript{39} Finally, they agreed on a set of guidelines on the relations between the Council of Europe and the EU, which state in particular:

6. The Council of Europe will, on the basis of its expertise and through its various organs, continue to provide support and advice to the European Union in particular in the fields of Human Rights and fundamental freedoms, democracy and the rule of law.

7. Cooperation between the European Union and specialised Council of Europe bodies should be reinforced. The European Union shall in particular make full use of Council of Europe expertise in areas such as

\textsuperscript{35} Recommendation 1744, supra note 21, ¶ 11.4.

\textsuperscript{36} EUR. PARL. ASS., Plans to Set Up a Fundamental Rights Agency of the European Union, Resolution No. 1427 (2005), ¶ 14.ii (hereinafter “Resolution 1427”).

\textsuperscript{37} Id. ¶ 14.iii. These elements are summarized in Recommendation 1696 (2005) adopted by the Parliamentary Assembly on the same day. EUR. PARL. ASS., Plans to Set Up a Fundamental Rights Agency of the European Union, Recommendation No. 1696 (2005).


\textsuperscript{39} Annex to the Warsaw Declaration, id. IV.1.
human rights, information, cyber-crime, bioethics, trafficking and organised crime, where action is required within its competence.

8. The future Human Rights Agency of the European Union, once established, should constitute an opportunity to further increase cooperation with the Council of Europe, and contribute to greater coherence and enhanced complementarity.

The Heads of State and Government also requested that the Prime Minister of Luxembourg, Jean-Claude Juncker, acting in his personal capacity, prepare a report on the relationship between the Council of Europe and the EU on the basis of the decisions adopted at the Summit and taking into account the importance of the human dimension of the European project. 40

On October 13, 2005, the Committee of Ministers of the Council of Europe replied to the Parliamentary Assembly’s Recommendation 1696 (2005). 41 After recalling the results of the Warsaw Summit, the Committee of Ministers referred to the proposals made in the meantime by the European Commission on the establishment of a Fundamental Rights Agency, 42 which (it considered):

- take several of the recommendations made by the Parliamentary Assembly of the Council of Europe and the Secretary General into account. Many of the tasks foreseen for the agency would indeed be complementary to the activities carried out by the Council of Europe. As regards co-operation with the Council of Europe, the Committee of Ministers acknowledges that the draft regulation [establishing the EU Fundamental Rights Agency] provides for a close institutional relationship, including provisions that the agency shall co-ordinate its activities with those of the Council, that a bilateral co-operation agreement shall be concluded and that an independent person shall be appointed by the Council to the management board of the agency.

- It also stated, in paragraph 4 of its reply, that it “agrees with the Assembly that the agency’s mandate should focus on human rights issues within the framework of the European Union, address its advice to the EU institutions and ensure that unnecessary duplication with the Council of Europe is avoided;” and it expressed its hope “that these points will be fully reflected in the future Community regulation.”

- It is doubtful that these statements have fully reassured the Secretariat and the Parliamentary Assembly of the Council of Europe. In July 2005, the Council of Europe’s Secretary General, Terry Davis, met with Vice President F. Frattini, in charge within the European Commission of Justice, Freedom and Security. Davis agreed to provide the Commission with an analysis, by the Secretariat of the Council of Europe, of the proposals on the establishment of the EU Fundamental Rights

40 That report was made public on April 11, 2006. See Juncker Report, supra note 7.
Agency. This memorandum was finalized on September 8th, 2005. Many of the themes evoked above are reiterated, in particular the idea that, in order to avoid duplication with the missions of the Council of Europe, the Agency should not systematically monitor the human rights performance of non-EU Member States who are Member States of the Council of Europe. These concerns were again reiterated by the Parliamentary Assembly of the Council of Europe in April 2006. The next section examines whether such concerns are justified.

B. The Reality of the Duplication of Tasks between the EU Fundamental Rights Agency and the Council of Europe Bodies

The question of whether the establishment of the Fundamental Rights Agency risks undermining the efforts of the Council of Europe’s monitoring bodies should be put into proper perspective. The primary task of the Agency will be to provide advice to the institutions of the Union in the field of fundamental rights. This task is not fulfilled, for the moment, by the Council of Europe bodies. That gap alone would justify setting up the Agency in order to ensure that fundamental rights are taken into account *ex ante* on a systematic basis in the legislative procedure of the EU, rather than only *ex post*, through judicial review mechanisms. However,
leaving aside that important function of the Agency, the focus will be here on the role of the Agency vis-à-vis the national authorities of the Member States of the Council of Europe—since it is here, of course, that the risk of overlap with the tasks fulfilled by the Council of Europe bodies is greatest. The Agency will monitor the situation of fundamental rights both as regards the EU Member States insofar as they implement Community law, and as regards certain non-EU Member States. Does this create a risk of overlap, and of undermining the monitoring performed by Council of Europe monitoring bodies?

1. Two meanings of monitoring

As already mentioned, the Fundamental Rights Agency’s mission is not supposed to involve “normative monitoring”—evaluation of compliance on the basis of a preexisting normative grid; it is, rather, to provide technical advice on the basis of its collection and analysis of information pertaining to the situation of fundamental rights in the Member States. However, it is uncertain whether it will be possible, in practice, to maintain a watertight division between monitoring consisting only in collecting and analyzing information in order to offer technical assistance, on the one hand (“advisory monitoring”), and monitoring implying an evaluation of the degree of compliance with fundamental rights, on the other hand (“normative monitoring”): even mere fact-finding, after all, necessarily consists in highlighting certain situations, and thus putting pressure on the actors concerned to remedy any deficiencies found to exist. In addition, even though points of emphasis or formulations may differ—with expert bodies of the Council of Europe explicitly evaluating certain situations for their compliance with the relevant standards, and the Fundamental Rights Agency more cautiously reporting about what it has found to occur and making certain recommendations of a general nature about trends—it remains the case that the same situations may be considered under both mechanisms. The EU Fundamental Rights Agency will publish annual reports and formulate conclusions and opinions on fundamental rights dimensions of the implementation of Community law by the Member States. Although the adoption of reports or recommendations on individual Member States is not defined as one of the tasks of the Agency in Article 4 of the Regulation establishing the Agency—on the contrary, Article 4(1)(d) specifically mentions that the Agency shall “formulate and publish


47 See supra text accompanying note 44.

48 On this distinction, see Martin Scheinin, The Relationship Between the Agency and the Network of Independent Experts, in Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency 73–90 (Philip Alston & Olivier De Schutter eds., 2005).
conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law,” a formulation which seems to be calculated to exclude conclusions and opinions on individual Member States or on specific events or measures—it is doubtful that the Agency will fully abstain from naming specific Member States in its thematic reports or annual reports describing the situation of fundamental rights in the Union. Therefore, it may be doubted whether the division of tasks between the Council of Europe bodies and the EU Fundamental Rights Agency could be founded exclusively on such a distinction.

2. The EU Member States implementing Community law

The EU Member States will only be provided assistance by the Agency and be “monitored” through the opinions and reports of the Agency in the implementation of EC Law. The original proposals of the Commission also envisaged that the Agency could be invited to provide its “technical expertise” in the context of Article 7 EU, which allows the Council of the EU to react to serious and persistent breaches by one Member State of the values on which the Union is founded, or to a “clear risk” that such serious breaches will occur. However, the Legal Service of the Council of the Union took the view that such a possibility would “go beyond Community competence,” and that, moreover, it would be incompatible with Article 7 EU itself insofar as this provision would not allow for the adoption of implementation measures and was, in that sense, self-sufficient. The Commission answered that the draft Article 4(1)(e) it proposed “should be seen not as an autonomous exercise of Community competence needing a proper legal basis in the EC Treaty, but rather as a largely declaratory opening clause, [providing for] a possibility that the Council would arguably have anyway, while clarifying modalities and limits.” Indeed, drawing upon the lessons from the Austrian crisis of 2000, Article 7(1) EU itself refers to the possibility of “call[ing] on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question” in order to determine whether there exists a “clear risk of a serious breach by a Member State of principles mentioned in Article 6(1),” among which principles are human rights and fundamental freedoms. The implicit view of the Commission was that the Agency could either be an “independent person” for the purposes of this provision, or could contribute to identifying such independent persons, in accordance with the broad flexibility that Article 7(1) EU intended to leave to the Council.
the view of the Commission, therefore, including Article 4(1)(e) in the proposed Regulation added nothing to Article 7 EU itself. In particular, a mere reference to the possibility of the Agency contributing its technical expertise upon request of the Council

should be distinguished from any further reaching provision that would enable other institutions to seize the . . . . Agency or even an own initiative power of the latter to analyse possible Article 7 EU situations. Any such provision might indeed exceed Community competence and conflict with the exhaustive institutional setting in Article 7 EU.

The Commission was taken at its word. Within the Council’s Ad Hoc Working Party on Fundamental Rights and Citizenship in charge of examining the Commission’s proposal on the Fundamental Rights Agency, a number of delegations expressed doubts as to the need to include a reference to Article 7 EU in the text of the Regulation establishing the Agency, as such a reference would, according to the Commission’s own admission, serve no useful purpose and, going beyond Community law, could moreover lack a legal basis. The compromise solution consisted therefore in appending to the Regulation establishing the Agency a Declaration of the Council confirming this possibility, without any reference being made to Article 7 EU in the text of the Regulation itself. This solution also preserved the purely political character of Article 7 EU: the mechanisms it provides allow for a political evaluation by the Council of the EU and the European Parliament, but do not allow the European Court of Justice or any other independent body—such as the Fundamental Rights Agency—to decide whether a State is in


55 Already in a Communication where it clarified its understanding of Article 7 EU, the Commission has mentioned the possibility that the Council could draw up a list of independent personalities which could be called upon the assist the Council in exercising its functions under Article 7(1) EU. See Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and Promotion Of The Values On Which The Union Is Based, COM (2003) 606 final (Oct. 15, 2003), ¶ 1.3.  

56 This Declaration states: “The Council considers that neither the Treaties nor the Regulation establishing the European Union Agency for Fundamental Rights preclude the possibility for the Council to seek the assistance of the future European Union Agency for Fundamental Rights when deciding to obtain from independent persons a report on the situation in a Member State within the meaning of Article 7 TEU when the Council decides that the conditions of Article 7 TEU are met.”
serious and persistent breach of the values listed in Article 6(1) EU or whether there exists a clear risk of a serious breach.

But, in any event, any potential role the Agency might have to play under Article 7 EU remains of marginal importance in comparison to its role under Article 2 of the Regulation providing the Member States with “assistance and expertise relating to fundamental rights” in the implementation of Community law. This may overlap with the activities of the Council of Europe bodies. Indeed, even when they implement Union law, the Member States remain fully bound to respect their other international obligations as defined, in particular, by instruments adopted within the framework of the Council of Europe. Therefore, the Council of Europe bodies (in particular, the European Court of Human Rights, the European Committee of Social Rights, the Advisory Committee of the Framework Convention for the Protection of National Minorities, or the Commissioner for Human Rights) routinely examine whether the States that are parties to Council of Europe instruments comply with their obligations under these instruments, even where the States concerned act in fulfilling their obligations under Union law. Whether this overlap proves problematic depends therefore on the nature of the relationship established between the Council of Europe and the EU Agency for Fundamental Rights, and even more decisively, on the status that the findings made by the Council of Europe monitoring bodies will have in the opinions, conclusions and reports of the Agency. I return to this point later.

3. Third countries

The Commission’s initial proposals allowed for the Agency to provide, at the request of the Commission, information and analysis on fundamental rights issues identified in the request concerning certain third countries. These countries were to be ones with which the Community has concluded association agreements or agreements containing provisions respecting human rights, or ones with which the Community has opened or is planning to open negotiations for such agreements, in particular countries covered by the European Neighbourhood Policy (“ENP”). The ENP was developed in the context of the EU’s 2004 enlargement, with the objective of avoiding the emergence of new dividing lines between the enlarged EU and neighboring countries and instead strengthening stability, security and well-being in the countries bordering the EU. The ENP does not offer an accession perspective, but it does offer the countries concerned a privileged relationship, building upon a mutual commitment to common values (democracy and human rights, rule of law, good governance, market economy principles, and sustainable development). Originally, the ENP was intended to apply to the immediate neighbors of the EU—Algeria, Belarus, Egypt, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, the Palestinian Authority, Syria, Tunisia and Ukraine. In 2004, it was extended to also include the countries of the Southern Caucasus with whom the then-candidate

57 See supra note 45.
58 See infra text accompanying notes 83–89.
59 See Article 3(4) of the Proposal for a Regulation, supra note 42.
countries Bulgaria, Romania and Turkey share either a maritime or land border (Armenia, Azerbaijan and Georgia).  

It was also envisaged that the Agency would collect information on the situation of fundamental rights in countries which have concluded an association agreement with the Community and which are recognized as candidate or potential candidate countries, so long as the relevant Association Council decides on the participation of these countries in the Agency. The Agency would then extend the remit of its activities to the concerned countries, mutatis mutandis. In principle, the Agency would concern itself only with the respect to fundamental rights in the implementation of the acquis of Union law, rather than in all fields or with respect to situations presenting no link to Union law. However, the precise modalities of such an extension to these countries of the Agency’s activities remained vaguely defined in the draft Regulation, not only because the relevant Association Council was to determine the precise modalities of such participation, but also because under Articles 6(1) and 49 EU, respect for human rights and fundamental freedoms is a condition for accession, which may justify that, vis-à-vis acceding countries, the Agency’s remit would be broader than vis-à-vis the EU Member States.

At the time, then, when the Commission presented its proposal for the establishment of the Agency for Fundamental Rights, fourteen Member States of the Council of Europe belonged to either of these two categories of non-EU countries to which the geographical remit of the Agency could extend. These were four candidate countries: Bulgaria and Romania (which now, of course, have become full members of the EU), Croatia, and Turkey; four potential candidate countries: Albania, Bosnia and Herzegovina, Serbia and Montenegro (which then still constituted one single State), and the former Yugoslav Republic of Macedonia; and six countries either covered by the ENP or with which the EU has an agreement containing a human rights clause: Armenia, Azerbaijan, Georgia, Moldova, Russia and Ukraine.

This raised a concern within the Council of Europe that the EU’s Fundamental Rights Agency would be duplicating the work performed by the Council’s monitoring bodies without any justification of a sufficiently close link to the EU’s activities. In the Recommendation it adopted on 13 April 2006 on this question, for instance, the Parliamentary Assembly of the Council of Europe took the view that

> the agency should have no mandate to undertake activities concerning non-European Union member states. Should such a mandate nevertheless be considered absolutely necessary, it should be strictly confined to candidate countries and limited to issues arising from the accession process.

In part as a reaction to such concerns, discussions within the Council’s Ad hoc Working Group have led to narrowing down the geographical remit of the Agency.

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61 Although Russia is also a neighbor of the EU, the relations between the EU and Russia are instead developed through a Strategic Partnership covering four “common spaces.”

62 Art. 27 of the Proposal for a Regulation, supra note 42.

63 See infra note 76.

64 Recommendation 1744, supra note 21, ¶ 11.3.
In addition, a distinction was made between candidate countries on the one hand, and potential candidates with which a Stabilisation and Association Agreement had been concluded on the other hand. In the former group are Croatia and Turkey, which started accession negotiations on 3 October 2005, and the former Yugoslav Republic of Macedonia, which was granted candidate status in December 2005 but with whom accession negotiations have not started yet. The latter group comprises the countries of the Western Balkans that are natural targets for accession to the EU and that see Stabilisation and Association Agreements as instruments to prepare themselves as candidate countries. These countries—Albania, Bosnia and Herzegovina, Montenegro, and Serbia—are all considered potential candidates. For none of these countries will the extension of the remit of the Agency be automatic, since it will depend in all cases on a decision of the respective Association Council. But following the final compromise put forward by the Finnish presidency of the Council of the EU of the second semester 2006 and agreed to by the Council, any potential candidate country with whom a Stabilisation and Association Agreement has been concluded can only participate in the Agency as an observer following a unanimous decision by the Council inviting it to do so—a condition not imposed as regards the participation of candidate countries.

We may therefore expect, at least in the immediate future, that participation in the Agency will be envisaged only for the three candidate countries, and that the geographical remit of the Agency therefore will almost completely be restricted to the Member States of the EU. In part, this choice was justified by the need to avoid the Agency’s tasks overlapping with those performed by the Council of Europe: while it does make sense to facilitate the implementation of the acquis of Union law by candidate countries, or by the Western Balkan countries preparing for candidate status, by ensuring that the fundamental rights dimension is taken into account in that preparation—indeed, the Regulation makes explicit that this is the purpose of these countries’ participation in the work of the Agency—it would go beyond the

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67 See id. Art. 28(2) (mentioning that, as regards countries participating as observers, the Agency may deal with “the fundamental rights issues within the scope of [European Community law] in the respective country, to the extent necessary for the gradual alignment to Community Law of the country concerned”). It will be noted that, under the new framework for the conduct of accession negotiations with candidate countries agreed upon by the Brussels European Council of December 16–17, 2004, the Commission may recommend, and the Council decide by qualified majority, the suspension of future negotiations in presence of a serious and persistent breach by a candidate State of the principles enshrined in Article 6(1) EU. Presidency Conclusions, Brussels European Council (Dec. 17, 2004), ¶ 23. Although it would be natural for the analysis of the Agency to contribute to such an evaluation as may be required for such a recommendation to be made by the Commission and for such a decision to be taken by the Council, this would go beyond the wording of Articles 2 and 28(2) of the Regulation, if read literally. Perhaps a reasoning by analogy with that which presided to the
objective of the Agency as defined in Article 2 of the Regulation (to provide assistance and expertise regarding fundamental rights to Member States in the implementation of Community law) to extend its tasks beyond this.

C. An evaluation

In sum, to the extent that the implementation of Community law by the EU Member States or by candidate countries (or pre-candidate countries) includes an obligation to take into account the requirements of fundamental rights, the Agency will have a role in providing advice to the States concerned. Leaving aside the question whether such “monitoring” of individual States through the Agency will in reality bear any resemblance to the normative monitoring performed by the Council of Europe bodies, three arguments against such “duplication” of the work of the Council of Europe by the Agency are generally put forward. These arguments are explicitly stated in Resolution 1427 (2005), adopted by the Parliamentary Assembly of the Council of Europe. Two arguments may be easily dealt with in sections 1 and 2. The third argument will be discussed in more detail in section 3.

1. The risk of “dividing lines in Europe”

First, it is said that “the existence of such parallel mechanisms (one for the twenty-five [now twenty-seven] member states of the Union and one for the forty-six [now forty-seven] member states of the Council of Europe) would be a serious blow to the principle that there should be no dividing lines in Europe.” This is a powerful rhetorical argument, but it is unconvincing when examined carefully. The instruments of the Council of Europe impose minimum standards on the State parties, and they contain provisions which allow these parties to go beyond those minimal requirements either by the adoption of internal legislation, or by the conclusion of international agreements affording a more favorable protection to the individual. It is no more a problem for the EU to ensure a guarantee of fundamental rights under the jurisdiction of its Member States that goes beyond the requirements of the Council of Europe instruments concluded by those States, than it would be for any individual State to go beyond those requirements in its national constitutional or legislative framework. Indeed, when the European Community

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68 See supra text accompanying notes 47–49.
69 See Resolution 1427, supra note 36, § 12.
adopted directives on the basis of Article 13 EC\textsuperscript{71} and adopted Directive 95/46/EC on the basis of Article 95 EC (then Article 100A of the EC Treaty),\textsuperscript{72} it went beyond the protection from discrimination and the protection of private life in the processing of personal data as provided under Council of Europe instruments. But this did not lead to “dividing lines in Europe” in the field of fundamental rights. Quite to the contrary, it contributed to the overall progress of the protection of human rights in Europe and inspired, in turn, developments within the framework of the Council of Europe itself.\textsuperscript{73} Indeed, the risk of “dividing lines” in Europe was also invoked when the EU Charter of Fundamental Rights was negotiated between October 1999 and October 2000.\textsuperscript{74} But the answer made then to this objection—that nothing in the Council of Europe instruments prohibits EU Member States or the Union itself from improving further the protection of human rights in their respective spheres of competence—should also be made today.

2. Economizing resources

A second argument that is put forward against any duplication of tasks between the Council of Europe bodies and the EU Agency is that such a duplication would constitute a waste of resources.\textsuperscript{75} However, to the extent the “monitoring” of individual States by the EU Fundamental Rights Agency is envisaged, this monitoring is performed for reasons specific to the needs of the Union—in particular, in order to assist the EU Member States in their implementation of Union law, which should better take into account the requirements of fundamental rights, and in order to facilitate the progress of EU candidate countries towards meeting the accession criteria.

Although the EU should make full use of the findings of the Council of Europe bodies in these different contexts, these findings nevertheless will be relied upon with regard to these particular aims, which do not correspond to the aims pursued by the bodies of the Council of Europe under their specific mandates. Indeed, it would not be thinkable to entrust those bodies, for instance, with the task of evaluating


\textsuperscript{72} See Directive 95/46, On the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31.


\textsuperscript{74} See EUR. PARL. ASS., Charter of Fundamental Rights of the European Union, Resolution No. 1210 (2000), § 5 (in which the Parliamentary Assembly “draws attention to the risks of having two sets of fundamental rights which would weaken the European Court of Human Rights”).

\textsuperscript{75} Resolution 1427, supra note 36, §10 (this argument is also briefly mentioned in the Council of Europe Memorandum of 8 September 2005, supra note 42, § 12).
whether a country complies with the criteria laid down for accession to the Union.\textsuperscript{76} And it would be incompatible with the principle of autonomy of the legal order of the Union,\textsuperscript{77} moreover, to have such bodies decide authoritatively whether a Member State has implemented Union law in conformity with the requirements—as imposed under Union law itself—of fundamental rights.\textsuperscript{78} The principle of autonomy of the Union legal order implies that “only the institutions of the particular legal order are competent to interpret the constitutional and legal rules of that order.”\textsuperscript{79} It would thus not be compatible with this principle to attribute to Council of Europe bodies tasks that would imply that they interpret and apply Union or Community law, with results binding on the EU institutions. On the other hand, it may perfectly be envisaged that the Council of Europe bodies be entrusted with fact-finding tasks, on the basis of which the Agency could report back to the Union institutions. Indeed, in its Memorandum of 8 September 2005, the Secretariat of the Council of Europe proposed that, “instead of multiplying monitoring mechanisms,” we should build on the successful experience regarding the preparation of candidate countries for EU accession. Findings of the Council of Europe human

\textsuperscript{76} See Article 49 EU, which, since it was amended by the 1997 Treaty of Amsterdam, includes a reference to the fact that a European state seeking to apply for membership of the EU must respect the principles set out in Article 6(1) EU (compare with Article O of the Treaty on the European Union signed in Maastricht, which did not contain a similar reference); and the so-called “political criterion” included among the criteria defined for accession by the Presidency Conclusions, Copenhagen European Council (June 21–22, 1993), 44 (referring to the stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities). On the use of the Copenhagen criteria, see also Christophe Hillion, The Copenhagen Criteria and Their Progecy, 13 EU ENLARGEMENT: A LEGAL APPROACH (Christophe Hillion ed., 2004).

\textsuperscript{77} The principle of autonomy is derived from Articles 220 EC and 292 EC. See Opinion 1/91, Draft Agreement Between the Community, on the One Hand, and the Countries of the European Free Trade Association, on the Other, Relating to the Creation of the European Economic Area, 1991 E.C.R. I-6079; Opinion 1/92, (Second) Draft Agreement Between the Community, on the One Hand, and the Countries of the European Free Trade Association, on the Other, Relating to the Creation of the European Economic Area. 1992 E.C.R. I-2821.

\textsuperscript{78} It would also be in violation of the principle of autonomy of the legal order of the Union to entrust bodies of the Council of Europe with the task of deciding whether there exists in a Member State a clear risk of a serious breach of the values on which the Union is based, or whether a Member State has been persistently in serious breach of those values, under Article 7 EU.

\textsuperscript{79} Theodor Schilling, The Autonomy of the Community Legal Order: An Analysis of Possible Foundations, 37 HARVARD INT’L L.J. 389 (1996). In addition, the principle of autonomy of the EU legal order is only one implication of the monopoly which Articles 220 and 292 EC reserve to the European Court of Justice in the final interpretation of the EC Treaty: attributing to the Agency for Fundamental Rights the task of deciding whether a Member State complies with its human rights obligations under EU or EC law would not be compatible with this monopoly. Consistent with this requirement, Article 4(2) of the Regulation Establishing the Agency states that the conclusions, opinions, and reports adopted by the Agency “shall not deal with the legality of acts within the meaning of Article 230 or with the question whether a Member State has failed to fulfill an obligation under the Treaty within the meaning of Article 226 of the Treaty.” Council Regulation Establishing a European Union Agency for Fundamental Rights, supra note 23, art. 4(2).
rights mechanisms have been central elements in the Commission’s assessment of the human rights situation in the candidate countries. If necessary, such findings could be presented in a more targeted way, and the details of such co-operation could be specified in an exchange of letters.80

Such a delegation to the Council of Europe mechanisms of fact-finding tasks, not implying authoritative interpretation and application of Union law, may be seen as contributing to a more rational use of the available resources. But it does not constitute an obstacle to the Fundamental Rights Agency’s reporting on the situation of fundamental rights in specific countries, provided it uses any such findings as may be available from the Council of Europe monitoring bodies.

3. The risk of weakening the European system of human rights protection

The third argument against any monitoring by the EU Fundamental Rights Agency duplicating the work of the Council of Europe monitoring bodies was best expressed by the Parliamentary Assembly of the Council of Europe, which voiced its concern that this could result in “the dilution and weakening of their individual authority, which in turn will mean weaker, not stronger, protection of human rights, to the detriment of the individual.”81 The Council of Europe Memorandum of 8 September 2005 explains that any duplication of the role of the Council of Europe bodies by a general monitoring of the EU Member States or even, under the circumstances described above, of non-member countries, would:

entail a real risk of undermining legal certainty. A situation where assessments made by the Agency would diverge from, or even contradict, assessments made by Council of Europe monitoring bodies would result in considerable confusion for individuals and Member States. It would also be highly detrimental to the overall coherence and effectiveness of human rights protection in Europe.82

Whether or not these fears are well-founded will depend on the strength of the links between the EU Fundamental Rights Agency and the Council of Europe, considered both in its standard-setting functions and in its fact-finding functions. It is already the case, of course, that the Member States of the Council of Europe are subjected to different forms of monitoring, under different human rights instruments which have set up a wide array of monitoring bodies. The clearest example is the duplication which exists between the United Nations human rights treaties and the instruments of the Council of Europe. For instance, the Human Rights Committee monitors the Council of Europe’s Member States under the International Covenant on Civil and Political Rights,83 which contains essentially the same guarantees as the European Convention on Human Rights; the UN Committee on Economic, Social and Cultural Rights monitors them under the International Covenant on Economic, Social and Cultural Rights,84 the substantive guarantees of which largely intersect

81 Resolution 1427, supra note 36, § 11.
82 Id. § 12.
with those of the 1961 and 1996 European Social Charters; many other examples could be given. Similarly, the European Court of Justice, which has included fundamental rights among the general principles of law that it upholds in the scope of application of Union law, routinely bases its decisions on the European Convention on Human Rights in situations where the European Court of Human Rights may also have to exercise its jurisdiction. Indeed, even within the Council of Europe, such “overlapping” takes place: the European Committee for the Prevention of Torture and Inhuman and Degrading Treatments and Punishments (CPT) makes recommendations that contribute to the implementation of Article 3 of the European Convention on Human Rights when it issues its country reports following visits to the States parties’ places of detention; the Advisory Committee created under the Framework Convention for the Protection of National Minorities addresses issues related to freedom of religion, non-discrimination, and minority rights, which may also give rise to applications to the European Court of Human Rights. Yet, contrary to the idea that this “duplication” would result in a lowering of the overall level of protection of human rights, it has been beneficial. These different bodies have sought inspiration from one another. They regularly refer to one another’s interpretations of the respective instruments that they seek to implement. The outcome of such dialogue between different jurisdictions has been the progressive development of a “ius commune” of international human rights, which represents progress, not a step backwards, in the implementation of human rights.

The argument against “duplication” is only founded to the extent that the “monitoring” by the EU Agency for Fundamental Rights would lead to conclusions that, in specific cases (for example, with respect to the compatibility of a particular legislative measure or policy with fundamental rights requirements), and although based on identically formulated standards, would differ from interpretations of any competent body of the Council of Europe. This would create confusion, be detrimental to legal certainty, and indeed would risk diminishing the authority of each individual organ—as feared by the Parliamentary Assembly of the Council of Europe. This however would not be the consequence of an overlapping of

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87 Perhaps ironically, the risk of confusion stems from the fact that the normative sources relied upon by the Fundamental Rights Agency (art. 6(1) EU and, in practice, the EU Charter of Fundamental Rights) include the European Convention on Human Rights which art. 6(1) EU refers to, thus leading to a situation where different bodies might arrive at different evaluations on the basis of the same normative texts. The risk would have been much less present if the EU had opted for an entirely different text, corresponding, for instance, to the specificities of the EU or based on the rights of the EU citizen.
monitoring functions as such. Rather, it would result from such an overlapping
taking place when not combined with an explicit and systematic reference to the
findings of the Council of Europe bodies in the interpretation of the different
provisions which together constitute the *acquis* of European human rights law.

If, on the other hand, in performing its tasks—even where those include
monitoring Member States of the Council of Europe with respect to situations over
which the Council of Europe bodies perform comparable monitoring—the EU
Agency for Fundamental Rights systematically refers to the findings of the Council
of Europe bodies, this practice may strengthen, rather than weaken, the authority
recognized in the interpretation by those bodies of the instruments they apply, and
contribute to an improved follow-up on the recommendations they address to the
States parties. Such a systematic referral to the findings of the Council of Europe
bodies, and to the authoritative interpretation by those bodies of the Council of
Europe instruments that constitute the source of inspiration for the development of
fundamental rights within the EU legal order, would contribute to the effectiveness
of the European system of human rights, rather than produce the negative
consequences feared by the Parliamentary Assembly of the Council of Europe.
What is required, therefore, is the establishment of a clear link between the Agency
and the Council of Europe, both at the substantive level and at the institutional level.

At the substantive level, it is crucial not only that the EU Fundamental Rights
Agency’s interpretation of fundamental rights take into account the human rights
instruments adopted within the Council of Europe, but also that the findings of the
Council of Europe bodies be relied upon in the Agency’s monitoring of individual
Member States. This is provided for by the Regulation establishing the Fundamental
Rights Agency, which refers to “the findings and activities of the Council of
Europe’s monitoring and control mechanisms, as well as of the Council of Europe
Commissioner for Human Rights;” in addition, a reference to the activities of the
Organisation of Security and Co-operation in Europe (OSCE), the United Nations,
and unspecified “other international organisations” has been included in the
Regulation.88 It is difficult to be more explicit.

Once it is agreed that the EU Fundamental Rights Agency should base itself on
the findings of the Council of Europe bodies, what becomes crucial for this
provision’s implementation is that the Council of Europe receive adequate
representation within the management structure of the Agency. Such representation
would ensure that all of the Council of Europe’s findings are carefully considered
and that any risks of diverging approaches or duplication in fact-finding are
avoided.89 The draft Regulation proposed by the Commission on 30 June 2005

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88 See art. 6(2)(b) and (c) of the Regulation establishing the Agency, *supra* note 24.
Art. 6(2)(c) of the initial draft Regulation proposed by the Commission, *supra* note 42, stated
that the Agency shall, “in order to avoid duplication and guarantee the best possible use of
resources, take account of existing information from whatever source, and in particular of
activities already carried out by . . . the Council of Europe and other international
organisations.” In the final text of the Regulation, the language has thus been strengthened
and made more precise.

89 As already mentioned, while the duplication of monitoring is not in principle
problematic, as any monitoring performed by the EU Agency would be for other purposes
provided in this regard that the Council of Europe shall appoint an independent 
person to the Management Board of the Agency, but that, in contrast to the current 
situation existing within the EUMC, that person shall not necessarily be a member 
of the Executive Board. As the Council of Europe Secretariat correctly pointed 
out, this was not satisfactory. The day-to-day business of the Agency, as well as 
the definition of the Agency’s position on what may be extremely sensitive points 
politically, will be defined within the Executive Board, rather than by the Board of 
Management. Therefore it was deemed necessary to widen the composition of the 
Executive Board in order to ensure that the independent person appointed by the 
Council of Europe will be in a position to contribute effectively to the coherence of 
the approaches adopted by the EU Fundamental Rights Agency on the one hand, and 
by the Council of Europe bodies on the other hand. Following the compromise 
solution proposed by the Austrian presidency of the Council on 9 June 2006 and 
agreed to by the Council, the Regulation now stipulates that, although not formally a 
member of the Executive Board, the person appointed by the Council of Europe in 
the Management Board “may participate in the meetings of the Executive Board.”

D. Conclusion

The rule according to which, when they act order to fulfill human rights, the EU 
institutions should refer to the standards of the Council of Europe and to the findings 
of their monitoring bodies, which is set out in the Memorandum of Understanding 
concluded between the Council of European and the EU, should guide, first and 
foremost, the future Agency for Fundamental Rights. It should be included in the 
cooperation agreement that the European Community should conclude with the 
Council of Europe according to the procedure provided for under Article 300 EC, as 
envisaged in Article 9 of the Regulation establishing the Agency. As noted by the 
Council of Europe Commissioner for Human Rights in his first annual activity 
report, there is therefore no reason to fear that the EU Fundamental Rights Agency 
will undermine the monitoring exercised by the Council of Europe bodies:

the primary task of the Agency will be to provide advice to the institutions 
of the European Union in the field of human rights, a task which is not 
within the Council of Europe’s remit. If the Agency systematically refers

than the monitoring performed by the Council of Europe bodies, duplication in fact-finding 
and in the evaluation of specific situations should be avoided as it may be seen as an 
unnecessary waste of resources and as creating a risk of divergent conclusions. In my view, 
the EU Agency should systematically refer to the findings made within the Council of Europe, 
but the EU Agency may process this information, collected by the Council of Europe bodies, 
in order to draw the necessary conclusions which are relevant to the fundamental rights 
policies of the European Union.

90 Art. 9(1) of Regulation No. 1035/97 Establishing the EUMC, supra note 26.
91 See Council of Europe Memorandum of 8 September 2005, supra note 43.
92 Art. 12(1) of the Draft Regulation, Council of the European Union, doc. 10289/06 
93 See supra notes 5–6.
to findings of Council of Europe bodies within its work, this may strengthen and not weaken the Council of Europe’s authority.94

IV. THE DEBATE ON THE “DISCONNECTION CLAUSES”

It is perhaps ironic that, whereas the establishment of the EU Fundamental Rights Agency has raised the fear that the EU might be transforming itself into a human rights organization, competing with the Council of Europe for setting the standards and monitoring human rights in Europe, this happens at a time when the EU is suspected of doing not too much, but too little, to ensure that it effectively complies with the requirements of human rights in its law- and policy-making. The debate on the insertion of disconnection clauses in treaties concluded in the framework of the Council of Europe—the other highly sensitive issue in the recent history of the relationship between the Council of Europe and the EU—is about the risk that, as integration between the EU Member States deepens, they may be trying to evade the obligations imposed under Council of Europe instruments. Indeed, in the form it is taking in the EU, deepened integration means that the EU Member States develop relationships based on mutual trust rather than on the need to ensure, on an ad hoc and case-to-case basis, that in each instance of cooperation between the Member States, human rights are fully respected. Thus, at a fundamental level, the question has arisen whether the relationships built between the EU Member States in the establishment between themseives not only of an internal market, but also of an area of freedom, security, and justice, may be reconciled with the classical paradigms of international State responsibility. The following sections move from an examination of the debate on the “disconnection clauses,” to the broader but closely related question of mutual trust between the EU Member States. They conclude that, while integration within the EU may be bound to shift responsibility for human rights violations from individual EU Member States to the EU as a whole, this should not lead to the lowering of the overall level of protection of human rights: rather, it implies that the EU itself should come to accept that it has human rights obligations, over and above the obligations imposed on the EU Member States considered individually. This part examines the issues raised by the so-called “disconnection clauses.” Part V then examines the role of fundamental rights, as defined by Council of Europe standards, in the establishment between the member States of the EU of relationships based on the idea of mutual trust.

A. The “disconnection clause”

Following the precedents set by the European Convention on Extradition of 13 December 1957,95 the European Convention on Transfrontier Television of 5 May

95 C.E.T.S. 24. Art. 28(3) of this instrument provides that, “Where, as between two or more Contracting Parties, extradition takes place on the basis of a uniform law, the Parties shall be free to regulate their mutual relations in respect of extradition exclusively in accordance with such a system notwithstanding the provisions of this Convention. The same principle shall apply as between two or more Contracting Parties each of which has in force a
1989,96 and the Protocol to the Convention on Insider Trading of 11 September 1989,97 three conventions opened for signature on 16 May 2005 at the Third Summit of Heads of State or government of the Member States of the Council of Europe contain a clause withdrawing the mutual relations between Member States of the EU and the relations between Member States and the European Community from the scope of the rules laid down in those instruments. A similar clause was inserted in the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which was negotiated between 2005 and 2007. The canonical form of such clauses is the following:98

Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.99

As part of the compromise which allowed the inclusion of this clause and the conclusion of the negotiations despite the strong reservations of certain Member

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96 C.E.T.S. 132. According to art. 27(1) of the Convention: “In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.”

97 C.E.T.S. 133. The Protocol was adopted for the sole purpose of inserting into the Convention on Insider Trading, Apr. 20, 1989, C.E.T.S. 130, a disconnection clause, stating (in art. 16bis of the Convention) that, “In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.”


99 The final part of the sentence was included at a late stage of the negotiations of the three conventions adopted in 2005, as a result of the insistence by certain States represented within the Committee of Ministers of the Council of Europe that “the EU should give a guarantee that the clause cannot lead to the adoption and application of Community or EU rules which override the minimum standards laid down in the convention in question. For example, in the case of the draft Convention against Trafficking in Human Beings, it is a question of obtaining confirmation that, as a matter of principle, the clause could not allow the drafting and application of rules less favourable than the standards for the protection of victims’ rights enshrined in the convention.” Note prepared by Directorate General I-Legal Affairs and Directorate General II-Human Rights of the Council of Europe, containing a Proposal aimed at facilitating the conclusion of the negotiations concerning the three draft conventions of the Council of Europe, 623d meeting of the Ministers’ Deputies, CM (2005) 58 (Apr. 6, 2005).
States of the Council of Europe, when the Committee of Ministers of the Council of Europe adopted the three conventions on 3 May 2005, the European Community and the EU Member States made the following statement, which forms part of the “context” of the Convention within the meaning of Article 31(2)(b) of the Vienna Convention on the Law of Treaties and should therefore guide its interpretation:

The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a “disconnection clause” is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member States to the Community.

This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this Convention.

The disconnection clause is necessary for those parts of the convention which fall within the competence of the Community/Union, in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community/Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its Member States on the one hand, and the other Parties to the Convention, on the other; the Community and the European Union Members States will be bound by the Convention and will apply it like any party to the Convention, if necessary, through Community/Union legislation. They will thus guarantee the full respect of the Convention’s provisions vis-à-vis non-European Union parties.

The disconnection clause should become a permanent feature of the instruments adopted within the Council of Europe, where the field covered overlaps in part with that of EU law. Such a disconnection clause provides, in sum, that the objectives of the instrument in which it is incorporated are fully maintained, but that as far as the Member States of the EU and the Community/EU are concerned, the obligations imposed by that instrument on its Parties may be performed by the Member States or by the Union according to how their respective competences develop as will ensue in particular from the adoption of legislation by the Union. In principle, whether the

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101 It has been noted in another context that “[a] general disconnection clause is more efficient than trying to identify for each aspect of a Convention possible inconsistencies with EC law. In addition, this is a difficult exercise, given that the Convention provisions are general and that EC legislation may evolve. Because the Convention provisions are so general, incompatibility with EC law could arise from their implementation into domestic law. A disconnection clause is also helpful in reassuring all interested parties that the Convention will not usurp existing Community law instruments.” Recommendation of the European Parliament on the Strategy for Creating a Safer Information Society by Improving the Security
obligations imposed by those instruments are fulfilled by the EU Member States acting individually or by their joint action in the framework of the Union should make no difference for the beneficiaries of the instrument in question, for example for the victims of acts of terrorism or of trafficking in human beings, or for children who have been sexually abused. The disconnection clause should not affect the scope of the obligations that are taken on, but simply the means through which those obligations shall be implemented. It does not seek to introduce an exception to the obligations stipulated by the instrument in which it is incorporated, but instead attempts to meet the needs of the instrument’s integration within the EU by taking into account the evolutionary nature of the division of competences between the Member States and the Community/Union. Thus, for example, the EU Member States who become parties to the Council of Europe Convention on Action against Trafficking in Human Beings would be in violation of their obligations under this instrument if, due to the content of their obligations under Union law (to which they afford priority, in conformity with the “disconnection” clause, in their mutual relations), they were unable to comply with the obligations imposed under this convention. It is in order to make this clear that, after their proposal to insert a “disconnection clause” within the Council of Europe instruments relating to domains partly transferred to the EU met with resistance, the European Community and the EU Member States offered to make the declaration quoted above, leading in turn to a conciliatory statement of the Council of Europe Secretary General.\textsuperscript{102} In addition, all the conventions containing a “disconnection clause” provide for the accession of the European Community/Union. Therefore, provided the EU has acted in a particular field, it will have to comply with the requirements of the convention, while its member States may apply Union law (rather than the prescriptions of the Council of Europe convention) in their mutual relations; where the EU has not taken action, the EU Member States remain bound, individually, by the convention.

\textbf{B. The Debate}

The fear has been expressed, however, that the insertion of such “disconnection clauses” signals “the beginning of double-standards setting within the common legal area in Europe.”\textsuperscript{103} Such a fear is not wholly without foundation. While no

\textsuperscript{102} When presented with the draft of the declaration made by the European Community and its member states and relating to the disconnection clause, to be included in the Explanatory Report, the Secretary General of the Council of Europe reportedly stated that the said declaration “provided the assurance asked for by the Secretariat that the clause could not lead to the adoption and implementation of Community and Union rules which derogated from the minimum standards laid down in the conventions under consideration.” \textit{See EUR. PARL. ASS., Notes of the Comm. Of Ministers, 923rd Meeting of the Ministers’ Deputies, CM/Notes/923/2.4/4.2/10.4 Addendum (Apr. 11, 2005).}

\textsuperscript{103} \textit{See, e.g., Serhiy Holovaty, Chairperson of the Parliamentary Assembly of the Council of Europe’s Committee on Legal Affairs, Statement Delivered to the 26th Conference of European Ministers of Justice (Helsinki, Apr. 7–8, 2005) (“The position of the European Commission is seen by many as potentially undermining the Council of Europe’s acquis. Here I refer, in particular, to the so-called “disconnection clauses”, which, if applied, could result in these conventions not being applicable to the European Community’s “constitutional context.”}
particular concerns arise from the disconnection clauses inserted into the Council of Europe conventions opened for signature at the Warsaw Summit on 16 May 2005, including the Council of Europe Convention on Action against Trafficking in Human Beings, or from the insertion of a similar clause in the 2007 Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, the systematic inclusion of such clauses in Council of Europe instruments does raise certain questions. Where such instruments contain the characteristics of human rights instruments, attributing certain rights to individuals under the jurisdiction of the State parties, the eviction of the Council of Europe instrument by EU law in the regulation of the mutual relations between the EU Member States will constitute a step backwards from the point of view of the protection of the rights of the individual, where the individual responsibility of each State constitutes a guarantee for which the joint responsibility of the EU Member States is not an adequate substitute. Consider, by way of illustration, the well-known case of T.I. v. United Kingdom, which the European Court of Human Rights held inadmissible on 7 March 2000. The applicant in that case had fled Sri Lanka, where he feared persecution, and claimed asylum in Germany in February 1996. Before exhausting the appeals available before the German courts, T.I. arrived in the United Kingdom, where he filed another asylum claim in September 1997. The United Kingdom Government requested that Germany accept responsibility for the applicant’s asylum request pursuant to the 1990 Dublin Convention. The Dublin Convention provides for measures to ensure that applicants for asylum have their applications examined by one of the Member States and that applicants for asylum are not referred successively from one Member State to another. On the basis of that convention, the United Kingdom authorities claimed that they should not examine the substance of T.I.’s claim to asylum, and that he should be returned to Germany, which under the Dublin Convention would be the State responsible for processing the asylum claim.

If the Council of Europe does not pay sufficient attention to the question, it may then in the near future permit the EU member states to apply—potentially—lower standards than those negotiated within the Council of Europe. Thereby introducing different standards for different groups of European countries. A line is drawn between EU member states and those not members of the EU. One group of states may in the future not be subject to the same obligations as the other group. This would be the end of effective treaty-making in the Council of Europe. This would be the beginning of double-standards setting within the common legal area in Europe. It is our deep conviction in the Assembly that for the sake of the greater and united Europe, this must not happen. Any disconnection clause, if deemed appropriate must be understood clearly to mean that no parallel system of protection can be allowed which is less favourable to that negotiated under the auspices of the Council of Europe.”.

The European Court of Human Rights, however, took the view that Germany and the United Kingdom could not, by the conclusion of the Dublin Convention, exempt themselves from the requirements of the European Convention on Human Rights, including the requirement not to put an individual at risk of being ill-treated by returning him to a country where there exists such a serious risk. Said the Court:

[T]he indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or mutatis mutandis international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution (see e.g. Waite and Kennedy v. Germany judgment of 18 February 1999, Reports 1999, § 67).105

Many other such examples could be given,106 but T.I. illustrates the problem adequately. Where rules of international law regulating the relations between States are designed not for the mutual benefit of the States concerned, but for the benefit of the individuals under their jurisdiction—and a rule such as the prohibition of refoulement certainly qualifies—States should not be allowed to introduce another rule, less protective of the individual, in their mutual relations. This would result in those States circumventing their international obligations by the conclusion among themselves of a separate regime.

C. Conclusion

It has been proposed, both by the Juncker report and by the Parliamentary Assembly of the Council of Europe, that the “disconnection clauses” receive another denomination, such as “modulation clauses” or “EU clauses.”107 It has also been suggested that it be clearly stated in any such clause that the EU Member States are to abide by the Council of Europe conventions they accede to, although they may do so partly through the adoption of EU instruments:108 “the wording of these

107 See Juncker Report, supra note 7, at 16.
108 While this formulation is close to that offered in ¶ 9.5.6. of Recommendation 1743, supra note 8, the view adopted in the Recommendation that, “[i]n the case of inconsistencies, the normal mechanism of reservations should be used,” is not tenable. The allocation of competencies between the EU and its Member States is in permanent evolution. Therefore, it would probably not be possible for the EU Member States to make a general reservation in order to preserve the exclusive application of EU law in their mutual relations in subject-
modulation clauses,” it has been noted, “should be reviewed to avoid giving the impression that member states of the European Union are trying to shirk their responsibilities under the convention in question.” But the question raised by the insertion of disconnection clauses is not one of symbols; it is one of content. Only an enhanced commitment of the EU itself to complying with the Council of Europe instruments concerned, ensuring that the level of protection achieved by Union law will be at least as high as those defined in those instruments, will convincingly respond to the concerns raised by the potential use of disconnection clauses in human rights treaties.

V. MUTUAL RECOGNITION AND MUTUAL TRUST

While it does pose new questions, the debate on the acceptability of the disconnection clauses where agreements are concluded in areas which are shared between the EU Member States and the EU may be recast as part of a much wider debate on the extent to which it is allowable for the EU Member States to establish among themselves an area in which inter-State cooperation is possible without verifying, on a case-by-case basis, whether fundamental rights are respected. The establishment of an area of freedom, security, and justice between the Member States of the EU is based on the idea that national courts and administrations of the different Member States, as well as law enforcement authorities, should cooperate with one another, in particular by exchanging information and by mutually recognizing judicial decisions in civil and criminal matters. Such cooperation in turn is based on a presumption that all the EU Member States uphold certain values, including fundamental rights, which they are trusted to respect. However, the status and function of fundamental rights in the establishment of the area of freedom, security, and justice raises a number of questions. I identify these questions and how the answers we provide may influence the relationship between the EU and the Council of Europe in section A. I then examine the two avenues which are being explored in order to ensure that the cooperation between the EU Member States in the area of freedom, security, and justice will be compatible with the requirements of fundamental rights: in section B, I discuss the approximation or harmonization of national legislations in order to impose a minimum level of protection of fundamental rights throughout the EU; and in section C, I consider the possibility of matters covered by the Council of Europe instruments which they would accede to in the future. Such a reservation would present a vague and unpredictable character, and would in effect allow precisely what should not be a consequence of disconnection clauses—that the protection of the individual be diminished because of the development of EU legislation in fields covered by Council of Europe instruments.


110 One of the EU’s objectives is to “maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.” Art. 2, al. 1, 4th indent EU. The Treaty of Lisbon intends to rename Title IV of the EC Treaty (itself renamed Treaty on the Functioning of the European Union), “Area of Freedom, Security and Justice.”
the EU setting up a form of permanent monitoring of the situation of fundamental rights in the EU Member States. I then offer a brief conclusion in section D.

A. The Role of Fundamental Rights in the Area of Freedom, Security, and Justice

Three interrelated questions arise. A first question is whether the fact that the Member States are bound by the same international human rights instruments, in particular those concluded within the framework of the Council of Europe, constitutes a sufficient guarantee that all Member States respect and protect fundamental rights at a sufficiently high level, justifying this “mutual trust” in each others’ systems. Apart from the other preconditions which should be realized in order for inter-State cooperation to function smoothly—in particular the mutual recognition of judicial decisions—should we content ourselves with the minimum level of protection ensured by these instruments, or should the EU instead legislate above these minimum standards, in order to facilitate such cooperation? A second question arises once all the EU Member States are bound by human rights standards defined at a sufficiently high level, whether under international instruments such as the European Convention on Human Rights or through the adoption of secondary EU legislation, for instance directives or framework decisions. Once this is the case, does this justify that they may cooperate with one another without a case-by-case verification that these safeguards are fully complied with, in the particular instance where cooperation is sought? Of course, the EU itself might seek to develop evaluation mechanisms in order to reassure all States that compliance with the requirements of fundamental rights will be effective, and that any failure to comply will be addressed at an early stage. But then a different set of questions arises concerning the impartiality of such mechanisms, their capacity to effectively ensure such compliance, and of course, their relationship to other evaluation mechanisms, such as those established within the Council of Europe.

It is easy to see how, as each of these questions is progressively being answered, the Council of Europe may fear that the rhetoric proclaiming that it is the “primary forum for the protection and promotion of human rights in Europe,” will become hollow due to the increased role of the EU in protecting and promoting fundamental rights. The current predicament may be summarized thus. On the one hand, if the EU Member States were to cooperate with one another without a case-by-case verification as to compliance with fundamental rights—on the basis of what might be called “blind mutual trust”—this may lead them to violate their undertakings under Council of Europe instruments, insofar as these instruments impose compliance with fundamental rights as one condition for inter-State cooperation. Partly for this reason—in order to avoid situations in which they would be bound by conflicting requirements, resulting from their undertakings in the frameworks, respectively, of the Council of Europe and of the EU—the EU Member States are authorized under Union law to refuse to comply with the requirements of inter-State cooperation in the area of freedom, security, and justice in any situation where this might conflict with fundamental rights as recognized in the legal order of the EU.

This authorization originated in the case-law of the European Court of Justice.\(^{112}\) It now also has a constitutional basis in Article 6(2) EU.\(^{113}\) In addition, the authorization is confirmed by the various instruments that are based on the mechanism of mutual recognition of judicial decisions in criminal matters.\(^{114}\)

Not only may the national authorities, including the national judicial authorities, refuse to cooperate with the authorities of another member State where such cooperation would lead to a violation of a fundamental right; they are under an obligation to deny such cooperation, both under European Union law and under international instruments such as the European Convention on Human Rights.\(^{115}\) It is simply wrong to presume, as certain national courts have done, that the establishment between the EU Member States of an area of freedom, security, and justice, would justify disapplying in their mutual relations other international instruments which may impose restrictions on the nature and extent of their cooperation.\(^{116}\) While such a “disconnection” may in certain cases be in conformity

\(^{112}\) The leading cases were Case 29/69, Stauder v. City of Ulm, 1969 E.C.R. 419; and Case 11/70, Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide, 1970 E.C.R. 1125. The Court recognizes that the EU Member States may invoke the need to protect fundamental rights as general principles of law even where this may lead them to derogate from their obligations under EU Law. See, e.g., Case C-368/95, Familiapress, 1997 E.C.R. I-3689, ¶ 24; Case C-112/00, Schmidberger, 2003 E.C.R. I-5659, ¶ 81.

\(^{113}\) Article 6(2) EU states: “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

\(^{114}\) See Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, 2002 O.J. (L 190) 1, 12th recital of the Preamble and art. 1, §3 (“This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.”); Council Framework Decision 2003/577/JHA of 22 July 2003 on the Execution in the European Union of Orders Freezing Property or Evidence, 2003 O.J. (L 196) 45, Article 1, second sentence (stating that the framework decision “shall not have the effect of amending the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty”), as well as, with regard to the ne bis in idem principle, the observance of which may constitute a ground for non-recognition or non-execution, art. 7 §1, c); Council Framework Decision 2005/214/JHA of 24 February 2005 on the Application of the Principle of Mutual Recognition to Financial Penalties, 2005 O.J. (L 76) 16, 5th and 6th recitals of the Preamble as well as art. 3 and 20 § 3 (“Each Member State may, where the certificate referred to in Article 4 gives rise to an issue that fundamental rights or fundamental legal principles as enshrined in Article 6 of the Treaty may have been infringed, oppose the recognition and the execution of decisions.”); Council Framework Decision 2006/783/JHA of 6 October 2006 on the Application of the Principle of Mutual Recognition to Confiscation Orders, 2006 O.J. (L 328) 59, 3rd recital of the Preamble and art. 1, § 2.

\(^{115}\) Although the case law of the European Court of Human Rights has not fully clarified the conditions in which such responsibility may be incurred, it is in any case clear that a Member State of the European Union cannot evade this responsibility under the pretext of the mutual trust which the Union Member States place in each other. See supra text accompanying notes 105–06, and infra text accompanying notes 118–21.

\(^{116}\) The reasoning underlying the judgment given by the Belgian Court of Cassation on December 8, 2004 is not acceptable on this point. See Cass. b., Dec. 8, 2004, 124 JOURNAL
with the general rules of public international law, it is deeply problematic in the context of certain parties to a human rights instrument establishing among themselves a separate regime governing their mutual relations. Indeed, if we seek to transpose the idea behind the adoption of such disconnection clauses to the question of the mutual recognition of judicial decisions in criminal matters, we face the difficulty that in this case the imposition on each individual State of the obligation in question (not to grant recognition or to enforce a judicial decision delivered in another State that infringes human rights) does indeed constitute for the holder of the rights in question an additional safeguard, which would not be respected to the same degree if we were to consider that the Member States of the European Union would assume this obligation jointly with the European Union, depending on how the mechanisms of judicial cooperation in criminal matters evolve within the Union. In

other words, the separation of the States as such constitutes a safeguard for the individual concerned.

The case of *Pellegrini v. Italy* illustrates this. The applicant, Ms. Pellegrini, had petitioned the Italian courts to obtain judicial separation from her husband. The petition was granted and the husband was ordered to make monthly payments to the applicant. In the meantime however, her husband had the marriage annulled on the ground of consanguinity before the Ecclesiastical Court of the Vatican, following a procedure which did not comply with Ms. Pellegrini’s rights of defense. Although Ms. Pellegrini appealed the judgment of the Ecclesiastical Court, complaining of a number of procedural defects, the judgment was upheld by the Roman Rota. Following this procedure, the Italian courts agreed to enforce the judgment delivered by the ecclesiastical courts, in accordance with a Concordat concluded between Italy and the Vatican. As a result, the divorce proceedings initially filed by Ms. Pellegrini were annulled and she lost her right to payment. Before the European Court of Human Rights, she complained of a violation of Article 6 of the European Convention on Human Rights on the ground that the Italian courts declared the decision of the ecclesiastical courts annulling her marriage enforceable at the end of proceedings in which her defense rights had been breached. The Court decided that it should determine

whether the Italian courts, before authorising enforcement of the decision annulling the marriage, duly satisfied themselves that the relevant proceedings fulfilled the guarantees of Article 6 [of the European Convention on Human Rights, guaranteeing a fair trial in procedures relating to civil rights and obligations]. A review of that kind is required where a decision in respect of which enforcement is requested emanates from the courts of a country which does not apply the Convention. Such a review is especially necessary where the implications of a declaration of enforceability are of capital importance for the parties.119

It concluded from its review that the Convention had been violated, since “the Italian courts breached their duty of satisfying themselves, before authorising enforcement of the Roman Rota’s judgment, that the applicant had had a fair trial in the proceedings under canon law.”120

Although the European Court of Human Rights has occasionally been more tolerant of national courts’ applying only a very low level degree of scrutiny when asked to recognize foreign judgments,121 it is clear that at least some form of scrutiny

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119 *Pellegrini v. Italy*, supra note 118, ¶ 40.
120 Id. ¶ 47.
121 See, e.g., *Lindberg v. Sweden*, App. No. 48198/99, Eur. Ct. H.R. (1st sect.) (2004). The applicant was complaining against the Swedish courts’ refusal to prevent the enforcement in Sweden (where the applicant lived) of a judgment delivered in Norway in defamation proceedings against him. The European Court of Human Rights noted that it: “does not deem it necessary for the purposes of its examination of the present case to determine the general issue concerning what standard should apply where the enforcing State as well as the State whose court gave the contested decision is a Contracting Party to the Convention and where the subject-matter is one of substance (i.e., here, the freedom of expression) rather than
is required when the national authorities of one State party to the European Convention on Human Rights are asked to enforce a decision adopted by the authorities of another State party. Therefore, “blind” mutual trust cannot, without any compensatory measures, be reconciled with the obligation imposed on States by the international human rights instruments to which they are parties.

On the other hand, however, the reliance on this “fundamental rights exception” in the area of freedom, security, and justice may be the source of a number of difficulties. It is purely reactive and ad hoc, rather than proactive and systematic. It creates the risk of barriers to mutual cooperation, to the extent that national authorities may remain suspicious of other States’ ability to fully comply with the requirements of fundamental rights. Moreover, the precise extent of the authorization given to Member States to refuse to cooperate remains a subject of debate. In principle, infringement of a safeguard contained in the national Constitution of each State cannot justify a refusal to cooperate, for instance in mechanisms of mutual recognition, unless this safeguard corresponds to a fundamental right recognized within the Union, such as those rights enshrined in the European Convention on Human Rights or those rights that are deemed to result

procedure [as was the case, for instance, in the case of Pellegrini, cited above]. In the particular circumstances it suffices to note that the Swedish courts found that the requested enforcement (in respect of the award of compensation and costs made in the Norwegian judgment) was neither prevented by Swedish public order or any other obstacles under Swedish law. The Court, bearing in mind its findings above as to whether the applicant had an arguable claim, does not find that there were any compelling reasons against enforcement.” Hence, the application was deemed inadmissible, as manifestly ill-founded. However, the fact that the Court had previously delivered a judgment where it found that the defamation proceedings had not constituted a violation of the freedom of expression of the editors which had published Mr. Lindberg’s allegations, see Bladet Tromsø and Stensaas v. Norway, App. No. 21980/93, 1999–III Eur. Ct. H.R. (GC), presumably was decisive in convincing the Court that a relatively low level of scrutiny was appropriate.

While acknowledging that it is legitimate for Member States to add to the grounds for refusal to execute a European arrest warrant the ground based on ne bis in idem before the International Criminal Court which the Framework Decision of 13 June 2002 does not explicitly provide for, as well as to expressly introduce grounds of refusal for violation of fundamental rights, the Commission points out, “However legitimate they may be . . . these grounds should be invoked only in exceptional circumstances within the Union.” Report from the Commission Based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, at 5, COM (2004) 63 final (Feb. 23, 2005). This is symptomatic of the ambiguous relationship which exists between the area of freedom, security, and justice and the requirements of fundamental rights: while these have to be respected in order for the area of freedom, security, and justice to establish itself, they may, if broadly interpreted, create obstacles to this very objective.

from the common constitutional traditions of the Member States. Yet, in order for a right to be counted among the general principles of Community law, it is not necessary all Member States give it exactly the same scope. In the *Omega Spielhallen- und Automatenaufstellungs GmbH* judgment of 14 October 2004, the Court of Justice agreed that the German authorities could justify a restriction on the freedom to provide services in the name of respect for human dignity, while recognizing that “the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another” and that, therefore, the competent national authorities must be allowed “a margin of discretion within the limits imposed by the Treaty.” Similarly, the 6th recital of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties asserts that this instrument “does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.” Of course, as in the *Omega* case, it is not the national constitutional rules as such which, being in force in the executing State, would justify this State’s refusal to recognize and execute a decision imposing a financial penalty: those constitutional rules could only be relied upon to oppose the recognition and execution of such a decision insofar as they are a translation of fundamental rights figuring among the general principles of Community law, as embodied in particular in the European Convention on Human Rights and the constitutional traditions the Member States have in common.

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125 Id. ¶ 31. In the immediately preceding paragraph, the Court had noted, however, that “the concept of ‘public policy’ in the Community context, particularly as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the Community institutions.” Id. ¶ 30. The balancing between these formulae shows the hesitations of the European Court of Justice between two conflicting approaches: while one approach would restrict the possibility of Member States invoking fundamental rights as an exception to their obligations under European Union law to those rights which are recognized by all Member States and thus forming part of the “common constitutional traditions” referred to in Article 6(2) EU, a competing approach would leave a certain margin of appreciation to each State in determining the content of the fundamental rights to be protected under its jurisdiction, in order to ensure that European Union law will not oblige a Member State to renounce such a protection or to lower the level of protection of these fundamental rights. In *Omega Spielhallen- und Automatenaufstellungs GmbH*, the Court clearly prefers to espouse the second branch of the dilemma: “It is not indispensable . . . for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected. . . . [The] need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State.” Id. ¶¶ 37–38.
126 The emphasis is added.
127 See Council Framework Decision 2005/214/JHA, On the Application of the Principle of Mutual Recognition to Financial Penalties, 2005 O.J. (L 76) 16, art. 20(3) (specifying, “Each Member State may, where the certificate referred to in Article 4 gives rise
adopted in the Preamble of the Framework Decision nevertheless creates some ambiguity: it suggests that a State can rely on its own domestic rules to refuse to cooperate in the execution of a judicial decision delivered in another Member State, but the obligation of execution is central to the concept of mutual recognition, including in cases in which the legal system of the executing State would have led to a different outcome (such as an acquittal).

In order to avoid such anarchical consequences and the risk of fragmentation in the area of freedom, security, and justice as may result from the absence of a common understanding of the requirements of fundamental rights between the Member States of the Union, two possible solutions may be explored: one consists in legislating in the field of fundamental rights in order to establish standards common to the EU Member States, over and above the minimum requirements imposed by the international human rights instruments they are bound by; another consists in setting up monitoring mechanisms in order to ensure, through mechanisms proper to the Union, that any risk of violations of fundamental rights by one Member State which could affect cooperation with the other Member States will be appropriately addressed. Both of these solutions may be problematic from the point of view of the Council of Europe, however. If, in order to establish the “mutual trust” that the area of freedom, security, and justice rests upon, the EU legislates in the field of fundamental rights, the standards set by the Council of Europe may become progressively irrelevant and there may be cases where, once a certain area has been preempted by EU law, the EU Member States will believe that by complying with EU law, they necessarily comply with any other standards developed by the Council of Europe in the same field. As to the development of evaluation mechanisms within the EU itself, which is justified primarily as a means to strengthen the mutual trust between the Member States—and which the Treaty of Lisbon intends to develop into a systematic practice128—it may in part compensate for the risks entailed by mutual trust based on an absolute presumption of compliance with fundamental rights. But it also may come to threaten not only the monopoly, but also the authority of the Council of Europe monitoring bodies, since it results in the creation of competing monitoring mechanisms which, in certain cases, may cover questions similar to those already monitored by the Council of Europe. I consider in turn each of these complementary answers to the challenge of ensuring the

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128 See Treaty on the Functioning of the European Union (as the EC Treaty will be renamed by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community), 2007 O.J. (C 306) 1, art. 61C, at 58 (“the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in [Title IV: Area of Freedom, Security and Justice] by Member States’ authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation”). Treaty Establishing a Constitution for Europe, Dec. 16, 2005, 2004 O.J (C 310) 1, had anticipated the introduction of such an evaluation mechanism.
protection of fundamental rights in the establishment of an area of freedom, security, and justice in the EU.

B. The Approximation or Harmonization of National Legislations

As already noted, a first answer to the need to ensure that inter-State cooperation in the area of freedom, security, and justice develops on the basis of a high level of protection of fundamental rights may consist in the adoption of secondary EU Law going beyond the minimum requirements imposed on the EU Member States by the international instruments they are bound by. The protection of personal data offers one illustration of the interplay between what might be called “negative” integration, by the abolishment of barriers between the EU Member States (including barriers to the exchange of information or to the mutual recognition of judicial decisions), and “positive” integration, by the adoption of common standards, which may be seen in certain instances as its necessary complement. Already for the purposes of the establishment of the internal market, the adoption of a directive in this field was seen as a requirement, in the face of the existence of a diversity of national legislations which might constitute an obstacle to the free movement of personal data within the European Community and thus, in particular, to the free provision of services across Member States. The adoption of the 1995 Data Protection Directive129 was justified by the consideration that:

the difference in levels of protection of the rights and freedoms of individuals, notably the right to privacy, with regard to the processing of personal data afforded in the Member States may prevent the transmission of such data from the territory of one Member State to that of another Member State; . . . this difference may therefore constitute an obstacle to the pursuit of a number of economic activities at Community level, distort competition and impede authorities in the discharge of their responsibilities under Community law.130

A similar dialectic is currently at play as regards the protection of personal data processed by law enforcement authorities in the establishment of the area of freedom, security, and justice. Just as the harmonization of personal data protection in the internal market was seen as a condition of mutual recognition of the relevant national legislations,131 the development of common rules on personal data protection in law enforcement activities is considered a condition for the exchange of information between the Member States’ law enforcement agencies under what came to be called the principle of availability. As defined in the Hague Programme adopted by the European Council of 4-5 November 2004, the principle of availability means that,

130 Id., Preamble, 7th Recital.
131 See id., art. 1(2) (providing that “Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with” the protection of the right to privacy with respect to the processing of personal data).
throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State.\textsuperscript{132}

In other words, information available in one Member State should be made available to the authorities of any other Member State, just as if these were authorities of the same State:

The mere fact that information crosses borders should no longer be relevant. The underlying assumption is that serious crimes, in particular terrorist attacks, could be better prevented or combated if the information gathered by law enforcement authorities in EU Member States would be more easily, more quickly and more directly available for the law enforcement authorities in all other Member States.\textsuperscript{133}

It is this principle which is currently codified in the proposal for a Framework Decision on the exchange of information under the principle of availability.\textsuperscript{134}

The principle of availability plays in this field the role that, in the field of judicial cooperation in criminal matters, is played by the principle of mutual recognition. It presupposes the mutual trust that should exist between the Member States’ national authorities. But it is also a technique through which leverage may be exercised in favor of the adoption of common standards in order to strengthen mutual trust.\textsuperscript{135} Indeed, as was stressed in the Hague programme,\textsuperscript{136} the implementation of the principle of availability requires that all Member States ensure a high level of protection of personal data, thus justifying the high level of trust which this principle presupposes between the national authorities of the different Member States. The 1995 Data Protection Directive does not apply to the processing of personal data effectuated in the course of an activity which falls outside the scope of Community law, such as the activities of the State in areas of criminal law or matters falling under Title VI EU.\textsuperscript{137} Moreover, while all the EU Member States are parties to the Council of Europe Convention for the Protection of

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  \item \textsuperscript{135} S. de Bioley, Collecte, Échange et Protection des Données dans la Coopération en Matière Pénale, 2006 JOURNAL DES TRIBUNAUX-DROIT EUROPÉEN 193, 194.
  \item \textsuperscript{136} The Hague Programme: Strengthening Freedom, Security and Justice in the EU, supra note 132, ¶ III.2.1.
  \item \textsuperscript{137} Data Protection Directive, supra note 129, art. 3(2).
\end{itemize}
Individuals with regard to Automatic Processing of Personal Data of 1981, the principles set forth in this instrument are expressed at a relatively high level of generality, and certainly do not ensure the same level of protection as, for instance, the 1995 Data Protection Directive. Therefore, almost simultaneously to proposing an instrument implementing the principle of availability, the Commission put forward a proposal for a Framework Decision on the protection of personal data processed in the context of police and judicial cooperation in criminal matters. This was encouraged by the European Parliament and welcomed by the European Data Protection Supervisor. It illustrates the need to adopt “flanking measures,” aimed at improving the level of protection of fundamental rights in the EU Member States, when lowering the barriers to mutual recognition or exchange of information.

The attempt to harmonize the procedural guarantees given to suspects in criminal proceedings offers yet another illustration of such a balancing between presupposing mutual trust and strengthening it. In February 2003, the Commission presented its Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union. Title I.7, “Enhancing mutual trust,” reads:

Mutual recognition rests on mutual trust and confidence between the Member States’ legal systems. In order to ensure mutual trust, it is desirable for the Member States to confirm a standard set of procedural safeguards for suspects and defendants. The desired end result of this initiative is therefore to highlight the degree of harmonisation that will enhance mutual trust in practice. The Member States of the EU are all signatories of the principal treaty setting these standards, the European Convention on Human Rights, as are all the acceding states and candidate countries, so the mechanism for achieving mutual trust is already in place. The question is now one of developing practical tools for enhancing the visibility and efficiency of the operation of those standards at EU level. The purpose of this Green Paper is also to ensure that rights are not “theoretical or illusory” in the EU, but rather “practical and effective.” Differences in the way human rights are translated into practice in national procedural rules do not necessarily disclose violations of the ECHR.

140 See European Parliament Recommendation to the Council on the Exchange Of Information And Cooperation Concerning Terrorist Offences EUR. PARL. DOC. 2005/2046 (INI), Jun. 7, 2005 (in favor of harmonizing existing rules on the protection of personal data in the instruments of the current third pillar, bringing them together in a single instrument that guarantees the same level of data protection as provided for under the first pillar).
However, divergent practices run the risk of hindering mutual trust and confidence which is the basis of mutual recognition. This observation justifies the EU taking action pursuant to Article 31(c) of the TEU. This should not necessarily take the form of intrusive action obliging Member States substantially to amend their codes of criminal procedure but rather as “European best practice” aimed at facilitating and rendering more efficient and visible the practical operation of these rights. It goes without saying that the outcome will in no case reduce the level of protection currently offered in the Member States.

Following the consultations held on the basis of the Green Paper, the European Commission put forward a proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union.143 In its Explanatory Memorandum, the Commission replies in the following terms to the question of whether the proposal respects the subsidiarity principle:

The Commission considers first that in this area only action at the EU level can be effective in ensuring common standards. To date, the Member States have complied on a national basis with their fair trial obligations, deriving principally from the ECHR, and this has led to discrepancies in the levels of safeguards in operation in the different Member States. It has also led to speculation about standards in other Member States and on occasion, there have been accusations of deficiencies in the criminal justice system of one Member State in the press and media of another. This would be remedied by the adoption of common minimum standards. By definition, the standards can only be common if they are set by the Member States acting in concert, so it is not possible to achieve common standards and rely entirely on action at the national level.144

Remarkably, the assertion of the need to establish mutual trust justifies the adoption of European legislation not only in order to ensure that minimum thresholds of protection of the individual’s rights are respected throughout the EU, but also to make certain that there are no excessive differences between Union Member States in the ways in which the requirements under Articles 5 and 6 of the European Convention on Human Rights are transposed. The fact that the instrument proposed is not entirely faithful to the declared intention145 should not prevent us from discerning the two principles on which the proposal is based: the European Convention on Human Rights, to which all the Member States are parties, certainly constitutes a common minimum threshold of protection, yet its requirements are not detailed enough to create the necessary cement between Union Member States justifying mutual recognition; mutual trust between Member States could be

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144 Id., ¶ 19 of the Explanatory Memorandum.

145 See supra note 143. In the Commission’s proposal, the Member States to which the Framework Decision is addressed may offer more favourable conditions to suspects (Article 17 (non-regression clause)). This obviously creates the risk that potentially significant divergences between the levels of protection offered in different Member States will remain, or develop, following the adoption of the Framework Decision.
threatened not only when a Member State violates this minimum standard which should be respected by all, but also when there are excessive differences between Member States. Insofar as the proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the EU is based on this logic, it is by no means exceptional. It is, instead, illustrative of an almost neo-functionalist kind of development in which incremental steps towards further integration, since they are grounded on the presupposition of mutual trust, produce feedback effects calling for the development of standards by the EU itself in the field of fundamental rights in order to justify that very presupposition. Although we are only at the first stages of the establishment of an area of freedom, security, and justice in the EU, a wealth of examples could already be provided, which further illustrate this logic at work.\footnote{In her Opinion delivered in the \textit{Pupino} case, Advocate General J. Kokott justified the reliance on this legal basis for the adoption of Council Framework Decision 2001/220/JHA of 15 March 2001 on the Standing of Victims in Criminal Proceedings in the Following Terms: \ldots common standards for the protection of victims when giving evidence in criminal proceedings may also encourage cooperation between judicial authorities, since they guarantee that that evidence is usable in all the Member States." \textit{Opinion of the Advocate General Kokott in the Criminal Proceedings Against Maria Pupino (Case C-105/03)}, at ¶ 51, available at http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79958888C19030105&doc=T&ouvert=T&seance=CONCL&where=(). See also, \textit{The Announcement Of The Presentation Of A Proposal For a Framework Decision on the Presumption Of Innocence And Minimum Standards On The Gathering Of Evidence Made In The Communication from the Commission to the Council and the European Parliament on the Mutual Recognition Of Judicial Decisions In Criminal Matters And The Strengthening Of Mutual Trust Between Member States}, COM (2005) 195 final (May 19, 2005), ¶ 24. More generally, the Communication from the Commission to the Council and the European Parliament on the Mutual Recognition of Judicial Decisions in Criminal Matters and the Strengthening of Mutual Trust Between Member States exemplifies this logic. Section 3.1., On Reinforcing Mutual Trust by Legislative Measures, says, \ldots The first endeavours to apply the [mutual recognition] principle, in particular with the European arrest warrant, revealed a series of difficulties which could to some extent be resolved if the Union were to adopt harmonisation legislation \ldots [aimed at] ensuring that mutually recognised judgments meet high standards in terms of securing personal rights". \textit{Communication from the Commission to the Council and the European Parliament on the Mutual Recognition of Judicial Decisions in Criminal Matters and the Strengthening of Mutual Trust Between Member States}, COM (2005)195 final (May 19, 2005), § 3.1. On this question, see Steve Peers, \textit{Mutual Recognition and Criminal Law in the EU: Has the Council Got It Wrong?}, 41 \textsc{Common Mkt. L. Rev.} 5 (2004).}
translation of procedural documents—in fact, mostly procedural rights of the accused whose foreign nationality might create a vulnerability if he or she is arrested in a Member State other than his or her national state. This reveals the hesitation of the EU Member States to legislate in fields already covered by Council of Europe instruments in the absence of any clear added value to an intervention by the Union.

It is significant in this regard that, at the Justice and Home Affairs Council meeting of 4-5 December 2006, it was concluded that “the main outstanding issues of the proposal relate to the question whether to adopt a Framework Decision or a non-binding instrument, and the risk of developing conflicting jurisdictions with the European Court of Human Rights.” This concern may also be phrased in the terms suggested by the principles of subsidiarity and proportionality. According to these principles, made applicable to the EU by Article 3b of the Treaty on the Functioning of the European Union, action may be taken by the Union in areas which do not fall under its exclusive competence “only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States . . . but can rather, by reason of the scale or effects of the proposed action, be better achieved by the [Union].” Moreover, any such action “shall not exceed what is necessary to achieve the objectives of the Treaties.” With the development of the EU’s activities in the field of human rights, the question which will be increasingly asked is whether the requirement of subsidiarity should not also take into account the fact that, where the EU Member States cannot act alone—where common standards should be developed in the field of fundamental rights, due to the existence of divergences between the EU Member States—the Council of Europe may constitute a forum where common standards should be negotiated and adopted, rendering the intervention of the Union unnecessary.

Does the mutual trust needed to make inter-State cooperation effective in the area of freedom, security, and justice require that the national rules implementing the minimum requirements of international human rights instruments be further approximated or harmonized? Is such approximation or harmonization required in situations where, although they are all above the minimum threshold defined by these instruments, the Member States’ approaches to fundamental rights diverge too much? There are no general answers to these questions. They should be addressed on a case-by-case basis, in accordance not only with the spirit of the principles of subsidiarity and proportionality, but also with the division of tasks between the EU and the Council of Europe which should be agreed upon in the future.

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147 Press Release 15801/06 (Presse 341), 2768th Meeting of the JHA Council of the EU, (Dec. 4–5, 2006), at 12.
150 See Report to the Committee on Legal Affairs and Human Rights, supra note 21. See also Recommendation 1744, supra note 21, ¶¶ 11.9 and 11.10.
C. Monitoring the Situation of Fundamental Rights in the EU Member States

Another possible answer to the need to firmly ground the establishment of the area of freedom, security, and justice on fundamental rights consists in monitoring. This could either constitute an alternative to harmonization, or be combined with harmonization. Performed within the EU itself, such monitoring could be justified by the need to provide each Member State with the assurance that, if a serious threat to fundamental rights exists in one Member State, it will be identified and handled appropriately.

This scenario has not fully materialized yet. But the building blocks are there, should there be a political will to explore it further. When the Treaty of Amsterdam initially formulated in Article 6(1) EU the values on which the Union was founded, this affirmation was backed up by a mechanism provided for in Article 7 EU, allowing for the adoption of sanctions against a State committing a serious and persistent breach of these values. And, as we have seen, this mechanism was improved by the Treaty of Nice, which introduced the possibility of recommendations being adopted preventively, where a “clear risk of a serious breach” of those values is found to be present. 151 These developments raised the question of whether these provisions of the Treaty on the European Union should lead to a permanent monitoring of the situation of fundamental rights in the EU’s Member States.

The European Parliament, through its Committee on Civil liberties, Justice and Home Affairs (LIBE Committee), took the leading role in this matter. As it noted itself, the Treaty of Nice “acknowledges Parliament’s special role as an advocate for European citizens” by granting the European Parliament the right to call for a procedure to be opened in the event of a clear risk of a serious breach. 152 But even before that Treaty entered into force, the European Parliament inaugurated the practice of adopting annual reports on the situation of fundamental rights in the Union after the adoption of the EU Charter of Fundamental Rights at the Nice Summit of 2000. 153 That practice was justified by the considerations that

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151 See EU Treaty, supra note 2.
following the proclamation of the Charter, it is . . . the responsibility of the
EU institutions to take whatever initiatives will enable them to exercise
their role in monitoring respect for fundamental rights in the Member
States, bearing in mind the commitments they assumed in signing the
Treaty of Nice on 27 February 2001, with particular reference to new
Article 7(1),154

and that

it is the particular responsibility of the European Parliament (by virtue of
the role conferred on it under the new Article 7(1) of the Treaty of Nice)
and of its appropriate committee [the Committee on Civil Liberties,
Justice and Home Affairs (LIBE)] to ensure . . . that both the EU
institutions and the Member States uphold the rights set out in the various
Chapters of the Charter.155

Since it soon appeared that the resources of the LIBE Committee and the
expertise and time it had at its disposal were not sufficient to enable it to conduct this
monitoring function in an entirely satisfactory manner, the European Parliament
requested that

a network be set up consisting of legal experts who are authorities on
human rights and jurists from each of the Member States, to ensure a high
degree of expertise and enable Parliament to receive an assessment of the
implementation of each of the rights laid down in the Charter, taking
account of developments in national laws, the case law of the Court of
Justice of the European Communities and the European Court of Human
Rights and any notable case law of the Member States’ national and
constitutional courts.156

That network was set up in September 2002.157 In October 2003, the European
Commission adopted a communication in which it set out its views about the
implementation of Article 7 EU.158 Referring to the work of the EU Network of
independent experts on fundamental rights, it took the view that the information
collected by the network

(P5_TA(2003)0376) (2002); Report on the Situation As Regards Fundamental Rights in the
basis of the report by Ms A. Boundedien-Thiery was rejected by the European Parliament.
The Cornillet Report was the first one to use the EU Charter of Fundamental Rights as its
template. However, the practice of preparing an annual report on the situation of fundamental
rights of the Union predated the adoption of the Charter. See Resolution on the Annual Report
154 Resolution of 5 July 2001 on the Situation of Fundamental Rights in the European
350, ¶ 2.
155 Id. ¶ 3.
156 Id. ¶ 9.
157 For the sake of transparency, it should be mentioned that the author was the
coordinator of this group of experts.
158 Communication from the Commission to the Council and the European Parliament
on Article 7 of the Treaty on European Union, supra note 55.
should make it possible to detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty.

Through its analyses the network can also help in finding solutions to remedy confirmed anomalies or to prevent potential breaches.

Monitoring also has an essential preventive role in that it can provide ideas for achieving the area of freedom, security and justice or alerting the institutions to divergent trends in standards of protection between Member States which could imperil the mutual trust on which Union policies are founded.

It is important for the Member States to be involved in the exercise of evaluating and interpreting the results of the work of the network of independent experts. With a view to exchanging information and sharing experience, the Commission could organise regular meetings on the information gathered with the national bodies dealing with human rights.\(^\text{159}\)

What the Commission was in fact suggesting was that a permanent form of monitoring compliance with fundamental rights by the EU Member States should be established, both in order to contribute to the mutual trust in the establishment of an area of freedom, security, and justice, and in order, where necessary, to provide the institutions of the Union with the information they require to fulfill the tasks entrusted to them by Article 7 EU. It saw the EU Network of independent experts on fundamental rights as the laboratory of such a mechanism. The communication stated that this network might be established on a permanent basis in the future in order to perform these functions. The Parliament disagreed. While criticizing in other respects the timidity of the European Commission’s proposed reading of Article 7 EU, it insisted that the use of Article 7 EU should be based on four principles, including the principle of confidence, which it explained thus:

The Union looks to its Member States to take active steps to safeguard the Union’s shared values and states, on this basis, that as a matter of principle it has confidence in: the democratic and constitutional order of all Member States and in the ability and determination of their institutions to avert risks to fundamental freedoms and common principles; the authority of the European Court of Justice and of the European Court of Human Rights.

Union intervention pursuant to Article 7 of the EU Treaty must therefore be confined to instances of clear risks and persistent breaches and may not be invoked in support of any right to, or policy of, permanent monitoring of the Member States by the Union. Nevertheless, the Member States, accession countries and candidate countries must continue to develop democracy, the rule of law and respect for fundamental rights further and, where necessary, implement or continue to implement corresponding reforms.\(^\text{160}\)

\(^{159}\) Id. ¶ 2.1, at 9–10.

\(^{160}\) European Parliament Legislative Resolution on the Commission Communication on Article 7 of the Treaty on European Union: Respect for and Promotion of the Values on
Therefore, it seems highly unlikely that, in the future, Article 7 EU will lead to the development envisaged by the European Commission in its Communication of 15 October 2003, especially since the Fundamental Rights Agency of the European Union has not received the mandate to monitor the EU Member States in situations other than where they implement European Community law. Although, to a large extent, the definition of the mandate of the Fundamental Rights Agency was guided by considerations of comity vis-à-vis the Council of Europe, and although the choice not to give the Agency a formal role in the implementation of Article 7 EU resulted from doubts about the usefulness of such an explicit attribution and about the legality thereof, this choice also corresponds to the European Parliament’s idea that Article 7 EU should not become a pretext for placing the EU Member States under a permanent supervision as regards compliance with fundamental rights, since they are already subjected to such supervision in other frameworks. In sum, mutual trust may have to be strengthened in the area of freedom, security, and justice, but it does not require the form of permanent monitoring of the Member States which the European Parliament, and then the EU Network of Independent Experts, have been exercising.

D. Conclusion

We can see the analogy between the idea behind, on the one hand, the adoption of the disconnection clauses inserted into Council of Europe conventions and, on the other hand, the development of forms of cooperation between the EU Member States in the area of freedom, security, and justice, which result in a tension between the obligation of each Member State to comply with the requirements of fundamental rights as derived from international instruments, and its obligations under EU law. Such a tension is perfectly illustrated by the reliance on the principle of availability in the exchange of personal data in law enforcement activities or on mutual recognition of judicial decisions in criminal matters: just like the use of disconnection clauses, these principles raise the question of whether the individual responsibility of each EU Member State under international human rights instruments, can be replaced by a commitment of the EU Member States jointly to respect the substantive requirements of these instruments, while basing their mutual relations on the principle of mutual trust rather than on an obligation to control, on a case-by-case basis, whether fundamental rights are respected in the framework of their cooperation.

With the progressive establishment of the area of freedom, security, and justice among the EU Member States, and the gradual substitution of a joint and several responsibility of the Member States and of the Union for the individual responsibility of each Member State, a paradigm shift is occurring. The nature of the relationship of the EU to international human rights instruments reveals that we are moving from the paradigm of interstate cooperation to that of cooperation between different entities within a single State, which at the international level will have to answer for the conduct of all those entities without being able to seek refuge behind

\[161\] See Parts III.B.1 and III.B.2, supra.
the autonomy that may be granted to them. This development may, and should, define the future stages of the relationship between the EU and the Council of Europe. While the development of EU legislation offering a level of protection of fundamental rights higher than the minimum requirements imposed by Council of Europe instruments may be seen as threatening the unique position of the Council of Europe in setting the human rights standards for its 47 Member States, this development appears in a very different light once we realize that EU directives or framework decisions building on the instruments of the Council of Europe and moving beyond them are, in fact, more akin to framework laws being adopted by a Federal State and directed towards its federated entities, than to competing international norms adopted by another European organization. Similarly, should the Union develop monitoring mechanisms in order to be able to respond to a Member State’s violations of human rights or to divergences between Member States which might threaten mutual trust, this should not be seen as putting in jeopardy the monitoring performed by the Council of Europe bodies any more than mechanisms developed at national level for the promotion and protection of human rights within the different Member States of the Council of Europe create such a threat.

VI. CONCLUSION

There are, in sum, two ways of looking at the relationship between the Council of Europe and the EU. One view is that these are both international organizations with overlapping memberships and, due to the expansion of the EU’s powers, an increasingly important overlap in their areas of activity. These organizations should therefore work together in order to complement their efforts, in particular by joint projects and consultations in standard-setting. This view indeed is the dominant one. In practice, cooperation is extensive, and it has been growing significantly since the adoption in 2001 of a Joint Declaration on cooperation and partnership between the two organizations.

But another view is that the EU is not simply one international organization among others. It is a federal State in the making. The development of networks of cooperation between national actors—bypassing governments—is at least as significant, in this respect, as is the element of supranationality—i.e., that the EU institutions are empowered to adopt decisions which are legally binding on the EU Member States, which have renounced the right to veto such decisions. It is this paradigm shift which the concept of mutual recognition or the principle of availability of personal data clearly exhibit. And it follows that, for instance, after the Union accedes to the European Convention on Human Rights, the European Court of Justice will stand vis-à-vis the European Court of Human Rights in a position similar to that of any Constitutional Court of the Member States of the

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Council of Europe. It also follows that the establishment of the EU Fundamental Rights Agency should no more be seen as a threat to the activities of the Council of Europe in this field than when the Federal Republic of Germany set up the German Institute for Human Rights. In both cases, the attempt to ensure that human rights are better complied with and taken into account in the law- and policy-making of the legal order concerned does not in any way jeopardize the unique role of the Council of Europe in setting the minimum human rights standards for the European continent and monitoring respect for those standards. There is a risk in this transformation of the EU, and there is an opportunity. The risk is that the relationships between the EU Member States will deviate from the requirements of European human rights law, which impose certain limits on inter-State cooperation where this might result in violations to the rights of the individual, and therefore cannot be reconciled with a “blind” understanding of mutual trust. The opportunity however, is that the EU itself will feel bound by the standards of the Council of Europe precisely as its Member States have accepted obligations in this framework, and will draw the necessary institutional conclusions by agreeing to accede to all the Council of Europe instruments which are relevant to the competences it has been attributed. Jean-Claude Juncker, in his report already quoted from, sets 2010 as a date for the European Union to accede to the Council of Europe. This is the way ahead.