

THE COUNCIL OF EUROPE, THE MOTOR OF THE EUROPEAN UNION'S LEGISLATIVE DEVELOPMENT IN MATTER OF PROMOTION OF HUMAN RIGHTS

JOSÉ NORONHA RODRIGUES

jose.n.rodrigues@uac.pt

Researcher at CEDIS, Nova School of Law, FD, Universidade NOVA de Lisboa - School of Law, Campus de Campolide (Portugal). Vice-President of the School of Business and Economics of the University of Azores. Scientific Coordinator of the Master's Degree in Company and Employment Law, as well as of the Degree in Law at the University of Santiago - Cape Verde, Visiting Professor in the Master's Degree in Civil Law and in the Master's Degree in Tax Law at the Catholic University of Mozambique. Doctor in Law (PhD) "CUM LAUDE", by the University of Santiago de Compostela, Spain, recognized the equivalence of the degree of Doctor in Law by the Lisbon University Faculty of Law, DEA in European Union Law, Master's in International Relations, Post-Graduate in Regional Law, Post-Graduate in Labor Law and Graduated in Law. He also holds the Chair of the Policy Center for the United Nations Convention on the Rights of the Child.
<https://orcid.org/0000-0002-7729-4954>.

DORA CABETE

dora.nr.cabete@uac.pt

Researcher at CEDIS, Nova School of Law, FD, Universidade NOVA de Lisboa - School of Law, Campus de Campolide (Portugal). Doctor (PhD) in Business Economic Sciences – specialization in Economics - at the School of Business and Economics of the University of the Azores, PhD candidate in Law at the Universidade Nova de Lisboa - School of Law, Lisboa, Master's and postgraduate degree in Social Sciences at the University of the Azores, Degree in Sociology (UAc) and in Law (UAL). She is a guest lecturer at the Azores University, a guest lecturer at the University of Santiago - Cape Verde and a lawyer. <https://orcid.org/0000-0002-0117-8818>.

Abstract

The Council of Europe, although often confused with the European Council, is not an institution of the European Union, but an international intergovernmental organisation. In reality, the Council of Europe is an international organisation that has legal personality recognised by international law and whose main objective is the defence of human rights, democratic development and political and social stability in Europe for around 820 million people in 47 Member States, including the Member States of the European Union. It is important to note that states wishing to join the Council of Europe must also ratify the European Convention on Human Rights, also known as the European Convention for the Protection of Human Rights and Fundamental Freedoms. We therefore restate that the Council of Europe is the driving force behind European Union legislation, to the extent that the European Union gets much of its legislative inspiration from the legal instruments that the Council of Europe has adopted to enshrine, promote, and protect the most fundamental human rights.

Keywords

Council of Europe, Human Rights, Engine Development, European Union, European Council.



Resumo

O Conselho da Europa, embora muitas vezes confundido com o Conselho Europeu, não é uma instituição da União Europeia, mas uma organização internacional intergovernamental. Na realidade, o Conselho da Europa é uma organização internacional com personalidade jurídica reconhecida pelo direito internacional e cujo principal objetivo é a defesa dos direitos humanos, o desenvolvimento democrático e a estabilidade política e social na Europa para cerca de 820 milhões de pessoas em 47 Estados-Membros, incluindo os Estados-Membros da União Europeia. É importante notar que os Estados que pretendem aderir ao Conselho da Europa devem também ratificar a Convenção Europeia dos Direitos do Homem, também conhecida como Convenção Europeia para a Proteção dos Direitos do Homem e das Liberdades Fundamentais. Por isso, reafirmamos que o Conselho da Europa é a força motriz da legislação da União Europeia, na medida em que a União Europeia se inspira, em grande parte, nos instrumentos jurídicos que o Conselho da Europa adotou para consagrar, promover e proteger os direitos humanos mais fundamentais.

Palavras-chave

Conselho da Europa, Direitos Humanos, Motor de Desenvolvimento, União Europeia, Conselho Europeu.

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Introduction

The Council of Europe, although often confused with the European Council, is not an institution of the European Union, but an international intergovernmental organisation. Some authors define an international organisation as a voluntary association of persons governed by international law, constituted by international treaty and regulated in the relations between the parties by rules of international law, and which takes the form of a stable entity with its own internal legal system and its own organs, through which it pursues ends common to the members of the Organisation, by carrying out certain functions and exercising the necessary powers conferred on it (Sereni, 1958, p. 804; Campos & Campos, 2007, pp. 42-50).

For its part, the European Council, according to Miguel Gorjão-Henriques, is an institution of the European Union, whose connection to the Communities, and in particular to the European Community, is based above all on the fact that the latter is a subject within the European Union (Article 1 of the EU Treaty: "The Union is founded on the Communities..."). Created in 1974 by decision of the Paris Summit of Heads of State or Government of the then EEC countries, it was configured and institutionalised outside the strict framework of the European Communities, although it was stated there that it would meet "as the Council of the Community for political cooperation" (Gorjão, 2003, p. 95). Therefore, the European Council should not be considered as a traditional "Sommet", a diplomatic conference at the level of heads of national executives, but rather as a true Community institution (Campos & Campos, 2007, p. 113; Gorjão, 2012, p. 149) that was given legal recognition by the Single European Act (Soares, 2006, pp. 152-157). The functional responsibilities of the European Council are laid down in Articles 235 to 243 of the Treaty on the Functioning of the European Union.

However, it should be pointed out that there are various types of international organisations, namely: a) universal organisations, which are open to all states in the world (e.g. United Nations Organisations - UN); b) regional organisations, which are aimed only at states in a particular region (e.g. Organisation of African Unity (OAU),



Council of Europe or European Union (EU); c) international cooperation organisations, in which states do not lose any sovereignty (e.g. North Atlantic Treaty Organisation (NATO) or the World Trade Organisation (WTO)); d) international integration organisations, in which states lose parts of their sovereignty and/or these parts are transferred. g. North Atlantic Treaty Organisation (NATO) or World Trade Organisation (WTO); d) international integration organisations, in which states lose parts of their sovereignty and/or these parts are transferred to a sui generis organisation to be created but capable of managing the common interests of its member states (e.g. European Union) (Santos, 2011, p. 1). Finally, there are two other international organisations: e) general international organisations, where the field of action is not limited to a particular area (e.g. the United Nations (UN)); f) sectoral international organisations, where the competencies are limited to a field of action, such as the Council of Europe, which promotes the values of democracy and human rights (Boniface, 2001, pp. 247-248).

The Council of Europe originated at the Hague Congress, held from 7 to 10 May 1948, which was a political and ideological conference based essentially on freedom, democracy and justice against authoritarian regimes such as the fascist and communist ones. In this regard, it's worth recalling a few excerpts from the minutes of this congress, mainly so that we can understand the underlying essence of the Hague Congress itself:

For four days, the participants debated Europe's future, seeking to reconcile approaches ranging from the most ardent federalism to rather more lukewarm unionism. Despite these differences, the goal - summed up in the words of President Kerstens at the opening of the Congress - was shared by all: 'to promote a freely and democratically united Europe'. Winston Churchill described the Congress's aims in terms which speak to us with undiminished force today: The movement for European unity must be a positive force deriving its strength from our sense of common spiritual values, it is a dynamic expression of democratic faith based upon moral conceptions and inspired by a sense of mission. At the centre of our movement stands a charter of human rights, guarded by freedom and sustained by law. It is impossible to separate economics and defence from general political structure. Mutual aid in the economic field and a joint military defence must inevitably be accompanied, step by step, with a parallel policy of closer political unity (European Parliament, 1999).

In fact, as Pedro Cantinho Pereira pointed out, the Hague Congress, chaired by Winston Churchill, can be seen as the high point in the process of maturing and realising the imperative need to unite Western Europe. It was a symbolic moment of recognition of the European spirit, which succeeded in merging the different pro-European currents into a unified "European Movement". (Pereira, 2008, p. 2) In fact, this Congress for Europe held in The Hague would forever be marked as one of the key moments in driving the European Union forward, to such an extent that it would become known as the Congress of Europe (Baltazar, 2021, pp. 20-21).

This international organisation, created on 5 May 1949, aims to bring about a closer union between its members in order to safeguard and promote the ideals and principles



that are their common heritage and to promote their economic and social progress. However, issues relating to national defence¹, are expressly excluded from these objectives, as they are the responsibility of the North Atlantic Treaty Organisation (NATO)². (Statute of the Council of Europe, 1949, p. 1). In fact, if we analyse the preamble to the Treaty of London and/or the Statute of the Council of Europe, we can understand the main motivations behind its creation.

[Convinced] that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilisation; Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy; Believing that, for the maintenance and further realisation of these ideals and in the interests of economic and social progress, there is a need of a closer unity between all like-minded countries of Europe; Considering that, to respond to this need and to the expressed aspirations of their peoples in this regard, it is necessary forthwith to create an organisation which will bring European States into closer association (Statute of the Council of Europe - Preamble, 1949).

In reality, the Council of Europe is an international organisation that has legal personality recognised by international law and whose main objective is the defence of human rights, democratic development and political and social stability in Europe for around 820 million people in 47 Member States, including the Member States of the European Union (Council of Europe, 2022). Having made the distinction between the Council of Europe and the European Council, it should also be emphasised that the Council of Europe was initially created by 10 founding countries³ with steady growth over the years, particularly after the fall of the communist bloc in 1989. The Council of Europe currently has 46 members⁴, including 28 [27]⁵ of the European Union (European Union, 2021), which corresponds to

¹ See Article 1(1) and (3) of the Statute of the Council of Europe adopted in London on 5 May 1949.

² This treaty was signed on 4 April 1949, and Article 5 of the treaty states its fundamental objective peremptorily. " It states that the parties have agreed that in the face of... *The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.* (The North Atlantic Treaty, 1949)."

³ Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

⁴ Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Republic of Macedonia, Turkey, Ukraine, United Kingdom.

⁵ Germany (1952), Austria (1995), Belgium (1952), Bulgaria (2007), Cyprus (2004), Croatia (2013), Denmark (1973), Slovakia (2004), Slovenia (2004), Spain (1986), Estonia (2004), Finland (1995), France (1952), Greece (1981), Hungary (2004), Ireland (1973), Italy (1952), Latvia (2004), Lithuania (2004), Luxembourg (1952), Malta (2004), Netherlands (1952), Poland (2004), Portugal (1986), United Kingdom (1973), Czech Republic (2004), Romania (2007), Sweden (1995). Let's not forget that the United Kingdom is no longer part of the European Union.



a vast territorial space, with the exception of Belarus. It also has six states with observer status⁶ (Council of Europe, 2024; Liberti, 2012).

It is important to note that states wishing to join the Council of Europe must also ratify the European Convention on Human Rights, also known as the European Convention for the Protection of Human Rights and Fundamental Freedoms. Regardless of the ratification of the Universal Declaration of Human Rights, as they are separate legal instruments, as can be seen in their preamble:

[Considering that] this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared (...) Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend; [...].

It should be noted, however, that states joining this international organisation do not transfer any sovereign power to it but interact on an equal basis in the international and intergovernmental sphere. The Council of Europe brings together governments from across Europe and beyond, with the aim of harmonising a minimum of legal standards with regard to the promotion and protection of human rights, as well as to monitor how well these standards are being implemented in the countries that request such guidance and/or as a way of offering technical assistance in areas of its expertise (Council of Europe, 2022i). In May 1990, the Venice Commission was created to act as an advisory organ to the Council of Europe on constitutional issues:

We welcome the interest shown by several states that are not members of the Council of Europe in the work of the Commission and wish to offer these states the possibility of participating in the Commission's work on equal terms. Convinced that the independent character of the Commission and its working methods are fundamental to its success and must be preserved (Council of Europe, Committee of Ministers, 2022).

This Venice Commission is made up of experts in law and political science, as mentioned in Article 2(1) of the Venice Commission statute:

The Commission shall be composed of independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science. The members of the Commission shall serve in their individual capacity and shall not receive or accept any instructions (Council of Europe, Committee of Ministers, 2022).

⁶ Canada, Israel, Japan, Mexico, the United States and the Holy See.



In this context, and in accordance with Article 1(1), this Commission has three main objectives:

[(...) a] strengthening the understanding of the legal systems of the participating states, notably with a view to bringing these systems closer; [b] promoting the rule of law and democracy; [c] examining the problems raised by the working of democratic institutions and their reinforcement and development." However, it maintains some priorities in its line of action, according to Article 1 al 2: [...] the constitutional, legislative and administrative principles and techniques which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law; fundamental rights and freedoms, notably those that involve the participation of citizens in public life; the contribution of local and regional self-government to the enhancement of democracy (Council of Europe, Committee of Ministers, 2022).

Today, the Council of Europe is recognised as an independent international organisation. However, it should also be noted that this Venice Commission is particularly active in the former Eastern bloc countries, assisting them in drafting new constitutions or laws on constitutional courts, electoral codes, minority rights and the legal framework for democratic institutions. Among the states that have regularly co-operated with the Commission in the electoral field can be mentioned countries such as Albania, Armenia, Azerbaijan, Georgia and Ukraine. The Venice Commission has been active on a more occasional basis in several other states, for example in the Swiss Cantons, Croatia, Moldova, Romania and the Republic of Macedonia (Council of Europe, 2022a).

Furthermore, it should be emphasised that this Venice Commission also identifies possible risks and incompatibilities, legal and legislative anomalies, but leaves countries free to draw their own conclusions and solve the most diverse problems in the way they see fit. In fact, the Venice Commission is so recognised for its experience and *status* that its work extends beyond the borders of Europe.

Finally, it should be noted that the Venice Commission has 58 members, with Argentina, Canada, Vatican City State, Japan, Kazakhstan, the United States and Uruguay having observer status. South Africa and the Palestinian National Authority have a special status similar to that of observer countries. Consequently, and as a result of the tasks assigned to the Council of Europe, this international organisation is often seen as the driving force behind the European Union's legislative development, mainly in terms of promoting democracy, the rule of law and human rights. Therefore, as José Noronha Rodrigues said

[this] international organisation is of capital importance in the development of the asylum institute both at international as well European Union level... It remains the fundamental legislative and conventional test tube for the development of policies and legislation on refugees, displaced persons, immigration, humanitarian protection and, in particular, asylum. In fact, as we have seen, at the level of the Council of Europe, various policies and measures have been outlined and adopted, principles and rights have been stipulated and various guidelines have been drawn up in the field of asylum,



which have served as inspiration and models for the policies and measures adopted within the European Union. In fact, the European Union drew much of its inspiration in the field of asylum from the policies adopted in Latin America and the Council of Europe (Rodrigues, 2022, pp. 94-113).

Due to all of these factors, we agree with Marc Antoni Deitos that the United Nations' 1948 Universal Declaration of Human Rights and regional organisations like the Council of Europe that protect these rights served as the spark for the internationalisation of human rights (Deitos, 2013, 1130). We therefore restate that the Council of Europe is the driving force behind European Union legislation, to the extent that the European Union gets much of its legislative inspiration from the legal instruments that the Council of Europe has adopted to enshrine, promote, and protect the most fundamental human rights.

1. The Treaty of London and/or the Statute of the Council of Europe

The Treaty of London and/or the Statute of the Council of Europe, concluded on 5 May 1949, is divided into ten chapters (I - Purpose of the Council of Europe; II - Composition; III - General provisions; IV - Committee of Ministers; V - Consultative Assembly; VI - Secretariat; VII - Financing; VIII - Privileges and immunities. IX - Amendments; X - Final provisions), spread over forty-two articles (Statute of the Council of Europe, 1949). Thus, the Council of Europe's fundamental objective, according to Article 1(a) of its Statute, is to promote closer union among its members in order to safeguard and promote the ideals and principles which are their common heritage, as well as to promote their economic and social progress (Statute of the Council of Europe, 1949).

To achieve this, it has an organisational structure made up of two sections:

- a) the Committee of Ministers, is a body competent to act on behalf of the Council of Europe and, is composed of a representative of each Member State (Ministers of Foreign Affairs), with voting rights⁷. "The Committee of Ministers is the Council of Europe's statutory decision-making body. Its role and functions are broadly defined in Chapter IV of the Statute. It is made up of the Ministers for Foreign Affairs of member States. The Committee meets at ministerial level once a year and at Deputies' level (Permanent Representatives to the Council of Europe) weekly. The conduct of meetings is governed by the Statute and Rules of Procedure. The Ministers' Deputies are assisted by a Bureau, rapporteur groups, thematic coordinators and ad hoc working parties" (Council of Europe, 2022b; Deitos, 2013, pp. 116-117);
- b) The Consultative Assembly is the deliberative body of the Council of Europe. Its role will be to discuss issues within its sphere of competence, as defined in these Statutes, and to present conclusions to the Committee of Ministers in the form of recommendations. It will be made up of representatives from each member, elected

⁷ See Articles 13 to 21 of Chapter IV of the Council of Europe Statute



by their parliament from among its members or appointed from among its members in accordance with the procedure established by each parliament.⁸ However, it should be emphasised that this body is a long way from what was idealised by the Hague Congress, insofar as the Hague Congress called for a body that was truly representative of the peoples of Europe and endowed with the necessary powers to promote the project of European unification on a political and legal-constitutional level. However, this Consultative Assembly does not have the power to legislate, nor can it even take decisions on funding directly related to its operation, and even less does it have any real political power in relation to the Committee of Ministers. (Deitos, 2013, p. 117).

However, both of the above mentioned entities are assisted by an office composed of the Secretary General and all the administrative staff deemed necessary. It must be emphasised that all members of the Secretariat staff must, in a solemn declaration, declare their loyalty to the Council of Europe, conscientiously perform the duties of their office without allowing themselves to be influenced by any national considerations, and neither seek nor accept instructions, in relation to the performance of their duties, from any government or authority outside the Council, and refrain from any action incompatible with their status as international officials in relation to the Council alone.

It should also be noted that the Secretary General is responsible to the Committee of Ministers for the activities of the Secretariat. It is the Secretary General's responsibility to submit to the Committee any request from the Assembly that involves expenditure exceeding the number of credits already included in the Assembly's budget and its work, as well as to submit to the Committee of Ministers an assessment of the expenditure arising from the implementation of each of the recommendations submitted to the Committee. A resolution whose implementation involves additional expenses will not be considered adopted by the Committee of Ministers until the Committee of Ministers approves the estimates of the corresponding additional expenses. It should also be noted that each year the Secretary General notifies the government of each member of the amount of its contribution. The contributions will be considered due on the day of this notification and must be paid to the Secretary General within a maximum period of six months⁹.

On 4 November 1950, the European Convention on Human Rights, also known as the Convention for the Protection of Human Rights and Fundamental Freedoms, was adopted in Rome by the Council of Europe. This Convention aims to protect human rights, democracy and, above all, the rule of law. It is therefore a fundamental legal instrument, as it has an organisational structure capable of overseeing compliance with its own rules, referring of course to the European Court of Human Rights. This Convention entered into force in the international legal order on 3 September 1953 and introduced a revolutionary novelty in the protection of human rights by establishing the European Court of Human Rights, whose decisions are binding on the signatory states (Direcção-Geral da Política de Justiça, 2022). All the member states of the Council of

⁸ See Articles 22 to 35 of Chapter V of the Council of Europe Statute.

⁹ See, Articles 36 and 37 of Chapter VI (Secretariat) and Articles 37 to 38 (Secretary General) of the Statute of the Council of Europe.



Europe have signed the European Convention on Human Rights, whose originality lies in establishing mechanisms to guarantee effective jurisdiction, offering people who have had their rights violated a mechanism for redress against states (AA.VV., 2005, pp. 83-84). Any individual can submit complaints of human rights violations to the Strasbourg Court, once all appeals have been exhausted in the member state in question. (Council of Europe, 2022I)

The European Court of Human Rights is *"an innovative jurisdiction established in 1959 within the framework of the Council of Europe, following the European Convention on Human Rights. Its aim is to effectively guarantee the fundamental human rights enshrined in that Convention and its Additional Protocols. [...] The Court's decisions are binding, and states undertake to implement them. It is the responsibility of the Committee of Ministers of the Council of Europe to ensure their implementation"* (AA.VV., 2005, pp. 342-343). This European Court of Human Rights essentially aims to promote, defend and guarantee respect for human rights, as well as international cooperation in various areas. Thus, it not only recognises certain rights for individuals, but also gives them access to a system for guaranteeing these rights, through which states can be held accountable for violations of their international obligations at this level (Barreto & Campos, 2004, p. 2).

However, it should be emphasised that the European Court of Human Rights should not be confused with the Court of Justice of the European Union. In fact, the Court of Justice of the European Union is a specialised jurisdiction of the European Union with the mission of ultimately guaranteeing the correct interpretation of Community rules, common to a collectivity of states, as well as controlling and sanctioning behaviour - both by Community organs and by its member states, and possibly by individuals themselves - that violates respect for the Community legal order (Campos & Campos, 2007, pp. 175-189). Despite this, it should be emphasised that the case law of the European Court of Human Rights can have a considerable influence on European Union law, since the fundamental rights guaranteed in the European Convention on Human Rights also constitute general principles of European Union law. (European Justice, 2022a).

On 14 January 1994, by decision of the Committee of Ministers of the Council of Europe, the Congress of Local and Regional Authorities of the Council of Europe was also created. This Congress is essentially a pan-European assembly whose main role is to promote local and regional democracy, improve local governance and strengthen self-government authorities. It pays particular attention to applying the principles set out in the European Charter of Local Self-Government, as well as encouraging the processes of decentralisation and regionalisation, as well as cross-border cooperation between cities and regions (Congress of Local and Regional Authorities, 2022).

Finally, in 1999, the Council of Europe established the figure of the Commissioner for Human Rights, whose main tasks are to: promote human rights education and promotion in the Member States, contributing to the effective fulfilment of rights and the full exercise of human rights in the Member States, among others; promote measures to achieve tangible improvements in the area of human rights promotion and protection; cooperate with a large number of national and international institutions as



well as human rights monitoring mechanisms¹⁰. However, it should be emphasised that the Commissioner for Human Rights is a non-judicial institution, so the Commissioner's Office cannot act on individual complaints, but the Commissioner can draw conclusions and take broader initiatives on the basis of reliable information about human rights violations suffered by individuals. Thus, its intergovernmental partners include the United Nations and its specialised offices, the European Union and the Organisation for Security and Cooperation in Europe (OSCE). It also cooperates with leading human rights Non-Governmental Organisations (NGOs), universities and *think tanks* (Council of Europe, 2022c); Council of Europe, 2022d).

It should also be noted that the work of the Council of Europe is greatly helped by contacts with the dynamic elements of society, in particular by cooperation with Non-Governmental Organisations (NGOs) such as the European Anti-Poverty Network, the European Blind Union and many others, which in total number more than 300 non-governmental organisations (Council of Europe, 2022e). Thus, one of the Council of Europe's main challenges is to strengthen NGOs and civil society in order to develop a pan-European participatory democracy (Council of Europe, 2022f). Furthermore, since its foundation in 1949, the Council of Europe has recognised the importance of making Europe known through a symbol with which its inhabitants could identify. With this in mind, on 25 October 1955, the Parliamentary Assembly unanimously adopted the emblem of a circle of golden stars on a blue background. On the blue background, the stars form a circle, symbolising unity. The number of stars is fixed at twelve, symbolising perfection and completeness and referring to the apostles, the sons of Jacob, the labours of Hercules and the months of the year, among others (Council of Europe, 2022g; Council of Europe, 2022h).

Finally, with a view to asserting itself internationally on 9 December 1995, the Committee of Ministers adopted the Star-Spangled Banner, which was officially presented in Paris on 13 December of the same year.

2. The Council of Europe and the European Union

For the first time in European history, an international organisation is explicitly binding itself to its member states in its Statutes. In particular, the Statute of the Council of

¹⁰ See Article 3 of Resolution (99) 50 of the Committee of Ministers of the Council of Europe: *"The Commissioner shall: a. promote education in and awareness of human rights in the member States; b. contribute to the promotion of the effective observance and full enjoyment of human rights in the member States; c. provide advice and information on the protection of human rights and prevention of human rights violations. When dealing with the public, the Commissioner shall, wherever possible, make use of and co-operate with human rights structures in the member States. Where such structures do not exist, the Commissioner will encourage their establishment; d. facilitate the activities of national ombudsmen or similar institutions in the field of human rights; e. identify possible shortcomings in the law and practice of member States concerning the compliance with human rights as embodied in the instruments of the Council of Europe, promote the effective implementation of these standards by member States and assist them, with their agreement, in their efforts to remedy such shortcomings; f. address, whenever the Commissioner deems it appropriate, a report concerning a specific matter to the Committee of Ministers or to the Parliamentary Assembly and the Committee of Ministers; g. respond, in the manner the Commissioner deems appropriate, to requests made by the Committee of Ministers or the Parliamentary Assembly, in the context of their task of ensuring compliance with the human rights standards of the Council of Europe; h. submit an annual report to the Committee of Ministers and the Parliamentary Assembly; i. co-operate with other international institutions for the promotion and protection of human rights while avoiding unnecessary duplication of activities."*



Europe reaffirms its adherence to the spiritual and moral values which are the common heritage of its peoples and which are at the root of the principles of individual liberty, political freedom and the rule of law, on which any true democracy is founded (Statute of the Council of Europe, 1949). As a result, in our opinion, there is an interconnection between the Council of Europe and the European Union, not least because both international organisations share the same principles.

We mustn't forget the interaction between the European Union and the Council of Europe brought about by the European Union's accession to the European Convention on Human Rights and Fundamental Freedoms, via Protocol 14 of June 2010, which brought with it various legal implications for the protection of human rights in Europe (Deitos, 2013, p. 119). We therefore consider the Council of Europe to be the legislative engine from which the European Union draws much of its inspiration. In reality, there is a lot of evidence of this fact, and it is almost impossible to list them all, since they are in various areas of activity. But for the sake of illustration, we can highlight a few:

In 1983, the European Parliament adopted the flag created by the Council of Europe and recommended that it become the symbol of the European Communities. The European Council gave its approval in June 1985 and the institutions of the European Union began using the flag in 1986 (Resolution on the adoption of flag for the European Community, 1983, pp. 17-19). Since then, the flag of the European Union has become the shared symbol of a political project that unites all Europeans, transcending their diversity.

The Council of Europe and the European Union share the same fundamental values, such as human rights, democracy and the rule of law. This can be seen when the European Union adopted the Charter of Fundamental Rights of the European Union. This Charter is divided into six chapters, dignity, freedom, equality, solidarity, citizenship and justice and, in a single text of 54 articles, summarises a set of civic, political, economic and social rights for European citizens and all people residing in the territory of the Union. These rights are based, in particular, on the Community Treaties, the fundamental rights and freedoms recognised by the European Convention on Human Rights, the constitutional traditions of the EU Member States, the European Social Charter of the Council of Europe and the Community Charter of the Fundamental Social Rights of Workers, as well as other international conventions to which the EU or its Member States are parties (Council of Europe, 2022j; AA.VV., 2005, pp. 42-43).

On the other hand, since 1993, in pursuit of common objectives related to the protection of democracy, respect for human rights and fundamental freedoms in Europe, the Council of Europe and the European Union have developed cooperation, instrumentalised through joint programmes. Indeed,

The Joint Programme format is designed as a tool to facilitate co-operation with countries that have joined the Council of Europe since 1989. (...) More than fifteen years of effective co-operation between the European Commission and the Council of Europe under numerous Joint Programmes has demonstrated that lasting results in support of the rule of law, better protection of human rights, and stronger democratic institutions can be achieved when the two organisations combine their resources and respective



strengths. (Co-operation between the Council of Europe and the European Union, 2009)

Most of the joint programmes are country-specific, but there are also various thematic, regional and multilateral programmes in this regard, for example joint programmes for: national minorities, raising awareness of the abolition of the death penalty, combating organised crime and corruption, and action to promote the European Social Charter. There are also other programmes promoting the strengthening of democracy and constitutional development in Central and Eastern Europe, with the Venice Commission of the Council of Europe.

However, an important step was taken in April 2001, when the European Commission and the Council of Europe signed a Joint Declaration on Cooperation and Partnership which, among other things, offered more systematic means of joint programming and priority setting:

[Co-operation] in the various fields of activity of the Council of Europe and the European Community should include all areas of common interest where such co-operation would be mutually beneficial. It should aim, among other things, at strengthening democracy, the rule of law and respect for human rights, including the protection of national minorities. In particular, the two organisations pledge to work closely together to maintain the high standards in these areas required for membership of the European Union and stand ready to help countries applying for membership of the European Union to meet these standards. Co-operation should be extended to all areas where it is likely to bring added value to both sides and strengthen complementarity of action. This concerns certain aspects of social cohesion, as well as the development of co-operation on research and ethical issues. Special attention will also be paid to activities aimed at strengthening cultural co-operation in Europe in all its national and regional diversity, in the spirit of the provisions on fostering co-operation between the European Community and the Council of Europe in the field of education and culture in Articles 149 and 151 respectively of the Treaty establishing the European Community. (Council of Europe, 2001)

In May 2007, a Memorandum of Understanding was signed which reaffirmed the determination of the two partners (the Council of Europe and the European Union) to strengthen ongoing cooperation within the framework of joint programmes. The signing of this Memorandum gave new impetus to relations between the two organisations: more developed political and technical cooperation, both quantitatively and qualitatively.

This Memorandum of Understanding provided a new legal framework and principles for this type of cooperation. Essentially, it aimed to achieve greater unity between the states of Europe through respect for the shared values of pluralist democracy, the rule of law and human rights and fundamental freedoms, as well as through pan-European co-operation, thus promoting the democratic stability and security to which European



societies and citizens aspired. On the other hand, it recognised the unique contribution of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights, as well as other standards and instruments of the Council of Europe to the protection of individual rights and, in particular, it also recognised the importance of the Charter of Fundamental Rights of the European Union.

Finally, this Memorandum of Understanding also aimed to create a new framework for enhanced cooperation and political dialogue based on the guidelines set out in Chapter IV of the Action Plan adopted at the Third Summit of Heads of State and Government of the Council of Europe in Warsaw in May 2005, as well as to intensify cooperation and ensure coordination of actions on issues of mutual interest. In other words, the role of the Council of Europe as a standard for human rights, the rule of law and democracy in Europe is confirmed, as well as highlighting the need for coherence between the legal bases of the two international organisations (Council of Europe and European Union) in the areas of human rights and fundamental freedoms, and encouraging ever greater unity between the Council of Europe and the European Union (Council of Europe, 2022k; Delegation of the European Union to the Council of Europe, 2022).

This cooperation is quite diverse and includes activities ranging from the regular exchange of information, the organisation of joint activities and even the use of the Council of Europe's monitoring mechanisms as a useful source of information in a diverse range of areas of interest to the European Union. In 2007, the signing of the Treaty of Lisbon increased the possibilities for EU action in many areas where the Council of Europe already had significant experience and expertise. This led to greater co-operation in a number of areas, such as combating trafficking in human beings and/or the exploitation of children and violence against women. Moreover, the Council of Europe opened up or made it possible for the European Union itself to sign the European Convention on Human Rights and other European agreements of the Council of Europe (Council of Europe, 2022l).

Thus, in 2010, there were 53 active joint programmes, ensuring a greater source of sustainable funding from the Council of Europe for technical assistance and cooperation projects for democratic reforms in the countries of eastern and south-eastern Europe. For the South Caucasus and Turkey, the EU funded 84 per cent of the total amount of €87.6 million. This form of cooperation, based on complementarity and coherence, has brought added value and builds on each other's strengths for the benefit of all Europeans. (Delegation of the European Union to the Council of Europe, 2022).

Cooperation has recently been strengthened within the framework of the European Neighbourhood Policy (ENP), especially within the framework of the European Union's Eastern Partnership initiative, where the Council of Europe has been invited to participate in the multilateral platforms on Democracy, Good Governance and Stability, and on People-to-People Contacts. Indeed,

Established in 2004, just 10 years ago, the ENP's mission is to consolidate stability in Europe, preventing the emergence of new divisions between the countries of the region. Prosperity, stability and security for all the peoples involved represent the set of objectives pursued, based on values that



constitute the genetic code of the European Union: freedom, democracy, the rule of law and respect for fundamental rights. (Sande, 2014, p. 88)

Within this framework, a specific financial instrument was designed, allowing the expertise of the Council of Europe to be deployed in the Eastern Partnership countries¹¹, in areas such as judicial reform, the fight against corruption, cybercrime and pre-election assistance. However, there are other plans to increase co-operation beyond the borders of the Council of Europe, namely in the Southern Mediterranean and Central Asia. In fact, we can define three priority areas for cooperation between the European Union and the Council of Europe, namely: a) geographical cooperation with the European Union candidate countries; b) thematic cooperation: a) in human rights (i) Strengthening respect for European human rights standards; ii) freedom of expression and assembly; iii) combating discrimination, promoting and protecting human rights and those of people belonging to minorities and vulnerable groups: Roma, Freedom of religion or belief (FORB), Children's rights, LGBTI, Women's rights, Trafficking in human beings iv) Social and economic rights); b) on Democracy; c) Rule of Law (i) Reform of the judiciary; ii) Data protection; iii) Combating corruption; iv) Judicial cooperation in civil and criminal matters; v) Combating organised crime; vi) Preventing and combating terrorism; vii) Combating cybercrime; viii) Combating sports manipulation); d) Cross-cutting issues enabling the creation of secondary legislation binding on the states that sign them, thus enabling the principles on which the Council of Europe is based to be transposed into national legislation.

Furthermore, we mustn't forget that over time, many of the legal instruments adopted within the Council of Europe, particularly in the field of human rights, have been given special attention by the European Union, to the point where they have become legal instruments of the European Union. Figure 1 shows some of these examples:

Figure 1: Some Council of Europe legal instruments that have been readapted into European Union legal instruments

Council of Europe	European Union
<ul style="list-style-type: none"> - European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment – 16/11/1987 - Protocol nº 1 and 2 to the European Convention for the Prevention Torture and Inhuman or Degrading Treatment or Punishment – 4/11/1993 	<ul style="list-style-type: none"> - Resolution on prison conditions in the European Union: improvements and alternative penalties (<i>Official Journal nº C 098 of 09/04/1999 p. 0299</i>) - The Charter of Fundamental Rights, Article 4 - Prohibition of Torture and Inhuman or Degrading Treatment or Punishment – 7/12/2000
<ul style="list-style-type: none"> - European Convention on the Adoption of Children – 24/04/1967 	<ul style="list-style-type: none"> - Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (<i>Official Journal L 178 of 2/7/2019. p. 1</i>)
<ul style="list-style-type: none"> - Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of 	<ul style="list-style-type: none"> - Regulation (Ec) No 1394/2007 Of The European Parliament And Of The Council of 13 November 2007 on advanced therapy medicinal products and amending Directive 2001/83/EC and

¹¹ Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.



Biology and Medicine, on the Prohibition of Cloning Human Beings – 12/1/1998	Regulation (EC) No 726/2004 (Official Journal L 324 of 10/12/2007, p.121)
– European Convention on the Legal Status of Children Born out of Wedlock – 15/10/1975	– The Charter of Fundamental Rights, Article 9 - Right to marry and found a family.
– European Convention on the Suppression of Terrorism – 27/1/1977	– Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on combating the dissemination of terrorist content online (Official Journal L 172 of 17 May 2021, p. 79)
– European Social Charter - 18/10/1961	– Community Charter of the Fundamental Social Rights of Workers (Strasbourg European Council, 8 and 9 December 1989)

Undoubtedly, the European Union continues to draw inspiration from the legal instruments issued by the Council of Europe and has progressively adapted them to the sources of primary and secondary European Union law.

3. The European Convention on Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights

The Cologne European Council, which took place on 3 and 4 June 1999, considered it appropriate to enshrine fundamental rights in a Charter, in order to give the European Union greater visibility "[t]he European Council considers that, at the present stage of development of the European Union, the fundamental rights in force at European Union level should be brought together in a Charter, thereby acquiring greater visibility" (European Parliament, 1999a).

It was therefore drafted by a "Convention" made up of a representative from each EU country and the European Commission, as well as members of the European Parliament and national parliaments. The term "Convention", as Guy Braibant says, was intended to express a historical gesture that evoked the French Revolutionary Conventions and the Convention that drafted the Constitution of the United States of America. (Braibant, 2001, pp. 19-20) However, this Charter of Fundamental Rights of the European Union was only formally adopted by the European Parliament, the European Council and the European Commission at the Nice European Council, which took place between 7 and 10 December 2000. The Charter became effective in 2009 with the Treaty of Lisbon and was given binding legal effect, as were the Community Treaties (Europa, 2022).

This Charter of Fundamental Rights of the European Union contains a preamble and is divided into seven chapters: I - Dignity; II - Freedoms; III - Equality; IV - Solidarity; V - Citizenship; VI - Justice; VII - General Provisions. These chapters are divided into 54 articles (Charter of Fundamental Rights of the European Union, 2012). In essence, they aim to include in the Charter the general principles enshrined in the 1950 European Convention on Human Rights and Fundamental Freedoms, previously adopted by the Council of Europe, as well as all the other principles resulting from the common constitutional traditions of the EU countries. In addition, the Charter should also include the specific fundamental rights of EU citizens, such as the economic and social rights enshrined in the Social Charter of the Council of Europe (1961) and the Community Charter of the Fundamental Social Rights of Workers (1989). It should also reflect the



principles derived from the case law of the Court of Justice and the European Court of Human Rights (Charter of Fundamental Rights of the European Union, 2012).

One might ask what idea of fundamental rights the Charter proposes? Why not a Charter of Human Rights? In the opinion of Sérgio Direito

[The] formal argument that we did not want to run the risk of confusing the Charter with the already existing European Convention on Human Rights seems too reductionist and simplistic to explain why the expression fundamental rights was chosen. As food for thought, let's say for now that the Charter aims to meet the needs of Community citizens, legitimise the intrusive actions of the institutions, make Community policies sympathetic to the interests and anxieties of specific individuals, demystify Eurocracy and involve European public opinion, which is now beginning to take shape. Jean Monnet's words will echo forever and with increasing symbolism as the notorious political union materialises: "Nous ne coalisons pas des États, nous unissons des hommes (Direito, 2002, p. 6).

It should also be noted that, like the EU Charter of Fundamental Rights, the Council of Europe's European Convention on Human Rights and Fundamental Freedoms is also structured by a preamble and three chapters: I - Rights and Freedoms; II - European Court of Human Rights; III - Miscellaneous Provisions, which in turn are divided into 59 articles (Council of Europe, 2022I). However, the Charter of Fundamental Rights of the European Union only applies at national level to the Member States of the European Union when they are implementing EU legislation, namely when the public authorities of the Member States (legislative, executive and/or judicial power) are dealing with EU legislation, in particular when they are implementing regulations, decisions and/or transposing directives (European Justice, 2022b). Indeed,

The Union contributes to the preservation and development of these common values by respecting the diversity of the cultures and traditions of the peoples of Europe, as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local level; it seeks to promote balanced and sustainable development and guarantees the free movement of persons, goods, services and capital, as well as freedom of establishment. (...) The Charter aims to guarantee the rights of EU citizens in relation to the EU institutions (Charter of Fundamental Rights of the European Union, 2022).

As far as the European Union is concerned, the Charter of Fundamental Rights of the European Union applies to all acts of the EU institutions. The Commission's aim is to ensure that the legislative proposals they put forward comply with the Charter: all EU institutions (and especially the European Parliament and the Council) must respect the Charter throughout the legislative process (European Justice, 2022a). If a national authority is found guilty of violating the Charter when applying EU law, a complaint can be lodged with the Commission, which has the power to initiate infringement proceedings against the Member State in question. However, the Commission is not a



judicial or appeal body against decisions of national or international courts. Nor does it, in principle, examine the merits of individual cases, except where this is relevant to its task of ensuring the correct application of European Union law by the Member States (European Justice, 2022b).

The Court of Justice of the European Union is the institution competent to assess violations of Community law, and in particular of the Charter of Fundamental Rights. In fact, the Court of Justice of the European Union is making more and more references to the Charter in its rulings. So it's no coincidence that the European Court of Human Rights is distinct from the Court of Justice of the European Union. The two institutions are different because they judge different issues, although they are of the same nature and from comparable perspectives.

Thus, in the words of Sérgio Direito

Human rights are rights valid for all peoples and at all times; fundamental rights are the rights of man, legally and institutionally guaranteed and limited in space and time. Human rights derive from human nature itself and therefore have an inviolable, timeless and universal character; fundamental rights would be the rights objectively in force in a concrete legal order (Direito, 2002, p. 10).

Regardless of all these theories, we are of the opinion that we do indeed have several international legal instruments safeguarding the most basic human rights and/or fundamental rights. Some of these legal instruments share the same principles and rights, which often makes them almost repetitive. In fact, we share the view that a single binding international legal instrument with universal reach, a *hard law* such as the Universal Convention on Human Rights, would suffice.

Final considerations

Since its creation, the Council of Europe has centred its attention and focus on promoting democracy, the rule of law and human rights, with the aim of achieving greater European unity and including as many European states as possible within it. The European Convention on Human Rights and Fundamental Freedoms was a revolutionary legal instrument of the Council of Europe, in that it allowed violations of the rights enshrined in this Convention to be judged by the European Court of Human Rights. Of course, the Council of Europe was and still is, in our opinion, the driving force behind the European Union's legislative development in terms of safeguarding human rights.

Today, however, the Council of Europe suffers from a problem of visibility, since the European Union has begun to assume a more prominent political and legislative role. Even today, as we have seen, there is an overlap of functions and legal instruments. In this regard, it is worth remembering Vitor P. Nogueira "[today], the most illustrative example of this reality is the entry, with the adoption of the EU Human Rights Convention, into the reserved domain of the Council of Europe. During its first twenty-five years of existence, the Council of Europe fought hard for greater visibility and political influence. Today it is also fighting to increase its credibility in the face of criticism that it is lowering



its standards when it comes to safeguarding democracy and human rights" (Nogueira, 2006).

However, despite this, we continue to believe that the role of the Council of Europe is fundamental in developing new international legal instruments to safeguard the most basic human rights.

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