

## 2. European Institutions of PHR I. – The Council of Europe

### *The Council of Europe Protecting Human Rights (required reading)*

**Keywords:** regional integration, political bodies, expert bodies, judicial bodies, monitoring, reporting, NHRIs, NGOs, values, principles, human rights footprint, amicus curiae, Parliamentary Assembly, Committee of Ministers, ECHR, ECtHR, Commissioner for Human Rights, Venice Commission

*In Europe, the institutional framework of human rights protection has at least three dimensions, if we consider the two regional integrations (Council of Europe and more recently, the European Union), and the respective frameworks developing on the national levels.*

*When we talk about the relevant institutions, it is understood as the institutional framework of the first European integration started specially with the purpose of protecting human rights after WWII. This framework is the Council of Europe, extending over 47 Member States as opposed to the smaller regional integration (that of the EU), extending over 28 (soon 27) Member States. The problems arising out of the parallel existence of these “two Europes” will also be discussed below (cf. bipolarity), with the institutions of the CoE in focus as their EU counterparts have developed much later in comparison.*



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#### **Learning outcomes**

1. Understanding the purpose of the institutional framework of the CoE
2. Understanding major positions and processes within the institutional system of the CoE

#### **Recommended Reading**

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| 1. <a href="#">London Statute of the Council of Europe</a>   |
| 2. <a href="#">The European Convention on Human Rights</a>   |
| 4. <a href="#">Federico Fabbrini: Fundamental Rights in Europe</a> . Doctoral Thesis, 2012, European University Institute, Florence, Chapter 1 |
| 3. All additional reading materials indicated under in-text links  |

*Study time: 1-2 hours (5-7 hours, with recommended reading included)*

#### **Disclaimer**

This following are based on parts of Chapter 9 [written by Orsolya Sziebig] of the book *Interstate Relations* (Szeged, 2018), edited by Anikó Szalai, Zsuzsanna Fejes and Márton Sulyok. The Reading also refers to and comments on relevant Articles and Additional Protocols of the ECHR (edited by Márton Sulyok).

## ***2. The European Context of International Organizations with a Human Rights Aspect: Multi- Or Bipolarity?***

In the [larger picture](#) of different continental structures of human rights protection, several major international organizations were established through the membership of the countries of the European continent. Some of these regionally specific organizations formulated largely along the lines of military and security cooperation, gradually extending some competences to cooperation in human rights protection. Currently the Organization for Security and Cooperation in Europe (OSCE) is the one specifically addressing security and military issues.

In contrast, the Council of Europe, which can be seen as an important milestone in European integration after WWII, has become known in the area of human rights protection and due to the intensive adoption of conventions, while military issues have been completely excluded from its purview as it was intended to serve lasting peace after WWII, causing inconceivable damage in Europe.

The universal international organization established after WWI, the League of Nations, was unable to prevent a new destruction. At the international level, the establishment of the UN was a great step in safeguarding peace and security as well as what were called [universal human rights](#). Meanwhile, at the European level, from the 1950s onwards an integration process went down, resulting in the present European Union. Looking back on the post-WWII period and the beginning of European integration, we would think that economic cooperation was its basis. This idea originates from the fact that the foundation of the organizations preceding the European Union was indeed based upon collaboration in economic sectors, but as a first step, European states were concerned with cooperation based on political foundations.

In the realm of political cooperation, the name of *Sir Winston Churchill* (1874-1965) rings a bell to many. He was one of the most influential politicians of the past century, Prime Minister of the UK from 1940 to 1955. He also played a decisive role in setting up the Council of Europe, realizing his vision of a United Europe. On 19 September 1946, he held his [famous speech](#) in Zurich, in which he proposed the establishment of a regional association, the 'United States of Europe', obviously based on the pattern of the USA. *"Yet all the while there is a remedy which, [...] in a few years make all Europe [...] free and happy. It is to recreate the European Family, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, safety and in freedom. We must build a kind of United States of Europe."*

The creation of the 'European Family' started from 1947, the basis of which was clearly political integration. In May 1947, the first General Assembly of the United European Movement was held in London, and at the end of that same year the International Committee for the Coordination of the European Movements was formed. The Committee also organized the first Congress of Europe from 7 to 10 May 1948 in The Hague. This negotiation process led to the signing of the Statute of the Council of Europe on 5 May 1949, in London (hence called the London Statute).

The beginning of European integration is mostly linked to the federalist idea, so the politicians and organizations involved have imagined the cooperation of European states on a political basis. However, after the establishment of the Council of Europe, it became clear that the integration based on political foundations would be replaced by economic cooperation. This paradigm shift is relevant to French Foreign Minister *Robert Schuman* recognizing that lasting peace can only be achieved through the collaboration of Germany and France. However, the centuries-old opposition of the two countries made approaching them impossible in a political field, so the cooperation was

first initiated based on economic affiliation, after WWII. This process has led to the establishment of the European Union, tending toward a bipolar system of protections for human rights.

We can see from the above, how *the dilemma of the two Europes (a bipolar Europe)* existing in parallel came to be, and over time, it is also clear that the Council of Europe and the protection of human rights within its institutional framework also affected the institutional and procedural system of the EU, and inspired the Union to adopt its own human rights instrument (the Charter of Fundamental Rights in the EU).

These two Europes, and even one integrated Europe to be honest, can be problematic in terms of the so-called “*pyramid theory*” of 1920s Austrian jurist, Hans Kelsen, who argued that the constitution is on the top of the national legal system and due to its paramount importance, *sui generis* autonomous bodies shall be created to protect it.

In a multiplicity of legal systems created by different regional integrations, the “pyramid theory” might no longer be valid as it was, and what further complicates this situation is that – according to French jurist Bertrand Mathieu – there are currently four pyramids within the two Europes. What he means under this is that

- *at present the values of national constitutions and national constitutional framework (1 pyramid) need to be reconciled*
- *not only with the values and rules of the two Europes (two pyramids), but also*
- *with commitments flowing from public international law (1 pyramid), contributing to the common constitutional heritage of the Member States, while also being part of national constitutional frameworks.*

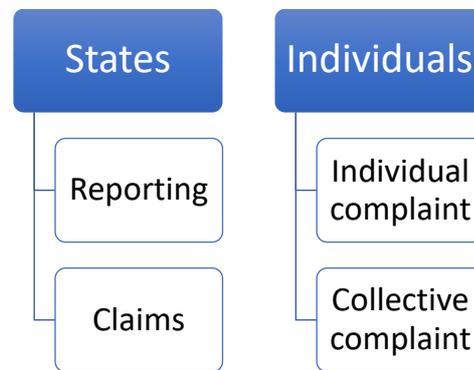
The dilemmas regarding this value (and legal) systems can be grasped in terms of how overlapping and thus redundant they can be, especially in light of recent events. Obviously, the CoE was the earlier integration formed in Europe, on a foundation of values created by the UN in post-War reconstruction, fighting for the respect of European values in protecting human rights.

With integration spilling over from the economy to politics and human rights, a “parallel human rights universe” was created as part of the EU (gradually broadening from the 1970s onward, until the adoption of the comprehensive EU Charter of Fundamental Rights, similar – in some ways – to the ECHR within the CoE.)

The **overlapping (bipolar) nature** of these structures has been exacerbated by certain provisions of the **Charter** and the **recent reforms of the ECHR**, when they made possible that the **EU join the ECHR**. In theory and also practically, this would mean that the ECHR – in some ways – would become a forum of external control over the protection of human rights in and by the EU.

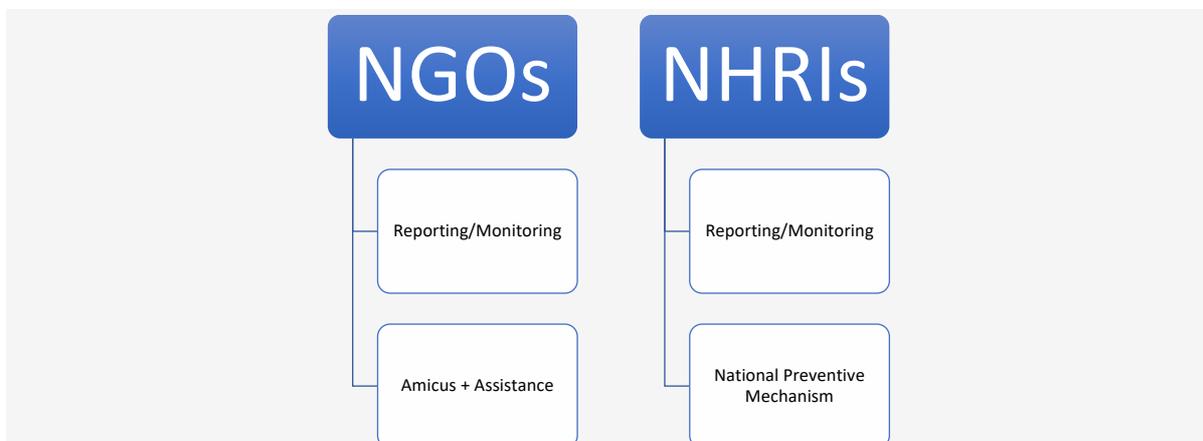
*(The Court of Justice of the EU has so far seemed reluctant to allow for such a “merger” of the two integrations, but who knows what the future holds. Further discussions on this will take place regarding the Integration of Human Rights Protection in Europe.)*

## 2.1. PHR in Europe: Tools, Processes and Institutions



As far as **tools of human rights** protection are concerned in general, states usually have the right (rather obligation) to [report](#) in front of international organizations and they can make claims against each other for violations of human rights. (e.g. [Interstate Claims](#) are known in the proceedings of the ECtHR as well) Individuals usually also have the right to file complaint, either as individuals or as groups, to different judicial, political or other expert bodies on the international level. (e.g. Within the CoE, (groups of) persons can file individual complaints called applications under the ECHR and they have the right to file a so-called [collective complaint](#) under the European Social Charter of the CoE.

**National Human Rights Institutions** (NHRIs) and **NGOs** are important actors in any international human rights context, and this is true in Europe as well. NHRIs have been established as specialized bodies with the specific purpose of national human rights protection through various processes [*such as NPM, **National Preventive Mechanism** under the Optional Protocol to the (UN) Convention against Torture, OPCAT*] as well as monitoring compliance with constitutional rules and international standards. International NGOs operating on both the international and national levels may engage in monitoring and reporting in “keeping honest” all national authorities when it comes to protecting human rights. These organizations might also act as “*amicus curiae*”, i.e. as **friends of the courts**, providing expert advice and opinions as third parties **intervening various forms of human rights litigation**. In addition, NGOs, through their expertise can provide **legal assistance** to individuals in arguing their cases in front of international human rights courts, without prejudice to their **right to file applications** themselves.



Just as NHRIs and NGOs may take many shapes and forms, there are various categories of those international institutions which – in a functional approach – undertake different roles in protecting human rights (*below*). If we look at the **institutional structures of the CoE or the EU**, we find that there are

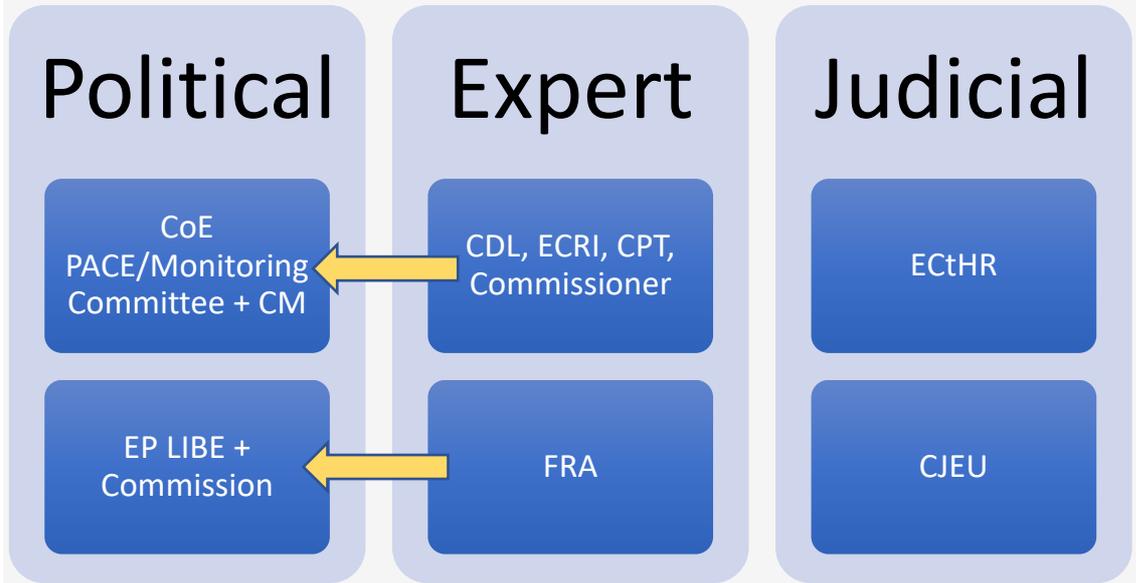
- (i) **political bodies** that monitor and protect human rights (such as the PACE or its Monitoring Committee or the European Parliament or the EU Commission),
- (ii) **expert bodies** responsible for professional advice and monitoring regarding specific human rights (such as the previously mentioned OPCAT or its CoE equivalent CPT, or European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment). Another example could be the European Commission against Racism and Intolerance (ECRI). This category also encompasses such professional bodies, which provide constitutional or evidence-based assistance to develop human rights frameworks (such as the Venice Commission of the Council of Europe, otherwise called European Commission for Democracy through Law, CDL for short, or the Fundamental Rights Agency of the EU, FRA for short). As for specialized bodies engaged in human rights protection, on the level of the CoE, we could also mention the Commissioner for Human Rights discussed in more detail below.

*(As indicated with yellow arrows in the Chart below, although certain bodies, like the FRA or CDL might be composed of experts and provide expert advice regarding specific human rights issues, their expert opinions are often used by political bodies to try and influence the outcome of political processes. The exact boundaries between the two categories are blurred.)*

The most important category however, also the most influential in terms of their historical “*human rights footprints*” are

- (iii) **judicial bodies**, like the ECtHR and the CJEU.

*It is also a valid argument, however, that these institutions also have a certain political character as normally, the judges of similar fora are elected by international political bodies, such as the PACE in the case of the ECtHR.*



## 2.2. PHR in Europe: the Role of the Council of Europe and its Institutional Structure

The aim of the CoE is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress. Matters relating to national defense, however, do not fall within its purview. The main values defined by the organization are parliamentary democracy, rule of law and respect for human rights and fundamental freedoms. In the so-called [London Statute](#), the founders of the Council of Europe, fundamentally, prescribe a devotion to spiritual and moral values as a precondition for the work of the Council. These fundamental values are individual freedom, political liberty and the rule of law, which form the basis of all genuine democracies.

**Members** of the Council “*must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively*” in the realization of the aim of the organization. Since 1950, the membership of the organization has grown dynamically. The significant expansion of the membership was made possible after the end of bipolar world order and the dissolution of the USSR.

Looking into the 47 Member States, we can find more that cannot be categorized as European (within the perspectives of the European Union), such as the Russian Federation and Armenia – who belong to Europe in a geographical dimension: to the European continent. This is possible because of the membership requirements, which, as sets the criterion of ‘Europeanism’ as a precondition, not that the acceding state shall be geographically located on the European continent. Of course, this issue was particularly important in connection with the accession of the post-Soviet states, so the Parliamentary Assembly (PACE) adopted a recommendation on **membership requirements** in 1994 (seen here).

### PACE Recommendation No. 1247 (1994)

*The **membership requirements** of the Council of Europe are:*

- 1. The requirement of a **European state**: membership of the Council of Europe is in principle open only to states whose national territory lies wholly or partly in Europe. However, traditional and cultural links and adherence to the fundamental CoE values might justify a suitable cooperation with the organization.*
- 2. The requirement of **democratic rule of law**: the state respects and embodies the characteristics of a democratic rule of law in its constitutional system, such as free elections, free press, separation of the branches of power.*
- 3. **Respect for human rights, fundamental freedoms and the rights of minorities.***

*The state shall also accede to the ECHR by ratifying the Convention and provide for the possibility of individual complaints. The acceding state **must recognize the jurisdiction of the ECtHR.***

*The USA, Canada, Mexico, Israel, Japan and the Vatican **have observer status** in the work of the Council of Europe.*

## The CoE is

based in **Strasbourg** (France), the official languages are English and French. Among its bodies we can find organs which deal with general tasks, but in the last decades, a number of specialized bodies have been established as well. ***After an enumeration of CoE institutions, we shall only discuss those that are relevant and essential to the protection of human rights.***

### The institutions of the CoE are:

- The Committee of Ministers (CM) is the most important decision-making and executive body of the organization;
- the Parliamentary Assembly (PACE) is the consultative body of the Council of Europe; the Secretariat carries out the management and administration of the organization.

The Special Representative bodies of the Council of Europe are:

- *The Congress of Local and Regional Authorities of Europe (CLARE) and*
- *the European Court of Human Rights (ECtHR).*

### The Committee of Ministers (CM)

is the most important decision-making and executive body of the organization. Based on the principle of intergovernmentalism, each Member State may delegate one representative (generally the ministers for Foreign Affairs, who – in case of another engagement – might be substituted by an alternate designated and sent by the Government of the MS, preferably from among the members of the Government). The principle “one state – one vote” determines decision-making.

The CM's work is assisted by preparatory and other committees. Rapporteur groups are informal working structures of the ministers' deputies and have no decision-making power as their duty is to prepare CM decisions. There are currently seven Rapporteur Groups including Education, Culture, Sports, Youth and Environment, Democracy, External Relations and Human Rights. The London Statute provides the opportunity for the establishment of advisory and technical committees.

The CM shall, upon the recommendation of PACE or on its own initiative, examine actions required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters. ***A number of international conventions have been adopted under the aegis of the Council of Europe by the CM, such as***

1. 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (Rome)
2. 1961 European Social Charter (Turin, modified in 1996)
3. 1977 European Convention on the Suppression of Terrorism
4. 1979 Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention)
5. 1985 European Charter of Local Self-Government
6. 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
7. 1992 European Convention on the Protection of the Archaeological Heritage
8. 1993 European Charter for Regional or Minority Languages
9. 2000 European Landscape Convention (Florence)
10. 2001 Convention on Cybercrime (Budapest)

## The **Parliamentary Assembly (PACE)**

is a parliamentary body based on the representation of national parliaments, i.e. the deliberative organ of the Council of Europe (designated as the Consultative Assembly of the Council of Europe under the London Statute). The PACE has no strong decision-making powers, it has the right to comment on CM decisions. It shall debate matters within its competence and present its conclusions, in the form of recommendations, to the CM. The PACE representatives are delegated from MS national parliaments or appointed from among national MPs based on a specific procedure. Representatives must be citizens of the MS they represent. Substitutes can also be appointed, who speak and vote on behalf of the absent member. Within the PACE, MPs are organized into political groups, there are currently six such groups. The PACE shall meet in ordinary session once a year (for a maximum of one month), the date and duration of which shall be determined so as not to overlap with national parliamentary sessions of MS.

## The **European Court of Human Rights (ECtHR)**

is a specialized body of the CoE and is „*the highest judicial forum for the protection of fundamental rights*” within the system of the Council. (*Separate slides and reading on its structure and functioning to follow.*)

## The institution of the **Commissioner for Human Rights**

is fundamentally different – in its functions - from the functions of the ECtHR, as they are explicitly preventive. The position was established in 1999 as a specialized body of the CoE, as elected by the PACE, for terms of 6 years. (From April 2018 *Dunja Mijatović* holds the office.) The Commissioner can assist the MS with advice on how to overcome their legislative deficiencies and make suggestions on the prevention of human rights violations. Thus, its duties are carried out through suggestions, advice and analysis. The Commissioner has issued several [reports and recommendations](#) on a number of occasions following a country visit. In its recommendations, the Commissioner calls the attention of the MS and the Council of Europe to the most pressing human rights issues. In the past, for instance, special attention was paid to the human rights aspects of artificial intelligence and robotics, the special human-rights needs of older people, and the human rights issues raised by migration.

## The **Venice Commission** (i.e. the European Commission for Democracy through Law or CDL)

is an independent [consultative body](#) working together with CoE MS, with interested states that are not CoE members, and with international organizations. The activities of the Commission are carried out in the service of democracy. It currently has 61 MS, but several observers and associate members assist in its operation. Cooperating international organizations are provided a special status. Its main areas of activity are democratic institutions and fundamental rights, elections, referendums and political parties, and constitutional justice. Its primary task is to provide [‘constitutional assistance’](#), i.e. to comment on the draft legislative proposals or the already adopted legal standards. The Commission also prepares studies and reports on current human rights issues.

Opinions on legal standards may be requested by the MS, their governments, parliaments or heads of state; the Council of Europe (Secretary General, CM, PACE, CLARE); and some international organizations such as the European Union. In proceedings pending before the ECtHR, **CDL may give an *amicus curiae* opinion** in comparative constitutional and international law matters. The opinion of the Venice Commission is not legally binding but gains more and more political significance in the changing European and international human rights landscape.

*CDL Members are internationally recognized lawyers, their legal opinion is considered credible and reliable by other international bodies or judicial fora. The **most discussed topics** nowadays include examining draft bills or laws related to gender, gender identity (homosexuality, transsexuality etc.), terrorism and migration. (It is a very important difference from other regional expert bodies (like the Fundamental Rights Agency of the EU) that the CDL examines norms and their adoption, not the practices that are realized once the norms have been accepted.)*

As described in the introduction, NGOs have an important role in shaping the human rights environment in Europe, through monitoring and awareness-raising. This was recognized by the CoE and an institutional platform was created for NGOs, dating back to 1952 when several organizations have obtained **consultative status** within the organization. Over the last decades, the Council of Europe has developed a closer and more effective cooperation. The process was completed in 2003 when the group of NGOs gained a **participatory status**, so they could actively participate in the design of the Council of Europe's programs. The **Conference of INGOs** was established in 2005 and it manages the consultations of some 400 participatory NGOs – among other – with the CM or the PACE.

### ***Self-Check Questions***

1. What were the competing visions of a United Europe after 1945? How does the Council of Europe fit into these?
2. How could you describe the bipolarity dilemma of European Human Rights Protection?
3. What role do NHRIs and NGOs have in protecting human rights?
4. How can you describe in general the three main types of bodies (in a functional approach) engaged in human rights protection?
5. What are the main organs of the Council of Europe that are relevant to the protection of human rights?
6. What are special representative institutions in the CoE?
7. What are the membership requirements of the Council of Europe?

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