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Memoranda of Understanding and other Agreements in the Practice of the Council of Europe

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Dear CAHDI members, dear colleagues, Ladies and Gentlemen,

It is a great pleasure to speak in this workshop on non-legally binding agreements/instruments. I would like to thank the German Presidency of the Committee of Ministers for the opportunity to present the experience of the Council of Europe with Memoranda of Understanding (MoUs).

I would like to address our theme from a very practical point of view, focusing on material scope, procedure and contents of MoUs concluded by the Council of Europe.

The term "Memorandum of Understanding" does not have a clearly defined meaning in the practice of the Council of Europe. In practice, the term has been used to identify any kind of agreement for which there is no mandatory form or title required by one of the parties. Over the years, different denominations have been used. While a majority are expressly called MoUs, others are named "Memorandum of cooperation" or simply "Agreement".

The Council of Europe has concluded MoUs with a number of different actors for a variety of purposes. Existing MoUs can be divided into six main groups:

1) MoUs concluded with international and intergovernmental organisations with the aim of strengthening cooperation between these organisations and the Council of Europe;
2) MoUs concluded with other international bodies, with the purpose of collaborating in a field of common expertise;
3) MoUs concluded with states, which has happened rather exceptionally, for a particular purpose, e.g. the Memorandum of Understanding on the granting of the Partner for Local Democracy status with the Congress of Local and Regional Authorities of the Council of Europe to the Kingdom of Morocco (2 April 2019);
4) MoUs concluded with states for the purposes of establishing 'Information Offices of the Council of Europe' (IOCEs) in member and non-member states;

5) Agreements which extend the jurisdiction of the Administrative Tribunal of the Council of Europe (ATCE) to disputes between international intergovernmental organisations, other than the CoE, and their agents.
6) MoUs employed by the Council in the framework of the execution of judgments of the European Court of Human Rights (ECtHR), in particular in those instances where the Council acts as an intermediary for the payment of the sums awarded by the Court as just satisfaction.

In my presentation, I will discuss the scope and contents of the MoUs in two steps:

- A first part will focus on the "classic" use of MoUs by the Council of Europe in its relations with international organisations and other international bodies (points 1-3 above).
- The second part will be devoted to discussing the use of MoUs for specific cases related to IOCEs, the ATCE and the execution of ECHR judgments (points 4-6 above).

Agreements concluded with international organisations and other international bodies

Already in 1951, the Committee of Ministers (CM) adopted a resolution providing for the conclusion of agreements with intergovernmental organisations on matters which are within the competence of the Council.[1] In the absence of any specification, it must be presumed that this resolution covers any form of agreement, irrespective of whether it is governed by international law or not.

The above resolution was complemented by the Secretary General's Rule No. 1318 of 20 October 2010 on guidelines for concluding agreements between the Council of Europe and other international intergovernmental organisations or public international entities. According to Rule no. 1318, such agreements must further the objectives of the Council of Europe by providing for consultation, co-ordination of effort, mutual assistance and possibly joint action in fields of mutual interest.[2] Furthermore, article 2 paragraph 3 provides that "the provisions

[1] CM, Resolution (51) 30, 3/5/1951, Relations with International Organisations, both Intergovernmental and Non-Governmental: "the Committee of Ministers may, on behalf of the Council of Europe, conclude with any intergovernmental Organisation agreements on matters which are within the competence of the Council, such agreements to define the terms on which such an Organisation shall be brought into relationship with the Council of Europe" – article 15 Statute of the Council of Europe; United Nations, Yearbook of the International Law Commission, 1982, Volume II, part two, Report of the Commission to the General Assembly on the work of the thirty-fourth session, A/CN.4/SER.A/1982/Add.1, p. 139, §§ 2-5.
[2] Article 2 (2) (b) of Rule 1318 (2010).

of the agreements [should] be as specific as possible as to the forms of cooperation [and] should not create operational, procedural or financial difficulties which would outweigh the value of the agreement for the Council of Europe."

Rule No. 1318, in its article 3, lays down two procedures for concluding agreements of such a nature:

- In principle, it is for the CM to approve the conclusion of any agreement with an organisation on behalf of the Council of Europe.

- An exception is made for agreements that merely implement or follow up on an existing agreement with an organisation. Recent examples of such agreements of subsidiary nature are the memoranda concluded with the OECD updating the 1962 Arrangement with the same organisation or the Memorandum of Understanding with the Inter-American Drug Abuse Control Commission (CICAD) which is based on the 2011 MoU with the Organisation of American States (OAS). Similar agreements may be concluded by the Secretary General (SG), without the express approval of the CM, "as long as such agreements do not have budgetary implications and do not create legal obligations for the CoE which go further than the existing agreements." Their conclusion should be foreseen in the original agreement, which is subject to CM approval, for example in the following terms:

"*[t]he Secretary General of the Council of Europe and [the representative of the other organisation/institution] may enter into such supplementary arrangements for the implementation of this Agreement as may be found necessary, provided that they do not have budgetary implications and do not create legal obligations for the participants which go further than the existing agreement (article 3, point 4).*"[3]

According to Rule No. 1318, in order to conclude a MoU with the Council of Europe, international bodies must have legal personality, and the provisions of the agreement "should be consistent with the Statute and rules of the Council of Europe" (article 2, paragraph 3). All MoUs of such a nature are signed by the SG.

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[3] Example of a paragraph on their implementation, as seen in Rule 1318: "The Secretary General of the Council of Europe and [the representative of the other organisation institution] may enter into such supplementary arrangements for the implementation of this Agreement as may be found necessary, provided that they do not have budgetary implications and do not create legal obligations for the participants which go further than the existing agreement."

Such MoUs are usually concluded with a view to creating a partnership between the Council of Europe and the international entity in question in the relevant field of expertise. For instance, the purpose of the Memorandum of Understanding on the setting-up of an Internet-based Freedom of Expression Platform to promote the protection of journalism and safety of journalists[4] is "to create a framework for cooperation between the Council of Europe and the Partner Organisations [International Federation of Journalists (IFJ), Association of European Journalists (AEJ), Reporters Without Borders (RWB)] on an internet-based platform drawing on information supplied by the Partner organisations to record and highlight serious concerns about media freedom and journalists' rights." Another example would be the Memorandum of Understanding between the Council of Europe and the Union of European Football Associations (UEFA)[5] whose purpose is "to promote the Council of Europe and UEFA's cooperation by exchanging views on their respective activities and by preparing and implementing common strategies and programmes for the priorities and areas of shared interest."

Given the broad scope of action of the Council of Europe, the MoUs cover a broad variety of fields of cooperation.

The Council has signed more than 100 MoUs with international governmental organisations.[6] All these MoUs have at least one common characteristic: to promote, develop or enhance cooperation between the Council and the partner organisation in question, in their fields of common expertise.

Given the time available to me, I can only discuss in greater detail three examples: first, the MoUs signed with the United Nations, second, the MoU signed with the European Union (EU) and, third, the already briefly mentioned MoU with the OAS.

As regards the United Nations and its agencies and bodies, all MoUs between the UN have been signed by the SG, or, on behalf of the SG, by the Head of a CoE's body which is a party to the memorandum, e.g. Memorandum of cooperation between the Secretary of the Convention of the Conservation of European Wildlife and Natural Habitats (Bern, 1979) and the Executive Secretary of the Convention on Biological Diversity (CBD) (Nairobi, 1992). The purpose of such MoUs is, once again, to develop, promote and enhance cooperation between

[4] Signed on the 4 December 2014.
[5] Signed on the 30 May 2018.
[6] See Agreements concluded by the Council of Europe with other international intergovernmental organisations or public international institutions.

the Council and the UN (or their bodies) in their area of specialisation (e.g. Memorandum of Understanding between the Council and the UN Alliance of Civilisations (UNAOC) whose purpose is "to enhance cooperation between the CoE and the AOC in the field of intercultural dialogue in all areas of joint interest in order to achieve complementary and avoid overlapping").

The Memorandum between the European Union and the Council was concluded in order to develop and "reaffirm [the] commitment [of the two organisations] to establish close co-operation based on their shared priorities and to strengthen their relations in areas of common interests".[7] As a matter of fact, following the release of the so-called Juncker report intitled 'Council of Europe – European Union: 'A sole ambition for the European continent' in April 2006, the Council of Europe and the EU negotiated between 2006 and 2007 what has become, without any doubt, one of the most important MoUs concluded by the Council. It has become a framework for a strategic partnership of "enhanced cooperation and political dialogue"[8] and such cooperation embraces all sectors of the Council of Europe and a wide spectrum of activities, making the EU an 'across the board' partner. Applying the OAS guidelines, it can be argued that this MoU constitutes a truly political commitment, given the language employed, the absence of a provision on entry into force, and the title of the agreement itself ("memorandum of understanding"). Indeed, the European Parliament, which has the power to ratify international agreements, was not involved in the conclusion of this MoU.

The third agreement I want to mention is the 2011 MoU between the Council of Europe and the OAS.[9] The purpose of this MoU is to "strengthen the cooperation between the Parties by setting up a new framework of cooperation and designing the priority areas of common concern."[10] The MoU contains a provision on "Privileges and Immunities" (which is quite exceptional with MoUs between the CoE and international organisations), stating that "nothing in the present MOU shall be interpreted as a waiver by the Council of Europe or by the OAS of the privileges and immunities which they enjoy by virtue of the relevant agreements and laws on the subject and general principles of international law."[11] This document uses

[7] Paragraph 14 MoU EU.
[8] Memorandum of Understanding between the Council of Europe and the European Union, 11 May 2007, Preamble § 8.
[9] Memorandum of Understanding between the Secretariat General of the CoE and the General Secretariat of the OAS, 19 September 2011.
[10] Memorandum of Understanding between the Secretariat General of the CoE and the General Secretariat of the OAS, 19.9.2011, Article 1 'Objective and areas of cooperation'.
[11] Article 5 MoU OAS.

vocabulary suggesting binding effects, as well as clauses on ‘entry into effect’, ‘termination’, as well as ‘settlement of disputes’.

The use of MoUs by the Council of Europe for specific purposes

Memoranda of Understanding on the Information Offices of the Council of Europe represent a pragmatic tool employed by the Council to negotiate and lay down the legal framework for establishing such information offices without having to resort to the conclusion of legally binding bilateral agreements. The main features of such MoUs is defined in CM Resolution (2010)5[12] on the status of the Council of Europe Offices, which describes the status and terms of reference for Offices in member and non-member states as well as the status and terms of Offices in charge of liaison with one or more international organisations. The conclusion of the MoUs is based on a dialogue between the Council of Europe and the host country, with the Council providing the national authorities with a standard template of the MoU based on CM/Res(2010)5.

Negotiations with national authorities mostly concern the terms and conditions of employment of local staff. The IOCEs are institutions of the Council of Europe and, as such, enjoy the privileges and immunities of the Council, according to the GAPI (for member states) or to the 1961 Vienna Convention on diplomatic relations (for non-member states). These offices have initially been established for a period of three years, at the end of which the Committee of Ministers decides for each Office on the possible renewal of its terms of office.

Another example is the extension of the ATCE’s jurisdiction. The ATCE is the jurisdictional body responsible for resolving disputes between staff members and the Council. The ATCE is also in charge of examining disputes between bodies attached to the Council of Europe and their staff members, if so requested by the representatives of these bodies. Currently, the foregoing concerns only the Council of Europe Development Bank.

The Council of Europe concluded a series of agreements to extend the ATCE’s jurisdiction to adjudicate upon disputes between international and intergovernmental organisations, other than the Council of Europe, and their agents. Indeed, in 2014, the CM adopted Resolution

[12] Resolution CM/Res(2010)5 on the status of Council of Europe Offices, adopted by the Committee of Ministers on 7 July 2010 at the 1090th meeting of the Ministers’ Deputies.

CM/Res2014(4)[13] amending article 15 of the Statute of the Tribunal and established the possibility for the ATCE to hear cases involving disputes between international governmental organisations other than the Council of Europe and their respective staff members. The agreements, which are not called MoUs, are concluded following a CM decision authorising the SG to sign. So far, only three agreements of such a nature have been concluded, the first one in 2014 with the Central Commission for the Navigation of the Rhine (CNNR),[14] and the two others in 2017 with the Hague Conference on Private International Law[15] and the Intergovernmental Organisation for International Carriage by Rail (OTIF).[16] On 30 November 2020, the ATCE issued its first decision in the case of A c. La Commission Centrale pour la Navigation du Rhin.[17]

The 2017 agreements with the Hague Conference and OTIF respectively provide for an internal appeals procedure – prior to the referral to the ATCE – which provides for the possibility of involving a conciliator appointed by the president of the ATCE. This conciliation procedure was already used successfully in 2018/19 in a case involving an OTIF staff member.

The Council of Europe has also used MoUs in the process of the CM's supervision of the execution of ECtHR judgments. In exceptional cases, there was a need for the Council of Europe to act as an intermediary for the payment of the sums awarded as just satisfaction by the ECtHR under article 41 of the ECHR. This procedure was first used in the cases of the *Loizidou*[18] and *Joannou v Turkey*.[19] In both cases, the payment modalities were laid down in a MoU between the respondent government and the Council of Europe, acting as the intermediary recipient of the payment, in order to facilitate the payment to the applicant.

More recently, the question has come up in the inter-state case of *Georgia v. Russia (I)*. In its just satisfaction judgment of 31 January 2019,[20] the Grand Chamber held that the Russian Federation was to pay the government of Georgia, within three months, €10 million in respect

[13] Resolution CM/Res(2014)4 amending the Statute of the Administrative Tribunal (Appendix XI to the Staff Regulation), adopted by the Committee of Ministers on 11 June 2014 at the 1202nd meeting of the Ministers' Deputies.
[14] Agreement on Extending the jurisdiction of the Administrative Tribunal of the Council of Europe to official of the Central Commission for the Navigation of the Rhine (CNNR), 16 December 2014.
[15] Agreement on extending the jurisdiction of the Administrative Tribunal of the Council of Europe to official of the Hague Conference on Private International Law, 24 November 2017.
[16] Agreement on extending the jurisdiction of the Administrative Tribunal of the Council of Europe to officials of the Intergovernmental Organisation for International Carriage by Rail (OTIF), 8 December 2017.
[17] ATCE, A c/ La Commission Centrale pour la Navigation du Rhin, request No. 626/2020, 30 November 2020 – *in French only*.
[18] ECHR [GC], Loizidou v. Turkey (just satisfaction), no. 15318/89, judgment of 28 July 1998.
[19] ECHR, Joannou v. Turkey, no. 53240/14, judgment of 12 December 2017.
[20] ECHR [GC], Georgia v. Russia (I) (just satisfaction), no. 13255/07, judgment of 31 January 2019.

of non-pecuniary damage suffered by a group of at least 1500 Georgian nationals who were the individual victims of violations. The judgment explicitly acknowledged the role of the Committee of Ministers to determine any practical arrangements to facilitate execution.[21] The idea is that the Council of Europe offers its services to accept payment of the sums awarded into an escrow account pending the establishment, by the Georgian authorities, of a distribution mechanism for the individual victims. The details will have to be laid down in MoUs to be concluded with Georgia and the Russian Federation respectively. The CM will have to authorise the Organisation to receive and hold the funds in a fiduciary capacity and to decide when the conditions are fulfilled to eventually release them.

Compared to the cases of *Loizidou and Joannou*, the *Georgia v. Russia (I)* case raises much more complex issues, neither the identity of all victims to be compensated nor the exact amount due in each case having been determined with precision by the Court. Nevertheless, I am happy to inform you that the idea to use MoUs as a vehicle to agree on a pragmatic and mutually acceptable way forward was well received by the Russian and Georgian authorities. On 11 March 2021, the Ministers' Deputies "*noted their readiness to consider the draft Memoranda of Understanding prepared by the Secretariat in the shortest possible time*" and "*stressed the importance that the Russian authorities, as well as the Georgian authorities, move forward quickly to finalise and sign the Memoranda of Understanding to enable such payment to take place without any further delay through a Council of Europe bank account held in escrow.*"[22]

Conclusions

The Council of Europe's practice of using MoUs is quite diversified. It is shaped by practice and reasons of expediency rather than by a strict legal framework. The Council of Europe enters into such agreements for a variety of purposes and the agreements themselves rarely have the same form and contents. It is probably precisely this multifaceted nature and their inherent flexibility that makes MoUs so popular in international relations.

In the Council of Europe, MoUs are in the first place a means to establish cooperative partnerships with different international entities, primarily international governmental organisations. The MoUs in question express mutual commitments of a political character

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[21] Ibid., § 79.

[22] Decision adopted by the Committee of Ministers at their 1398th meeting (DH) H 46-26 Georgia v. Russia (I) (Application No. 13255/07).

while avoiding creating legally binding obligations. Such partnerships enable the Council to have visibility in a field of expertise which it has in common with the partner organisation.

In addition, the Council of Europe has used MoUs for other quite specific purposes where a certain formality of commitment was required but where, for various reasons, a treaty was not an available option. MoUs have thus proven to be a pragmatic and effective tool to establish a framework for IOCE in member and non-member states, to extend the ATCE's jurisdiction to other international governmental organisations or to resolve politically complex issues arising from the payment of compensation ordered by the European Court of Human Rights. In particular, these last examples are evidence for the proposition that MoUs are not "indifferent" in legal terms.[23] The MoUs in question manifestly contain binding rules that the parties expect to be honoured. This follows from the wording used in the substantive provisions, the context of their conclusion and corresponds to the intention of the signatories. Irrespective of how exactly such MoUs are eventually categorised, they certainly deserve the international lawyer's attention. I can therefore only congratulate the Germany Presidency of the Committee of Ministers for having chosen the topic of legally non-binding agreements for our discussions today.

[23] H. Hillgenberg 'A Fresh Look at Soft Law'10 EJIL 499, 515 (1999).