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STEERING COMMITTEE FOR HUMAN RIGHTS

(CDDH)

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COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

(DH-SYSC)

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Executive summary prepared by the Secretariat

concerning the Preliminary draft CDDH report on the place of the European Convention on Human Rights in the European and international legal order

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Note:

1. It is recalled that the DH-SYSC-II, at its 7th meeting (18–20 September 2019), adopted the text of the three chapters of the Preliminary draft CDDH report on the place of the European Convention on Human Rights in the European and international legal order, as well as its Introduction and Conclusion.[1]

2. As requested by the DH-SYSC-II,[2] the Secretariat had further drafted an executive summary of the said Preliminary draft CDDH report[3] for discussion and possible adoption by the DH-SYSC-II at its September meeting. In view of the complexity of the subjects dealt with, the Group could not agree on a text of the executive summary in the time remaining for its meeting, although a majority of the delegations would like to have a summary of the Report. The Chair of the DH-SYSC-II announced that she would transmit the draft executive summary, as a separate document, drafted under the sole

[1] See document DH-SYSC-II(2019)R7, §§ 5-7 and DH-SYSC-II(2019)R7 Addendum.
[2] See document DH-SYSC-II(2019)R6, § 10.
[3] That summary was contained in document DH-SYSC-II(2019)43.

responsibility of the Secretariat, not adopted by and not binding in any way the Group, to the President of the DH-SYSC for information.[4]

3. Following receipt of this draft executive summary, in the version in which it had been submitted to the DH-SYSC-II at its 7th meeting,[5] as well as an accompanying letter from the Chair of the DH-SYSC-II, the Chair of the DH-SYSC has considered it appropriate to circulate both the text of the draft executive summary and the letter to the participants in the forthcoming DH-SYSC meeting (15-18 October 2019) for information and discussion.

4. The present document contains this draft executive summary as well as the letter addressed by the Chair of the DH-SYSC-II to the Chair of the DH-SYSC in an Appendix.

[4] See document DH-SYSC-II(2019)R7, §§ 5-8.
[5] See document DH-SYSC-II(2019)43.

EXECUTIVE SUMMARY

Introduction

1. The present Report was elaborated in the **context** of the Interlaken reform process towards the long-term effectiveness of the Convention system. In its 2015 Report on "The longer-term future of the system of the European Convention on Human Rights", the Steering Committee for Human Rights (CDDH) had identified the place of the European Convention on Human Rights in the European and international legal order as one of the areas which were decisive for the longer-term effectiveness and viability of the Convention system. In its **terms of reference**, the CDDH and its Committee of experts on the system of the European Convention on Human Rights (DH-SYSC) were subsequently charged with preparing a draft report for the Committee of Ministers on that topic and the related challenges, containing conclusions and possible proposals for action. The preparatory work relating to this report was entrusted to the Drafting Group on the place of the European Convention on Human Rights in the European and international legal order (DH-SYSC-II).

2. As for the **methodology** followed and the **outline** of the report, the DH-SYSC-II identified and addressed in turn the three priority themes it had identified: the challenge of the interaction between the Convention and other branches of international law, including international customary law (theme 1); the interaction between the Convention and other international human rights instruments to which the Council of Europe member States are parties (theme 2); and the interaction between the Convention and the legal order of the European Union and other regional organisations (theme 3). The **aim** of the work in its entirety is the preservation of the efficiency of the Convention system against risks of fragmentation of the European and international legal space in the field of human rights protection, stemming from diverging interpretations. In the report, therefore, observations, or a stocktaking, is made in respect of each of the three priority themes addressed, followed by an analysis of the challenges arising for the efficiency of the Convention system and of possible solutions.

I. The challenge of the interaction between the European Convention on Human Rights and other branches of international law, including international customary law

1. Methodology of interpretation by the European Court of Human Rights and its approach to international law

3. At the outset, the way in which the European Court of Human Rights (the ECtHR / the Court) interprets the European Convention on Human Rights (ECHR / the Convention) is analysed in the Report and compared with the rules of international law on treaty interpretation, notably those contained in Articles 31 to 33 of the 1969 **Vienna Convention on the Law of Treaties** (VCLT).

4. Indeed, the **ECtHR** confirmed that for the interpretation of the ECHR, account is to be taken of Articles 31 to 33 VCLT subject, where appropriate, to any relevant rules of the Council of Europe. It relies on the VCLT's rules of interpretation, referring notably to the

"object and purpose" (Article 31 § 1 VCLT) of the ECHR as a human rights treaty. It further relies on the "subsequent practice" (Article 31 § 3 (b) VCLT) of States Parties to the ECHR notably as a confirmation of the existence of tacit agreement between States Parties to the ECHR regarding the interpretation of certain provisions of the ECHR or in finding support for its intention to depart from its previous case-law. It is, however, not clear whether the ECtHR may consider the subsequent practice of only some, but not all of the States Parties sufficient to establish an agreement regarding the interpretation of a Convention provision.[6] Where the Court seeks to establish a "European consensus", it is important that such consensus is based on an analysis of the practice and specific circumstances of the States Parties in line with the consensual nature of State obligations under international law.

5. Moreover, the ECtHR stated repeatedly that the ECHR had to be interpreted in the light of the rules set out also in Article 31 § 3 (c) VCLT, which indicated that account was to be taken of "[a]ny relevant rules of international law applicable in the relations between the parties". It is essential for States Parties that the Court's case-law is clear and consistent in this respect in order to avoid risks of fragmentation of international law.

6. On various occasions, the Court further invoked, with some variations in its approach, the *travaux préparatoires* (Article 32 VCLT) of the ECHR as a subsidiary means of interpretation, notably as confirmatory evidence of the ordinary meaning of a ECHR provision as already identified by it. It equally relied on Article 33 VCLT for the interpretation of ECHR provisions in cases of differences between the authentic English and French versions of the text.

7. As other international courts, the ECtHR also developed its own doctrines of interpretation, in particular the doctrine of autonomous concept and the 'living instrument' doctrine. In doing so, the Court has not expressly sought to derive them from, or otherwise invoke the VCLT. However, the language used in this context shows that the ECtHR tacitly operated with the general rules of interpretation as enshrined in the VCLT. The ECtHR acknowledged in this context that it could not, by means of an evolutive interpretation, derive from the ECHR a right that was not included therein at the outset, but it proved to be a delicate task to strike the right balance in this respect. The traditional rules of treaty interpretation and the consensual nature of public international law set limits to a dynamic interpretative approach. It is important that the Court explains its methods of interpretation and that the outcomes reached are predictable and understandable for the Contracting States.

[6] *Comment by the Secretariat: check against the final version of former § 29 of Theme 1, subtheme i) which has not yet been provisionally adopted. [The comment concerns § 42 of the Preliminary draft CDDH report on the place of the European Convention on Human Rights in the European and international legal order as adopted by the DH-SYSC-II at its 7th meeting, document DH-SYSC-II(2019)R7 Addendum].*

2. State responsibility and extraterritorial application of the European Convention on Human Rights

8. Taking as its starting point the concept of jurisdiction in public international law, the Court has developed its own notion of jurisdiction for the purpose of Article 1 ECHR, invoking the special character of the Convention as a human rights treaty.

9. An analysis of the ECtHR's case-law comprising cases concerning the situation in northern Cyprus, the case of *Banković*, cases leading to the case of *Al-Skeini* and cases since *Al-Skeini* shows that the Convention organs – as other international courts and treaty organs in respect of the jurisdiction clauses of other treaties – have established already at an early stage that jurisdiction is primarily territorial, but that there are exceptions to that principle. Despite the attention given by the Court to defining and categorising in detail these exceptions, some unresolved issues of interpretation of that notion and its scope remain.

10. In particular, in the case of *Banković*, one of its important decisions on the subject-matter, the Court had clearly set out the guiding principles on the interpretation of the notion of "jurisdiction". It had stressed that the Convention operated in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States and had enumerated five categories of exceptions to the territorial scope of jurisdiction (extradition/expulsion cases, extraterritorial effects cases, effective control cases, diplomatic or consular cases and flag jurisdiction cases). The facts of the case – concerning air strikes outside Convention territory – were found to fall under the principle that there was no jurisdiction extraterritorially; the conditions for any of the exceptions were not met.

11. In subsequent cases, and notably in *Al-Skeini*, another important judgment on the scope of the notion of jurisdiction, the Court restructured the different categories of exceptions to the rule of jurisdiction within the State's own territory and, to some extent, departed from *Banković*. It divided the exceptions into two groups: first, cases of State agent authority and control, in which the State must secure to the individual the rights relevant to the individual's situation and, second, cases of effective control over an area in which the State must secure, within the area under its control, the entire range of substantive rights of the Convention.

12. In *Al-Skeini*, as well as in a number of further applications such as *Hirsi Jamaa*, *Hassan* and *Jaloud*, the Court found the facts of the case to fall under the exception of State agent authority and control. As a consequence, the respondent State was found to have jurisdiction outside the Convention legal space in further situations arising outside the respondent States' territory, including operations of armed ground forces on the territory of a non-Convention State and the returning of migrants intercepted on the high seas to their country of departure. Because of the broad formulation of the principles in these cases it could be difficult for the respondent State to foresee the exact scope of its obligations under the Convention, in particular as the Convention rights now also comprise positive and/or procedural obligations.

13. Several important judgments, notably in the cases of *Catan* and *Chiragov*, further defined the scope of the States' jurisdiction where they were found to have effective control

of an area and in particular in cases where that control was found to be exercised not directly, but through a subordinate administration. In this category of cases, where a respondent State does not have direct territorial control, but only decisive influence over the administration of a breakaway territory, the consequences of a finding of jurisdiction are considerable. The respondent State is under the obligation to secure on such a territory the full range of Convention rights in the sense of an obligation to achieve the result required by the Convention, and not only as an obligation of means, that is, to do what is possible to achieve that result.

14. The Court does not always clearly distinguish jurisdiction within the meaning of Article 1 ECHR on the one hand, and attribution of conduct under the law of state responsibility on the other hand. In choosing the term "effective control of an area", the Court appears to have taken up a concept familiar to international law, but as a basis for attributing the conduct of one entity to another in the law of State responsibility.

15. The interpretation of the scope of Article 1 is a particularly sensitive question for the States Parties to the Convention as it is decisive for triggering a whole range of substantive obligations under the Convention. In view of the importance for the States of knowing the exact circumstances in which they are obliged to secure the Convention rights, legal certainty is of the essence in this particular field.[7]

16. Likewise, the application or respect of the general international law on **State responsibility** by the ECtHR in its case-law was examined more closely. A distinction was made between cases concerning questions of attribution of the actions of private or non-State actors to a State; cases concerning questions of attribution in situations in which more than one State was involved in the underlying facts; and cases concerning attribution in situations in which one or more States and an international organisation were involved in the underlying facts.

17. [8]It emerges from the analysis of that case-law, and notably of the cases of *Ilaşcu and Others*, *Rantsev*, *Stojkovic*, *El-Masri* and *Al Nashiri*, that the Court, in determining whether conduct is attributable to the respondent State, does not make clear whether, and in how far it applies the rules of attribution reflected in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). While the Court repeatedly referred to specific Articles of the ARSIWA when listing the relevant provisions of international law, it does not explicitly apply these rules when deciding at the merits stage whether an impugned act can be attributed to the respondent State. It rather appears that the Court applies its own principles, having taken into account the relevant rules of international law and applying them, as it usually does, while remaining mindful of the Convention's special character as a human rights treaty.

[7] One delegation disagreed with the decision taken by the CDDH that problems for the States at the stage of the execution of judgments in cases concerning the extraterritorial application of the Convention shall not be addressed as they go beyond the scope of the Report on the interaction between the Convention and general international law and the analysis of the risk of fragmentation arising from diverging interpretations which are to be addressed in the Report.

[8] Note by the Secretariat (to be deleted after the adoption of the Report): The present and following paragraphs, highlighted in blue, have to be revisited in the light of the finalised text of former §§ 93-103 of Theme 1, subtheme ii). *[The comment concerns §§ 176-186 of the Preliminary draft CDDH report on the place of the European Convention on Human Rights in the European and international legal order as adopted by the DH-SYSC-II at its 7th meeting, document DH-SYSC-II(2019)R7 Addendum].*

18. Despite the fact that the Court's methodological approach is not entirely clear in this respect, a comparison of the Court's case-law with the ARSIWA rules shows that in a large number of cases, the Court's approach does not differ from those rules. However, the threshold of the necessary degree of control of a State over an entity in order for that entity's conduct to be attributed to it was lower under the Court's case-law (see, *inter alia*, *Ilaşcu*) than under Article 8 of the ARSIWA. In some other cases (see, for instance, *El-Masri* and *Al Nashiri*), it is difficult to discern which rules exactly the Court applied in respect of State responsibility and, in particular, whether or not the Court's reasoning amounted to attributing to the respondent States the conduct of a third State.

19. In cases covering situations of extraterritoriality, which usually concern politically sensitive areas including questions of national security, a clear methodology and precise interpretation of the applicable rules is, however, of utmost importance in order to guarantee legal certainty.

3. Interaction between the resolutions of the Security Council and the European Convention on Human Rights

20. The UN Charter's solution to any conflict between obligations under the Charter and obligations arising under other international agreements is that Charter obligations should prevail by virtue of **Article 103 of the UN Charter**. It is further established in the jurisprudence of the International Court of Justice that mandatory decisions of the Security Council are obligations arising under the Charter for the purposes of Article 103.

21. The ECtHR, rather than applying Article 103 of the UN Charter to give precedence to obligations under a United Nations Security Council Resolution, appears to avoid finding that conflicts have arisen between a ECHR right and an obligation arising under the UN Charter, in a spirit of systemic harmonisation. Referring to Article 24 § 2 of the Charter, the ECtHR has adopted the presumption that Security Council resolutions are adopted in accordance with the Purposes and Principles of the United Nations and should therefore be interpreted so as to avoid finding any incompatibility with human rights under the ECHR.

22. This presumption may, however, affect the ability of States to comply with a clear requirement of a Security Council resolution. As the Security Council's tools rely for their effectiveness entirely on the active cooperation of States, an approach that national authorities subject their observance of binding measures of the Security Council to ECHR requirements might impair the Security Council's discretion to take effective measures to maintain peace and security. The ECtHR has sought to take into account the nature and purpose of the measures adopted by the Security Council by limiting the required scrutiny under the ECHR to arbitrariness (see the case of *Al-Dulimi*).

23. As regards **Security Council measures not involving the use of force**, in particular UN sanctions, the ECtHR had to decide on the compatibility with the ECHR of the imposition by member States of travels bans (see *Nada*) or of the freezing of assets (see *Al-Dulimi*) pursuant to a Security Council resolution. The ECtHR focussed in these cases on the actions of the member States implementing Security Council decisions rather than the decisions of the Security Council themselves. The approach of the ECtHR, which stressed

that in the light of a degree of latitude which the States have in the implementation of sanctions, they could not confine themselves to relying on the binding nature of Security Council resolutions, may cause difficulties to, or even a conflict of obligations for the States. While there may be some room for a national judicial review regarding certain procedural or formal requirements, the discretion left to the States for a review regarding the merits of Security Council decisions is very limited. It was important to note that the Security Council, which is best placed to ensure that there are appropriate mechanisms and review processes regarding its decisions, has seen significant developments in its practice in this respect in recent years.

24. As regards **Security Council decisions authorising the use of force** by member States and depending on the nature of the UN involvement, the ECtHR may consider impugned actions attributable to the UN (see the cases of *Behrami and Behrami* and *Saramati*) or the member State in question (see *Al-Jedda*). To take a too narrow view of the word "obligations" in Article 103 of the UN Charter, so as to deny primacy to a Chapter VII authorisation of enforcement action by States simply because there is no mandatory obligation on States to participate in such action, risks undermining the ability of the Security Council to carry out its tasks under the Charter.

4. Interaction between international humanitarian law and the European Convention on Human Rights

25. International Humanitarian Law (IHL) is the body of international customary and treaty-based rules that specifically applies in armed conflict to ensure respect for the basic standards of humanity. International human rights law will apply in principle in times both of peace and conflict.

26. As regards the relationship between those two bodies of law, the International Court of Justice has found that both bodies of law could apply to the same situation (see notably *DRC v. Uganda*).

27. The ECtHR, for its part, had initially been reluctant to consider the provisions of **IHL** (see *Isayeva*).[9] It has subsequently acknowledged provisions of IHL as part of the legal context in which the ECHR applies (see *Varnava*). In other cases, it examined whether IHL gave a conclusive answer to the question of the lawfulness of the national authorities' measures, but found that this was not the case (see *Sargsyan*). Finally, in *Hassan*, the ECtHR found that even in situations of international armed conflict, the ECHR continued to apply, albeit interpreted against the background of the provisions of IHL and thus sought an "accommodation" between two apparently conflicting legal provisions, based on Article 31 § 3 (c) of the VCLT. In situations in which the provisions of IHL are clear and well-established, this constitutes a possible approach to the reconciliation of the two bodies of law.

[9] Note by the Secretariat (to be deleted after the adoption of the Report): The section of the present paragraph, highlighted in blue, has to be revisited in the light of the finalised text of former § 13 of Theme 1, subtheme iv). *[The comment concerns § 230 of the Preliminary draft CDDH report on the place of the European Convention on Human Rights in the European and international legal order as adopted by the DH-SYSC-II at its 7th meeting, document DH-SYSC-II(2019)R7 Addendum].*

28. A similar solution may be possible in relation to **non-international armed conflicts**, but there may be additional complexities, notably for determining the content of some of the rules applicable to these conflicts, which are still largely derived from customary international law.

29. An alternative solution to the question of determining conflicts between (at least some) provisions of IHL and of international human rights law is for a State to derogate from the ECHR in accordance with Article 15. However, further questions may arise regarding the applicability of **Article 15 ECHR** and the extent of possible derogations in particular in relation to an extra-territorial conflict situation. A careful assessment would have to be made of its overall contribution to creating greater legal certainty, which is of particular importance in armed conflict situations.

II. The challenge of the interaction between the European Convention on Human Rights and other international human rights instruments to which the Council of Europe member States are parties

30. The second part of the Report addresses the interaction between the ECHR and other international human rights instruments to which the Council of Europe member States are parties, in particular human rights instruments adopted under the auspices of the United Nations: the International Covenant on Civil and Political Rights (ICCPR, 1966), the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1966), the Convention on the Elimination on All Forms of Discrimination Against Women (CEDAW, 1979), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984), the Convention on the Rights of the Child (CRC, 1989) and its Optional Protocols, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW, 1990), the Convention on the Rights of Persons with Disabilities (CRPD, 2006) and the Convention for the Protection of All Persons from Enforced Disappearance (CED, 2006).

31. The coexistence between the **ECHR** and the **UN human rights conventions** through the case-law of the ECtHR and the practice of the UN treaty bodies may lead both to a diverging interpretation of substantive rights and to diverging approaches to procedural matters, despite the fact the **"Views" of the UN treaty bodies** on individual communications are **not legally binding** and follow-up consists of the initiation of a dialogue between the relevant treaty body and the State concerned.

32. The coexistence of different normative sets in the ECHR and in different UN human rights conventions may lead to a **diverging interpretation of substantive rights**. Illustrations could include, firstly, a number of cases concerning the scope of the freedom to manifest one's religion in the context of the wearing of religious symbols and clothing. Despite the fact that the wording of Article 9 ECHR and Article 18 ICCPR do not diverge significantly, the ECtHR, referring to the States' margin of appreciation, did not find prohibitions on the wearing of religious clothing to be in breach of Article 9 ECHR (see, for instance, *Leyla Sahin v. Turkey* and *S.A.S. v. France)*. In contrast, the UN Human Rights

Committee, in a number of comparable cases, repeatedly found such prohibitions to be in breach of Article 18 ICCPR (see, in particular, *Bikramjit Singh* and *Sonia Yaker*).

33. Secondly, divergent interpretations of the right to liberty as guaranteed by the ECHR and different UN Conventions have, in certain cases, become apparent. Article 5 § 1 (e) ECHR and also Article 3 ECHR (as interpreted by the ECtHR), as well as Article 9 ICCPR (as interpreted by the UN Human Rights Committee) appear to be more permissive as regards the possibility to order the involuntary placement and treatment of persons with mental disorders than Article 14 of the CRPD (as interpreted by the CRPD Committee).

34. Divergence may also be illustrated with regard to the scope of the prohibition of torture under Article 3 ECHR, under the ICCPR and under Article 3 of the CAT in the context of expulsion or extradition procedures. In particular, it is apparent that the CAT Committee (see, for instance, *Abichou* and *H.Y. v. Switzerland*) is more reluctant than the ECtHR (see, for instance, *Othman (Abu Qatada)*) to place reliance on diplomatic assurances provided for the non-use of torture by the State to which the person concerned is to be deported.

35. Moreover the coexistence of different international mechanisms for the guarantee of human rights may lead to **diverging approaches to procedural matters**. Different approaches to questions of admissibility of an application or communication have the potential to threaten the coherence of human rights law if they may lead to an examination of the same or much similar matters by different organs and the latter come to contradictory results concerning the same legal obligation.

36. In particular, unlike Article 35 § 2 ECHR, Article 5 § 2 (a) of the Optional Protocol to the ICCPR does not bar the Human Rights Committee from examining communications which have previously been examined by the ECtHR unless the State party concerned has made a valid reservation against the competence of that Committee to re-examine the same case; the same applies to the CED and CERD Committees. It must further be noted that even where such a reservation has been made, the Human Rights Committee has considered that its competence to re-examine a case is not excluded when the limited reasoning of the ECtHR for declaring a case inadmissible (arguing that “it does not disclose any violation of the rights and freedoms in the Convention”) did not allow the Committee to assume that the examination included a sufficient consideration of the merits (see, in particular, *Maria Cruz Achabal Puertas*).

37. Moreover, compared to the ECtHR, the UN treaty bodies including the Human Rights Committee, the CAT Committee, the CRC Committee and the CESCR appear to have a broader approach in respect of interim measures provided for in their respective rules of procedure.

38. For reasons inherent in the relevant treaty provisions, in the different geographical scope of those treaties, but also because different bodies are involved, complete convergence in the human rights protection under these treaties would be neither possible nor appropriate.

39. Nevertheless, the existence of parallel human rights protection mechanisms, normally a source of enrichment and enhancement of the universal protection of human rights, has

also the potential of becoming a source of uncertainty for States parties on how to best fulfil their human rights commitments, not to mention for individuals as regards the exact scope of their rights. Overlapping jurisdictions and conflicting findings led to some extent to human rights forum-shopping.

40. This threat to the coherence of human rights law and the credibility of human rights institutions should be addressed by containing divergence between the different human rights protection systems. The ECtHR should continue to seek, and the UN treaty bodies should increasingly refer to, and attempt to arrive at a harmonious interpretation of different treaties by which States are simultaneously bound. Moreover, the **dialogue** between the ECtHR and the UN treaty bodies and between the latter and the States Parties should be increased. Moreover, in so far as possible, **measures limiting overlapping jurisdiction** between these organs, for instance by the introduction of stricter time-limits for filing communications with the UN treaty bodies or by an extension of the reasons given by the ECtHR for declaring an application inadmissible, could help to minimise the risk of contradictory interpretation of human rights standards.

III. The challenge of the interaction between the Convention and the legal order of the European Union and other regional organisations

41. As regards the interaction between the ECHR and the **EU legal order**, it is to be noted that fundamental rights in the EU legal order are now codified in the Charter of Fundamental Rights of the European Union, which, since the entry into force of the Lisbon Treaty on 1 December 2009, has the same legal value as the primary law Treaties of the EU (the Treaty on European Union (TEU) and the Treaty on the Functioning of the EU (TFEU); see Article 6 § 1 TEU).

42. A strong **link** has been established between the **EU** and its **Charter of Fundamental Rights** and the **ECHR**. Pursuant to Article 6 § 3 TEU, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the member States, shall constitute general principles of the EU's law. Moreover, Article 52 § 3 of the EU Charter of Fundamental Rights provides that "[i]n so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

43. The **ECtHR** developed the following **principles regarding the interaction** between the ECHR and the EU legal order. While the ECHR does not exclude the transfer of competences to international organisations, the member States' responsibility to secure the Convention rights continues even after such a transfer (see, *inter alia*, *Matthews*). The fact that national measures give effect to EU law does not remove them from the ambit of the ECHR (see, for instance, *Cantoni*). However, if the international organisation to which the member State in question had transferred part of its sovereignty provides a protection of fundamental rights in a manner which could be considered at least equivalent to that for which the ECHR provides, a presumption arises that a State has not departed from the requirements of the ECHR when it did no more than implement its strict legal obligations flowing from its membership of the organisation in question. However, any such

presumption could be rebutted if, in the circumstances of a particular case, it is considered that the protection of ECHR rights was manifestly deficient (see, in particular, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi*). The ECtHR has clarified that the presumption, which led to it reducing the intensity of its supervisory role in the interests of international cooperation, arises only under two conditions, namely the absence of any margin of manoeuvre on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided for by EU law (see *Michaud* and *Avotiņš*).

44. The **accession of the EU to the ECHR** has been discussed since the late 1970s. Article 6 § 2 TEU, as amended by the Lisbon Treaty, provides that the EU shall accede to the ECHR. In December 2014 the Court of Justice of the European Union (CJEU), in its Opinion 2/13, found, however, that the draft Accession Agreement, elaborated by the CDDH in co-operation with the European Commission and setting out the modalities of the EU's participation in the ECHR system, was not compatible with EU law. The CJEU took the view that the draft Accession Agreement, *inter alia*, was liable to affect the specific characteristics and the autonomy of EU law as well as the principle of mutual trust between member States. It further failed to have regard to the specific characteristics of EU law with regard to the judicial review of acts on the part of the EU in Common Foreign and Security Policy (CFSP) matters. Possible solutions to the various objections raised by the CJEU in its Opinion are currently being examined by the EU institutions.

45. The co-existence, in the same geographical area, of the EU Charter of Fundamental Rights and the ECHR, which are strongly linked, but not identical, can be a source of mutual enrichment. At the same time, it can create challenges if the different instruments are interpreted, in substance and in relation to methodology, in a manner which creates **conflicting obligations** for States and can thus potentially lead to a fragmentation of international human rights law.

46. From the perspective of an EU member State, the need to simultaneously comply with the principles of mutual recognition and mutual trust as developed in EU law and with the obligation to carry out an individualised examination of the applicant's situation as required by the ECHR notably under Article 3 ECHR in expulsion cases (see, for instance, *Tarakhel*) appears particularly challenging. Mutual recognition and mutual trust in essence delimit the extent to which an EU member State can engage in individualised examination without running the risk of being found in breach of its obligations stemming from EU law. Judicial dialogue is one of the most powerful tools in this respect to ensure a harmonious cooperation between the ECtHR and the CJEU and enhance consistency of the case-law. Involvement of the EU institutions, namely, the EU Commission as a third party, could also serve as a tool to assist the ECtHR in the cases which concern the interpretation and application of EU law provisions.

47. Furthermore, it may be considered problematic that the "*Bosphorus* presumption" described above requires the ECtHR to interpret EU law in order to determine whether it left the member States a margin of manoeuvre in the application of that law. The reduction of the intensity of the ECtHR's supervisory role in the event of the application of the said presumption could further lead to a **non-uniform protection** of the rights of persons in different Council of Europe member States, although sight may not be lost of the fact that where the presumption applies, the applicants' rights are also protected by EU law.

48. As for the delay in the EU's accession to the ECHR, it entails the risk that two separate bodies of case-law develop under the EU Charter of Fundamental Rights and under the ECHR, creating a dividing line in Europe. As long as the EU is not a Contracting Party to the ECHR and therefore not subject to external scrutiny, it could further be argued that a **protection gap** exists. It is therefore desirable that accession negotiations will be resumed soon and that possible changes to the draft Accession Agreement can be accommodated in an acceptable manner.

49. As regards the interaction between the ECHR and the **Eurasian Economic Union** (EAEU), it is noted that the EAEU was established by the Treaty on the Eurasian Economic Union which entered into force on 1 January 2015, replacing the Eurasian Economic Community (2000 – end of 2014). It is an international organisation for regional economic integration which consists of five member States, two of which – the Russian Federation and the Republic of Armenia – are also member States of the Council of Europe.

50. The Court of the EAEU has jurisdiction to resolve disputes arising in connection with the implementation of the Treaty on the EAEU, international treaties within the EAEU and/or decisions of the EAEU institutions. It notably established the principle of the **primacy of EAEU law** over national law (see *Russia v. Belarus (Kaliningrad Transit)*). In view of the lack of express provisions on the protection of fundamental rights in the Treaty on the EAEU, the Court of the EAEU rarely dealt with human rights issues. However, the Court of the EAEU has referred to the preamble of that Treaty stating that the member States are "guided by … the need for unconditional respect for the rule of constitutional rights and freedoms of man and national" to find that the level of protection of the rights and freedoms offered by the EAEU cannot be lower than the level of protection ensured in the member States (see *Opinion СЕ-2-2/7-18-БК*). It further sporadically referred to the practice of the ECtHR (see *Opinion СЕ-2-3/1-16-БК*).

51. At the moment the interaction between the ECHR system and the EAEU is limited and does not appear to raise immediate challenges in terms of fragmentation of human rights law. However, the interaction between the ECHR and the EAEU could notably benefit from constructive **judicial dialogue** that would help the judges to exchange information about the relevant developments in the two systems, as well as to ensure that both systems maintain proper cross-references.

Conclusion

52. As the ECtHR itself found on many occasions, the ECHR cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the international protection of human rights. Legal certainty as regards, in particular, the applicable rules concerning the interpretation of the ECHR as well as the applicable rules in the relationship with other rules of international law on State responsibility or international humanitarian law is of great importance for the States Parties.

53. In order to avoid a risk of fragmentation of the international legal order, the ECtHR, just as all other systems making up the European architecture of human rights protection,

should proceed, to the extent possible, in the direction of a harmonisation of their practice, notably with the help of an enhanced judicial dialogue. In order to avert the particular risk that two separate bodies of case-law develop under the EU Charter of Fundamental Rights and under the ECHR, it is desirable that the negotiations regarding the EU's accession to the ECHR will be resumed and concluded soon.

Appendix

Letter addressed by the Chair of the DH-SYSC-II to the Chair of the DH-SYSC

(*translation by the Secretariat*)

Paris, 30 September 2019

Madam Chairperson,

Dear Brigitte,

I am pleased to inform you that the SYSC-II Drafting Group, at the end of its seventh and last meeting held from 18 to 20 September, adopted the preliminary draft CDDH report on the place of the European Convention on Human Rights in the European and international legal order (document DH-SYSC-II(2019)R7 Addendum). The Group thus considers that it has fulfilled its mandate.

It has been a great honour for me to chair this Drafting Group, whose discussions have been extremely rich. In this regard, I would like to highlight the very active participation of many delegations since, as you know, more than twenty delegations were present at each of the meetings, attesting to the keen interest in the subjects discussed.

I would like to stress the constructive approach adopted by all members throughout the works, despite the complexity of the subject and the differences in the positions of delegations. It is particularly the subject of the extraterritorial application of the Convention and State responsibility which has given rise to the most complex exchanges. This draft chapter has indeed been discussed extensively in five meetings (in addition to the first general discussion) and it has been difficult to reach an agreement on the text, including on the descriptive part of the chapter. As you will see, two delegations have made statements in respect of this topic.

The preliminary draft report consists of three chapters, an introduction and a conclusion. In accordance with the guidance provided by the Group, the Secretariat had also prepared an executive summary of the report. However, in view of the complexity of the topics covered, the Group could not agree on a text of the executive summary in the time remaining for its last meeting. However, a majority of the delegations indicated that they would like to have an executive summary of the Report. Therefore, as Chairperson of the Drafting Group, I have the honour to transmit this draft executive summary to you for your full information. I would like to point out that this document was drafted under the sole responsibility of the Secretariat and that it was not adopted by the Group.

I wish you success in your work at the next SYSC meeting, at which I will participate, in the hope that the examination of the preliminary draft report will lead to the adoption of a draft report for transmission to the CDDH.

Best regards,

[*signature*]
Florence Merloz
Chairperson of the DH SYSC-II